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The Potential Role of the International *Lex Mercatoria* in Assisting Individuals and Business Entities to Navigate the African Continental Free Trade Agreement

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Abstract

The African Continental Free Trade Agreement (AfCFTA) which went operational on 1 January 2021 covers the largest free trade area in the world including 54 out of the 55 African Union (AU) Member States. This massive free trade area is also compatible with the General Agreement on Tariffs and Trade of 1994 (GATT 1994) and other World Trade Organisation (WTO) Agreements. It is trite that individuals and business entities or private legal persons are not governed by the AfCFTA even though they are key actors in international trade. Given the predominant roles individuals and private legal persons play in international trade, the international lex mercatoria has provided the window through which these actors can navigate the AfCFTA. In this regard, this article examines the organisation and institutions of AfCFTA and its compatibility with the GATT 1994 and other WTO rules. It also examines the position of the international lex mercatoria in international trade. It argues that individuals and private legal persons may navigate the AfCFTA

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through the international lex mercatoria. Finally, regarding individuals and dispute settlement under the AfCFTA, I contend that individual traders and private legal persons prefer arbitrations to resolve their disputes. Arbitration tribunals will only apply the rules that are agreed upon by the parties. Therefore, the international lex mercatoria is the logical option to regulate commercial disputes between the AfCFTA state members and a foreign national or individual.

Keywords: AfCFTA; WTO; African Union; the international *lex mercatoria*; individuals and business entities; dispute settlement

1 INTRODUCTION

The African Continental Free Trade Agreement (AfCFTA) is a treaty concluded by 54 out of the 55 Member States of the AU.[1] This treaty which came into force on 30 May 2019,[2] is compatible with GATT 1994 and other World Trade Organisation (WTO) Agreements.[3] Some of the general objectives of the AfCFTA include[4] the creation of a single market for goods and services facilitated by the movement of persons in order to develop economic integration of the African continent in accordance with the Pan-African vision. Further, to create a liberalised market for goods and services through successive rounds of negotiation and to contribute to the movement of capital and natural persons and ease investment building and development in the territories of State Parties. The AfCFTA contains specific aims, some of which include the progressive elimination of tariff and non-tariff barriers to trade in goods and services; to cooperate in all trade related-matters and lay the foundation for the establishment of a Continental Customs Union (CCU),[5] and finally, to establish a mechanism for the settlement of disputes concerning rights and obligations.[6] Finally, the establishment of the AfCFTA is consistent with the objectives and principles adopted by the AU Member States in the Treaty Establishing the African Economic Community of 1991.[7] The Abuja Treaty called for the establishment of the African free trade area and the abolition of customs duties among the AU Member States.[8]

The international *lex mercatoria* encompasses the legal rules that, although stemming from an international source, govern the international commercial transactions of parties of which at least one is of an individual or business entity.[9] In other words, the international *lex mercatoria* governs legal transactions between individuals and States and between individuals per se.[10] International *lex mercatoria* may also be defined as a set of rules that originate outside the

1 See Africa "Free Trade Agreement: Moving People across Borders is the Real Magic" https://www.msm.com/en-za/news/other/africa-free-trade-agreement-moving-people-across-borders-is-the-real-magic/ar-BB1czZ0w?ocid=Huawei&appid=hwbrowser&ctpe=news (accessed 21-01-2021).

2 See "Agreement Establishing the African Continent Free Trade Area / Africa Union" https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-ares (accessed 05-01-2021).

3 See Arts 4 and 5 of the 2018 AfCFTA as para 3 of this Agreement.

4 See "Africa Unites to Form the Largest Free Trade Area in the World" http://www.capetalk.co.za/articles/354287/africa-unites-to-form-the-largest-free-trade-area-in-the-world (accessed 21-01-2021).

5 See Onyejekwe and Ekhator "AfCFTA Lex Mercatoria: Reconceptualising International Trade Law in Africa" 2020 *Commonwealth Law Buttetin* 94–95.

6 See generally Art 3 of the 2018 AfCFTA.

7 See the "Treaty Establishing the African Economic Community/African Union" (adopted in 1991 and came into force on 12 May 1994) (the 1991 Abuja Treaty) https://au.int/en/treaties/treaty-establishing-african-economic-community (accessed 25-01-2021).

8 See Art 4(d) of the 1991 Abuja Treaty.

9 See Booysen *Principles of International Trade Law Monistic System* (2003) 11.

10 Individuals here also include private legal persons or corporations recognised by law.

domestic legal systems and which are applicable to international business transactions.[11] It is therefore made up of an international source of law and self-regulatory rules. Some examples of international *lex mercatoria* rules include international commercial customs, the general principles of law, the norms embodied in the United Nations Convention on Contracts for International Sale of Goods (CISG) 1980,[12] and the various International Commercial Terms (INCOTERMS) adopted by the International Chamber of Commerce (ICC).[13] Unfortunately, commercial transactions between individuals per se, between individuals and private legal persons or corporations, and finally between individuals and State are not covered by the AfCFTA thus, creating a vacuum. Given the rising importance of individuals and private legal persons in international trade, and the fact that individuals are key actors and participants in international trade, the critical question is how individuals and private legal persons, or business entities would navigate the AfCFTA since it is a treaty applicable to State Parties in terms of the law of the nations.

After the brief introduction, Part II of this article will begin by examining the organs, composition, and the various protocols under the AfCFTA, and its compatibility with international *lex mercatoria*. Part III will examine the fact that the international *lex mercatoria* is an integral part of the AfCFTA. It will further examine how individual traders and private legal persons may navigate AfCFTA through the *lex mercatoria*. In this regard, the role of individuals and private legal persons in international trade will be examined. Individuals as actors of international trade law as well as the main subjects of the *lex mercatoria* will also be examined. Part IV will consider the applicable rule in cases where there is a dispute between an individual and a State under AfCFTA, on the one hand, and between individuals or between private legal persons and individuals per se, on the other hand. Part V presents the conclusion.

2 THE STRUCTURE AND COMPOSITION OF THE AFCFTA

The AfCFTA has three protocols attached as an integral part of the agreement. These protocols are the Protocol on Trade in Goods, the Protocol on Trade in Services, and the Protocol on Rules and Procedures on the Settlement of Disputes.[14] In terms of the provisions set out in these instruments, there is no room for individuals and private legal persons in the structure and composition of AfCFTA. The institutional framework created for the implementation, administration facilitation, and monitoring of the AfCFTA consists of five main organs. In this regard, the main organs of the AfCFTA and its mandate will be examined as well as the compatibility and consistency of the principles of the AfCFTA with the WTO rules. The rationale for this examination is to prove that the AfCFTA governs only the relationship between State Parties.[15] However, given the continued importance of individuals in international trade matters, *lex mercatoria* therefore came in to fill the vacuum.

2 1 The Organs of the AfCFTA and its Mandates

The Institutional Framework for the Implementation of the AfCFTA consists of the Assembly, the Council of Ministers, the Committee of Senior Trade Officials, and the Secretariat. By virtue

11 See Booysen *Principles of International Trade Law* 11.

12 See United Nations Convention on Contracts for the Sale of Goods Vienna 1980/ United Nations Commission on International Trade Law (adopted on 11 April 1980 and entered into force on 1 January 1988) (the 1980 CISG) https://uncitral.un.org/en/texts/salegoods/conventions/sale_of _goods/cisg (accessed 05-01-2021).

13 See for example "Incoterms 2020 - ICC - International Chamber of Commerce" https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020 (accessed 05-01-2021).

14 See Art 8 of the 2018 AfCFTA.

15 See Ajibo "African Continental Free Agreement: The Euphoria, Pitfalls and Prospects" 2019 *Journal of World Trade* 872–873.

of Article 10 of the 2018 AfCFTA, the Assembly oversees and provides all strategic guidance on the AfCFTA. The Assembly also has the sole mandate to approve any interpretations of the AfCFTA by consensus, upon recommendation from the Council of Ministers. The Assembly is therefore the supreme decision-making body of the AfCFTA. The Council of Ministers consists of ministers of trade or similar authority as designated by the State Parties,[16] and this council meets twice a year in an ordinary session and may also meet in an extraordinary session as needs arise.[17] These ministers are required to report to the Assembly through the executive council. In accordance with Article 11(2) of the AfCFTA, some of the responsibilities of the Council of Ministers are as follows: (i) take decisions in accordance with the rules of AfCFTA; (ii) ensure effective implementation and enforcement of the AfCFTA; (iii) promote the objectives of the AfCFTA and its relevant protocols; (iv) consider the reports from the Secretariat and the budgets of the AfCFTA, and take necessary actions; and (v) work in collaboration with relevant organs of the AU and perform any other function consistent with the rules of the AfCFTA.[18]

The Committee of Senior Trade Officials is another vital organ of the AfCFTA. This Committee comprises of permanent or principal secretaries or other officials appointed by each State Party.[19] The Committee of Senior Trade Officials is mandated to accomplish the following tasks: (i) implement the decision of the Council of Ministers; (ii) draft programmes and action plans for the implementation of the AfCFTA; (iii) create committees or other working groups and monitor the functions and development of the AfCFTA; (iv) give directives to the Secretariat to undertake specific assignments and perform any other function as may be requested by the Council of Ministers which is consistent with the rules under the AfCFTA.

The Secretariat is established by the Assembly which also decides on its nature, budget, and location.[20] The Secretariat has an independent legal personality and functions autonomously within the AU system.[21] Finally, the functions of the Secretariat shall be determined by the Council of Ministers of Trade. These five principal organs of the AfCFTA work in collaboration with each other to ensure that the AfCFTA and all its attached protocols are compatible with the WTO principles. Again, there is no room for individuals to trade in accordance with these provisions.

2 2 The Compatibility of the AfCFTA Rules with WTO Principles.

The WTO is an organisation that replaced the GATT. It was created in 1994 and it came into operation on 1 January 1995.[22] The WTO Agreement replaced GATT which is an agreement created in 1947 and came into force on 1 January 1948.[23] All the State Parties that created the GATT in 1947 were eligible for original membership of the WTO when it came into operation. In other words, GATT 1994 is also known as part of the WTO rules which include all the rules of the GATT.[24] Consequently, GATT 1994 or the WTO rules also consist of the GATT 1947

16 See Art 11 of the 2018 AfCFTA.

17 See Art 11(4) of the 2018 AfCFTA.

18 See generally Art 11 (3) of the 2014 AfCFTA.

19 See Art 12(1) of the 2018 AfCFTA.

20 See Art 13(1) of the 2018 AfCFTA.

21 See Art 13(3) of the 2018 AfCFTA.

22 See WTO official documents and legal text (GATT1994/WTO Agreements) https://www.wto.org/english/docs_e/legal_e/legal_e.htm (accessed 13-01-2021).

23 *Ibid*.

24 See WTO/GATT members https://www.wto.org/english/thewto_e/gattmem_e.htm (accessed 08-01-2021).

provisions.

One of the main barriers to international trade has been very high tariffs.[25] The creation of the AfCFTA, therefore, is also aimed at progressively eliminating both tariff and non-tariff barriers to trade in goods and services.[26] Accordingly, Article XXIV of GATT 1994 sets out the requirements necessary for the creation of a Customs Union (CU),[27] and Free Trade Area (FTA).[28] Consequently, Article XXIV paragraphs four, five, and six of GATT 1994 are consistent and compatible with the objectives of the AfCFTA. This Article provides as follows:

> 4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.[29]
>
> 5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area.[30]

In accordance with Article XXIV (5)(a) of the GATT1994/WTO Agreements, the duties and other regulations of trade levied at the institution of any such union or interim agreement in respect of trade with third countries should not be higher or more restrictive than the general incidence of the duties and regulations of trade applicable in the constituent territories prior to the formation of a union or the adoption of an interim agreement. In other words, the duties and regulations of trade imposed on non-members of the AfCFTA as per Article 3(d) of the 2018 AfCFTA should not be higher or more restrictive than that imposed on AfCFTA members.[31] By virtue of Article XXIV(5)(b) of the GATT 1994 the duties and other regulations of trade maintained in each Member State territory and applicable at the formation of a free-trade area shall not be higher or more restrictive than the corresponding duties and other regulations of trade existing in the same constituent territories prior to the formation of the free trade area. This also implies that duties and regulations imposed by the AfCFTA Member States should not be higher than any prior agreement agreed between non-States Parties of AfCFTA. Finally, by virtue of Article XXIV5 (*c*) of GATT 1994/WTO Agreements, the customs union or the free

25 See Vandevert "The Uruguay Round and the World Trade Organization: A New Era Dawns in the Private Law of International Customs and Trade" 1999 *Case Western Res. Journal of International Law* 111.

26 See Art 3 of the 2018 AfCFTA.

27 By virtue of Art XXIV(8)(a) of GATT1994/WTO Agreements a customs union means the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

28 In accordance with Art XXIV (8)(b) of GATT1994/WTO Agreements, a free trade area means a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

29 See Art XXIV (4) of GATT1994/WTO Agreements.

30 See Art XXIV (5) of GATT1994/WTO Agreements.

31 See Art 3(d) of the 2018 AfCFTA which indicate that one of the objectives of the AfCFTA is the lay the foundation for the establishment of a Continental Customs Union which means the custom union at the continental level by adopting a common external tariff.

trade area should be formed within a reasonable length of time.

Additionally, Article XXIV (7) of the GATT 1994 requires a GATT member to notify the contracting parties of GATT and provides all information together with reports should the member or members wish to create a customs union or free trade area.[32] In other words, all the parties to the AfCFTA who are also members of the WTO should inform the WTO contracting parties about the AfCFTA through the AU.[33] This obligation is compatible with Article 5 of the 2018 AfCFTA dealing with transparency of and disclosure of information as one of its governing principles.[34] Similarly, regarding the Most-Favoured-Nation (MFN),[35] and National Treatment principle,[36] Article XXIV (9) of the GATT 1994 indicates that preferences referred to in paragraph 2 of Article I will not be affected by the formation of a CU or of a FTA, but may be eliminated or adjusted by means of negotiations with affected contracting parties.[37]

The MFN principle under the GATT 1994 is compatible with Article 5(g) of the 2018 AfCFTA and this means that the same benefit, advantages, and immunity accorded to AfCFTA members may apply to the GATT 1994 contracting parties when dealing with any member of the AfCFTA.[38] Finally, based on Article XXIV(10) of the GATT 1994, contracting parties may adopt a proposal to prevent the formation of a CU or FTA should the agreement creating the CU or FTA be incompatible with the GATT 1994 set in paragraphs five to nine of the GATT 1994.

In all, Article XXIV of the GATT 1994/WTO Agreements authorises the creation of a CU or FTA like the AfCFTA. The CU or FTA must be in accordance with the provisions of the WTO Agreements. Therefore, Article XXIV of the WTO Agreements guarantees the creation of the AfCFTA. Consequently, the AfCFTA is compatible with the GATT 1994 and WTO Agreements. These agreements do not recognise the position of individuals as actors in international trade despite their undeniable contribution to the development of international trade. Having examined the organs and legality of the AfCFTA,[39] this article will now turn to the critical question of how individuals and private legal persons may navigate the AfCFTA through the international *lex mercatoria.*

3 INTERNATIONAL *LEX MERCATORIA* AS AN INTEGRAL PART OF THE AFCFTA

Lex mercatoria is a multi-faceted term that serves both to draw boundaries around a community and its practices, and to denote a legal system.[40] It describes the totality of actors, customs and usages, organisational techniques, and guiding principles that animate private, transnational

32 See Art XXIV (7)(a) of GATT1994/WTO Agreements.

33 See generally Art XXIV (7) of GATT1994/WTO Agreements dealing the information sharing, consultation and recommendation leading to the formation of a CU or FTA.

34 See Art 5(e) of the 2018 AfCFTA.

35 The MFN clause is defined as a treaty provision in which one State undertakes an obligation toward another State to accord the most favoured nation treatment in an agreed area. This MFN treatment is considered as treatment accorded by the granting State to the beneficiary State or persons in a regulated relationship with the State not less favourable than the treatment extended by the awarding State to a third State or persons or things in the same relationship with the third State. It is simply a promise of non-discrimination against the trade of the other contracting party.

36 See Art 5(g) and (h) of the 2018 AfCFTA.

37 Art 1 of the GATT1994/WTO Agreements provides that any advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

38 See more on MFN https://www.wto.org/search/search_e.aspx?search=basic&searchText=The+most+favour+nation+principle&method=pagination&pag=0&roles=%2Cpublic%2C (accessed 22-01-2021).

40 See Booysen *Principles of International Trade Law* 103.

trading relations. It also refers to a body of substantive law and dispute resolution procedures that govern these relations.[41] Irrespective of its origins and nature, the *lex mercatoria* is the proper law to govern international economic relations.[42] In other words, *lex mercatoria* denotes autonomous, independent international commercial law applicable to commercial contracts and transactions where one of the parties is an individual.[43] For example, there are cases where international *lex mercatoria* has been used by a domestic court as selected by one of the parties to apply in their contract. Some examples of such contracts include cases dealing with monetary sovereignty on contract,[44] and foreign exchange control measures to contracts.[45]

As far as the origin and application of the international law merchant are concerned,[46] the medieval law merchant appeared in the eleventh and twelfth centuries and consists of a relatively comprehensive and efficient legal regime for trade beyond local borders.[47] The legal system was developed by traders and their agents.[48] The rationale was to enable merchants to escape conflict between various local customs and their rules on the one hand, and to avoid submitting to the authority of the judges attached to pre-existing jurisdictions on the other hand.[49] The regime embodied certain constitutive principles such as good faith or promises made must be kept, reciprocity, non-discrimination between foreigners and locals at the site of exchange, third-party dispute settlement, and equitable conflict resolution.[50] The effectiveness of the *lex mercatoria* legal regime depended on the reputation of the merchant and the consequences of being ostracised from the trading community. The function of dispute settlement in this legal regime was, therefore, to encourage and cajole trading parties to continue with their business using equitable and fair norms in their various transactions.[51] Finally, in the nineteenth century, the status of the international law merchant as a body was recognised in both French and Austrian case law.[52] Similarly, in Italy, the highest court declared that the international *lex mercatoria* constitutes a legal order distinct from national legal orders.[53]

In a modern society, the existence of any law is linked to the State. Therefore, the modern international law merchant or the international *lex mercatoria* exists by leave and licence of the sovereign State. Therefore, the modern international law merchant uses autonomous

41 See Sweet "The New Lex Mercatoria and Transnational Governance" 2006 *Journal of the European Public Policy* 629.

42 See Goldman "Lex Mercatoria" 1983 *Forum Internationale* 5.

43 See Booysen *Principles of International Trade Law* 10; Sweet 2006 *Journal of the European Public Policy* 633, noting that international *lex mercatoria* is autonomous from traditional sources of law such as national statute and public international law.

44 See *In re Claim by Herbert Wagg & Co Ltd* [1956] 2 WLR 183 (Ch).

45 See *Wilson, Smithett & Cope Ltd v Terruzzi* (1976) 2 WLR 418 (CA).

46 See Sweet 2006 *Journal of the European Public Policy* 629–633; Goldman1983 *Forum Internationale* 3, noting that *lex mercatoria* is a respected old lady who has twice disappeared from the face of the earth and twice been resuscitated.

47 See Goldman 1983 *Forum Internationale* 3–4.

48 See Sweet 2006 *Journal of the European Public Policy* 629.

49 *Ibid*.

50 See Booysen *Principles of International Trade Law* 13–14, noting that the purpose of international *lex mercatoria* is not to solve the conflict of laws between different national legal systems governing a particular transaction but rather to avoid conflict through providing substantive legal rules capable of governing that relationship directly.

51 See Sweet, 2006 *Journal of the European Public Policy* 629–630.

52 See Booysen *Principles of International Trade Law* 190–191, noting that the re-emergence of the international *lex mercatoria* as part of legal science can be traced back to the early twentieth century when it reappeared in the legal documents of most European writers.

53 See Goldman 1983 *Forum Internationale* 20–21, noting that the Supreme Court of Italy on 8 February 1982 recognised international *lex mercatoria* as a distinct legal governing international transaction.

international rules such as the ICC incoterm, the 1980 CISG,[54] international commercial customs, the International Institute for the Unification of Private Law (UNIDROIT) rules,[55] and the 1978 Hamburg Rules.[56] Further, alongside these rules, the law merchant would also apply the general principle of law such as *pacta sunt servanda* and good faith.

The point of departure here is that uniform commercial rules are also created by businessmen (*lex mercatoria*) and trade organisations.[57] In this section, this article examines the role of individuals as subjects of international trade law, and the fact that individuals and private legal persons may navigate AfCFTA through the international *lex mercatoria*.

3 1 Individuals and Private Legal Persons as Subjects of International Trade Law.

Even though in theory, international trade law is regulated by a body of State laws or inter-state legislation in the form of treaties such as the AfCFTA, trade may be organised and carried on outside of these regulations.[58] Individuals are subjects of international trade law through the international *lex mercatoria*. The GATT and GATS,[59] are clearly based on the presumption that individuals are the primary players in international trade law.[60] Likewise, international trade law is based on the supposition that individuals will act internationally, and if they do not act, then the public international trade law created by States will be meaningless.[61] In other words, the AfCFTA created by the AU Member States will be meaningless if individuals do not participate in all the trading opportunities created by the AfCFTA. Individuals may be allowed to enforce their rights on a treaty.[62] The European Court of Justice (ECJ) decided that individuals are capable to rely on the court to enforce their trading rights from a treaty before the court.[63] Accordingly, the main function of the State in international trade is a regulatory one. Nevertheless, individuals may also create norms in international trade given their active participation in commercial activities. The CISG for example recognises the binding effects of usages and customs created by individuals and these usages apply to international contracts.[64] In this regard, individuals are creating laws on the international level. Again, it must be reiterated that individuals cannot conclude treaties or appear before the International Court of Justice (ICJ) because individuals and States operate at different stages on the international level.[65] The general rule is that individuals cannot rely on the provision of a treaty before a national court and cannot enforce the rights and obligations in a treaty against a State Party.[66] However, the rules

54 See Booysen *Principles of International Trade Law* 150.

55 See "UNIDROIT – Contracts" https://www.unidroit.org/contracts (accessed 14-01-2021).

56 See the United Nations Conference on the Carriage of Goods by Sea held at Hamburg adopted the United Nations Convention on the Carriage of Goods by Sea 1978 that came into force on 1 November 1992 https://uncitral.un.org/texts/transportgoods/conventions/harmburg_rules (accessed 14-01-2021).

57 See De Ly "Uniform Commercial Law and International Self-Regulation" 1997 *Diritto Del Commercio Internazionale* 520–521.

58 See Goldman 1983 *Forum Internationale* 4–5.

59 See General Agreement on Trade in Service https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (accessed 12-07-2022).

60 See Booysen "International quest and the law as legal system: need for a private-law the leg" 1996 *South African Yearbook of International Law* (*SAYIL*) 60–72, 67

61 *Ibid*.

62 See *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze,* ECJ 5/2/76, case 87/75, 129.

63 See also *Hauptzollamt Mainz v CA Kupferberg & Cie*, ECJ, 26/10/82, case 104/81, 3641.

64 See generally Art 9 of the 1980 CISG.

65 See Booysen, 1996, 68.

66 See *International Fruit Company et al v Produktscap voor Groentren en Fruit*, Judgment of the ECJ, 12/12/1972, joined cases 21 to 24/72, 1972 II ECR 1219; *British Airways v Laker* [1984] 3 WLR 413 (HL) p, 426; *Winfat Enterprises (HK) Co Ltd v AG of Hong Kong* [1985] 3 All ER 17 (PC) p.21; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR, 273.

which must be applied to individuals in this regard will be the general principles of law, which is one of the sources of international *lex mercatoria*. In this regard, in the English judgment of *Deutshe Schachtbau- und Tiefbohr-gesellschhaft GmbH v Ras Al Khaimah National Oil Co*,[67] it was decided that the proper law to contract may be the general principles of law recognised by nations.[68] Accordingly, individuals may select international *lex mercatoria* to govern their commercial contracts. In other words, in contracts between States and individuals, the parties can select a non-national law like the law of nations to govern their contracts.[69]

The position of individuals from a legal perspective is no different from that of a bank or private legal persons known as multinational corporations. They are all private law persons or non-public entities. The roles of these commercial companies are very vital today just as in the sixteenth and seventeenth centuries.[70] For example, these companies played a decisive role during the colonial period of international law with many countries being colonised by commercial companies. In the twentieth century, the principle of territoriality makes it difficult for individual States to control the activities of multinationals.[71] There is therefore a need in international trade law for rules that will transcend the territorial sovereignty of States and effectively govern the activities of multinational corporations, hence the *lex mercatoria* rules which are directly applicable to non-state entities. Consequently, in modern society, international law is shedding its public nature and is becoming directly applicable to individuals and non-state entities. In the *Case Concerning the Barcelona Traction, Light and Power Company*,[72] the court said international law has had to recognise the corporate entity as an institution created by States within their domestic jurisdiction and its existence as an independent legal entity.

3 2 Individuals and Private Legal Persons Navigating the AfCFTA through Lex Mercatoria

The Preamble of the CISG indicates that the adoption of uniform rules for contracts for the international sale of goods should consider different social, economic, and legal systems. Consequently, this would both contribute to the removal of legal barriers in international trade and promote the development of international trade.[73] Individuals are the primary subjects of *lex mercatoria* as well as subjects of international trade as indicated earlier. Besides being a regulator of international trade, the State is also an active participant. This means a Member State of the AfCFTA may act as buyer and seller towards individuals or private legal persons in other countries.[74] A State participates in international trade as a merchant and not just as a sovereign State.[75] If for example State X who is a member of the AfCFTA buys second-hand State cars from Y an individual and non-AfCFTA Member State, the agreement is in the nature of a private

67 See [1987] 2 All ER 769 (CA) 776.

68 See also *Orion Cia Espanola de Serguros v Belfort Maatshappij voor Algemene Verzekeringen* [1962] 2 Lloyds Rep 257, where the general principles of law were applicable as part of *lex mercatoria* in the contract.

69 See further *Avanessian Iran-United States Claims Tribunal in Action* Dordrecht (1993) 243, https://link.Springer.com/book/97853339028 (accessed 21-06-2023).

70 See Booysen *Principles of International Trade Law* 53, noting that multinationals may legally be allowed and empowered by States to play an important role on the international level as States.

71 See Booysen, 1996, 64, noting that in the United States (US) chartered British companies like the London Company, Plymouth Company, and the Hudson's Bay Company played a role in the colonisation process and exercise political and administrative powers far above and beyond those a mere commercial enterprise would exercise.

72 1970, *ICJ* Reports 4.

73 See para 4 of the Preamble of the 1980 CISG.

74 See *Union of India v Lief Hoegh &Co*, High Court of Gujarat 4 May 1982 (All India Reports 1983, Gujarat 34) in 1984 (9) YCA 405 407, where it was noted that commerce includes transportation, purchase, sale and of commodities between the citizens of different countries.

75 See Booysen *Principles of International Trade Law* 494.

law agreement and should be governed by the international *lex mercatoria*. The agreement may also be governed by AfCFTA rules of dispute settlement provided both parties choose it as the proper law in their transactions. Otherwise, the international *lex mercatoria* is a suitable law to govern contracts of sale between AfCFTA Member States and individuals especially those from other countries outside the AU. Additionally, individuals and private legal persons may also navigate the AfCFTA through *lex mercatoria* using general principles of law, the principle of good faith,[76] and the various INCOTERMS.[77] These INCOTERMS which are also known as International Rules for the Interpretation of Trade Terms cover only certain aspects of an international contract of sale such as the duties of the parties, the passing of the risk, the delivery of the goods, the regulations of insurance, the documentation and matters incidental to the export and import of goods.[78] Accordingly, INCOTERMS refer to the legal relationship between the seller and the buyer in an international contract of sale.[79] These INCOTERMS are great examples of rules which the international *lex mercatoria* may use to navigate the AfCFTA. Again, the primary actors of international *lex mercatoria* are individuals. Moreover, another means through which individuals may navigate the AfCFTA is through the banks.[80] The international *lex mercatoria* may feature in the AfCFTA activities using the Uniform Customs and Practice for Documentary Credits (UCP) of the ICC.[81] The UCP has legal force as general principles recognised by States and may be selected by parties in commercial transactions to govern their agreement.[82]

Finally, the autonomous position of the international *lex mercatoria* will enable individuals and private legal persons to navigate the AfCFTA. It has been established that the international law merchant is a legal order,[83] and it creates laws through usage and customs in international commercial transactions.[84] The primary motive for the application of *lex mercatoria* rules in a commercial transaction is to promote fair and equitable trading in international commerce and the protection of individuals and private legal persons against the national laws of sovereign States.[85]

4 INDIVIDUALS AND DISPUTE SETTLEMENT UNDER THE AFCFTA

The AfCFTA has an annexed Protocol on Rules and Procedures of the Settlement of Disputes which is an integral part of the agreement. This Protocol provides for the resolution of trade disputes which arise between State Parties concerning their rights and obligations under the AfCFTA.[86] The objective of the Protocol is to ensure the settlement of disputes in accordance

76 See Sweet 2006 *Journal of the European Public Policy* 633; Booysen *Principles of International Trade Law* 215, noting that the principle of good faith is also a basic principle of the international *lex mercatoria* which allows for the consideration of relevant interest.

77 Examples of these INCOTERMS include FCA (Free Carrier), CPT (Carriage Paid To), CIP (Carriage and Insurance Paid To), DAP (Delivery at Place), DDP (Delivery Duty Paid), FAS (Free Alongside Ship), FOB (Free On Board), CFR (Cost and Freight), and CIF (Cost Insurance and Freight).

78 See Booysen *Principles of International Trade Law* 609.

79 *Ibid*.

80 See Sweet 2006 *Journal of the European Public Policy* 635.

81 See Goldman 1983 *Forum Internationale* 14.

82 See Booysen *Principles of International Trade Law* 60.

83 See Sweet and Maxwell, "Legal Order and their Manifestation: The Operation of the International Commercial and Financial Legal and its Lex Mercatoria" 2006 *Berkeley Journal of International Law* 3.

84 See Goldman 1983 *Forum Internationale* 21–22; Art 9 of the 1980 CISG.

85 See Booysen *Principles of International Trade Law* 494–495.

86 See Art 3 of the AfCFTA Dispute Settlement Protocol.

with Article 20 of the AfCFTA,[87] using transparent, accountable, fair, and predictable processes.[88] The Protocol also provides for the use of customary public international law rules to settle disputes under the supervision of the Dispute Settlement Body (DSB). The DSB is made up of the representatives of the State Parties with the authority to establish Dispute Settlement Panels and an Appellate Body.[89] By virtue of Article 5(5) of the AfCFTA Dispute Settlement Protocol, the DSB may meet as often as possible to discharge its function and with regard to procedures.[90] The DSB also makes determinations concerning any matter and its decision is final.[91] The parties may also have recourse to arbitration as the first dispute avenue in accordance with Article 27 of the AfCFTA Dispute Settlement Protocol.[92] For example, while in *SPP (Middle East) Ltd, Hong Kong v Arab Republic of Egypt,* International Chamber of Commerce Award,[93] the arbitration clause was enforced as agreed by the parties but arbitration awards were denied in the *Libyan American Oil Co v Socialist People's Libyan Arab Jamahiraya*,[94] because the United States District Court refused to enforce judgment based on an arbitration clause because the act of nationalisation is considered an act of the State.[95]

Unfortunately, the AfCFTA Protocol on Dispute Settlement has no provision for disputes arising between individuals and State Parties, between individuals *inter se,* on the one hand, and between private legal persons and State Parties. Therefore, individuals and private legal persons may settle disputes using the international *lex mercatoria* rules through arbitration,[96] as seen in the *Iran-United States Claims Tribunal in Action.*[97] The arbitration of contracts governed by the international *lex mercatoria* will be international,[98] as seen in the *Mitsubishi Motors Corp v Soler Chrysler-Plymouth*. Arbitration tribunals exercise judicial functions, however, they enjoy no sovereign State power and the State also allows the exercise of this function by individuals.[99] Accordingly, international commercial disputes which involve persons from different countries, that is, commercial disputes between foreign nationals or between a foreign

87 See Art 20 of the AfCFTA noting that dispute settlement mechanism will apply to disputes arising between State Parties.

88 See Art 2 of the AfCFTA Dispute Settlement Protocol.

89 See Art 5(3) of the AfCFTA Dispute Settlement Protocol.

90 See generally Art 6 of the AfCFTA Dispute Settlement Protocol dealing procedures and dispute settlement mechanism between State Parties of the AfCFTA.

91 See Art 6(5) of the AfCFTA Dispute Settlement Protocol.

92 See Art 6(6) of the AfCFTA Dispute Settlement Protocol.

93 16 February 1983 no 3493 in 1984 (9) *YCA* 111, annulled by both the French Court of Appeal, 1984 (23) *ILM* 1048 and French Court of Cassation on the ground that no arbitration agreement exist but was later awarded by International Centre for the Settlement of Investment Dispute (ICSID) in *Southern Pacific Properties v Arab Republic of Egypt* 106 *ILR* 501.

94 *482* F Supp 1175 (1980), see also *Libyan American Oil Co (Liamco) v Socialist People's Libyan Arab Jamahiraya* 1982 (7) YCA 382.

95 See *Mitsubishi Motors Corp v Soler Chrysler-Plymouth* 105 S. Ct. 3346 (1985) (473 US 614).

96 Arbitration is the process whereby one or more private individuals decide a dispute which parties have voluntarily agreed to refer to them. The arbitrators who form the arbitration tribunal must decide a legal or factual dispute arising out of a legal relationship, and they derive their competency from the arbitration agreement which may also be a clause in a contract.

97 Dordrecht (1993) 243.

98 There are two types of international arbitration: public international arbitration and private international arbitration. Public international arbitration exist when the arbitration agreement is governed by public international law and this arbitration may be created to arbitrate legal disputes between individuals and states and between individual mutually, while international private arbitration exists when the arbitration agreement is international, concluded individuals including private legal persons and also between an individual and a state and is governed by private law which may also be international *lex mercatoria.*

99 See Booysen *Principles of International Trade Law* 767–768.

individual and a State may be settled by public international arbitration.[100] In this regard, the arbitrators will apply the international *lex mercatoria* if it was chosen by the parties and also it will be the appropriate and applicable law because individuals are involved in the dispute.[101] Some institutions which allowed the arbitration rules to apply international *lex mercatoria* are the ICC, the Economic Commission for Europe of the United Nations, the New York Convention of 1958, and the Vienna *Bundeskammer der gewerblichen Wirtschaft*.[102] Moreover, in the case of arbitration, the parties are at liberty to choose the composition of the tribunal, the specific arbitrators, the place of arbitration, the procedure to be followed by the tribunal and the language. Consequently, based on this principle, any commercial dispute between the AfCFTA Member State and foreign nationals or individuals on the one hand, and between the AfCFTA Member State and a non-State Party can be regulated and resolved using the international *lex mercatoria* rules as agreed upon by the parties in their contract.[103] This is the most objective and logical system of law to govern such transactions. Finally, the internationalisation of contracts between States and individuals or foreigners is intended to give individuals or private legal persons increased protections against the State's possible violations of the contract.[104] The protection of individuals against the State is also guaranteed through the stabilisation clause usually included in such contracts.[105] In other words, the AfCFTA Member States' contract with individuals from a non-State Party to the AfCFTA,[106] and with foreign nationals may also be subjected to the international *lex mercatoria* rules.

5 CONCLUDING REMARKS

International traders prefer arbitration rather than court-centred processes to resolve their disputes and enforce the law they have chosen to govern their contracts. Today most transnational commercial contracts contain an arbitration clause.[107] As the growth of arbitration as a means of resolving international private individual commercial disputes has proceeded, the autonomy of the international *lex mercatoria* has also been enhanced.[108] For instance, the Iran-United States Claims Tribunal contributed significantly to the stabilisation and development of many principles and rules of *lex mercatoria*.[109] The enforcement mechanism of the international *lex mercatoria* is similar to public international law. Since private individuals are not at the same level as a State, for example, only States are parties to the AfCFTA and only States may use an international organisation to exert political pressure on another State to honour its commercial obligation. In the case of the AfCFTA, the AU can exert pressure on State Parties to comply

100 See *Liamco v Socialist People's Arab Republic of Liby*a decision of the Svea Court of Appeal 18 June 1980 in 1982 (7) *YCA* 359 361. Also, see Booysen *Principles of International Trade Law* 757.

101 *Southern Pacific Properties v Arab Republic of Egypt* 106 *ILR* 501.

102 See Booysen *Principles of International Trade Law* 772.

103 International *lex mercatoria* will also determine and apply to commercial contracts involving States and foreigners dispute the lack of express or implied selection by the parties.

104 See *Kloeckner Industrie-Anlogen GmbH v United Republic of Cameroon* 1986 (11) *YCA* 162 170; *Wena Hotels Ltd v Arab Republic of Egypt* 2002 (41) *ILM* 933 941.

105 Stabilisation is a clause in the contract between the State and the individual in terms of which the State agrees not to use its sovereign or legislative power to change the provisions of the contract.

106 In this case only Eritrea is not a State Party to AfCFTA, out of the 55 AU Member States, 54 are States Parties to the AfCFTA.

107 See *Award on Merits in the Dispute Between Texaco Overseas Petroleum Company/ California Oil Company v The Government of the Libyan Arab Republic* 1978 (17) *ILM* 1

108 See *Anglo-Iranian Oil Co* case 1952 *ICJ Reports* 93 112.

109 See Brunetti "The *Lex Mercatoria* in Practice: The Experience of the Iran-United States Claims Tribunal" 2002 *Arbitration International* 355–356.

with their obligations under the AfCFTA.

Regarding the international *lex mercatoria*, a foreign partner or individual who does not fulfil their obligations will be stigmatised, as an unreliable partner and may be shunned by the international business community. This reprisal against a foreign partner to fulfil their obligation voluntarily is only possible through the application of the international *lex mercatoria*. Therefore, the contribution of individuals and private legal persons towards the growth of the AfCFTA would be undeniable since individuals are presumably the primary actors in international trade, and individuals may only navigate the AfCFTA through the international *lex mercatoria*. Consequently, the special treatment and non-discrimination clauses accorded by the AfCFTA to all its Member States may also be granted to individuals and private legal persons through the international *lex mercatoria*. Consequently, as indicated earlier, the practice of arbitration tribunals has revealed that the international *lex mercatoria* is often applied to agreements between States and foreigners. The international *lex mercatoria* can also be made applicable in cases where the conflict of laws does not produce satisfactory results, and when the national law cannot be applied for practical reasons, such as cases where the conflict of laws has connected a contract to a specific law, but that law cannot be proved.

With the States and individuals on board the AfCFTA through the international *lex mercatoria*, commercial transactions between States and individuals will enhance trade and development in the Continent.