AfCFTA and Revenue: Navigating Outstanding Fiscal Issues and Legal Framework to attain Agenda 2063

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Abstract

The African Continental Free Trade Area ("AfCFTA") Agreement will adversely affect revenue collected by African States in its early stages of adoption. The legal effect of tariff liberalisation among Member States will result in the decline of much needed developmental income. Revenue mobilisation is a priority to attain Agenda 2063 and to improve the standard of living and quality of life for "all Citizens". Domestic taxes are one of the most sustainable financing methods African countries leverage for development. Tariff rates and trade-facilitation measures are the primary focus of the continental project. The AfCFTA Agreement and draft Investment Protocol, however, include agenda items on fiscal policy related issues. Taxes run parallel with trade and economic rules and play a critical part of integration particularly on issues such as incentives, investor rights and most importantly revenue mobilisation for the government. The continental project could potentially play a significant role in facilitating harmonisation that addresses base erosion and profit shifting, and common approaches that increase domestic tax collection and revenue. It is therefore necessary to examine interlinks between trade and taxes under the AfCFTA. This paper examines tax related issues in the continent, and the role the AfCFTA could play in integrating them into the continental project. The salient issues that will be analyzed relate to; a) the movement of capital, b) VAT harmonisation in the continent which is key to ensure efficient and fair intra-African trading, c) tax incentives which create tax competition, d) transfer pricing and comparables; and e) exchange of information regarding domestic taxes. The paper further goes beyond substantive issues and also examines the legal infrastructure of the AfCFTA and regional institutions such as African Tax Administration Forum ("ATAF"), and Regional Economic Community ("REC"), interventions in administering fiscal issues, in order to attain AfCFTA's objective of creating a single common market, and attain Agenda 2063.

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1. Introduction

The Agreement Establishing the African Continental Free Trade Area ("AfCFTA Agreement") fundamentally seeks to attain economic integration through liberalised goods and services.[2] This requires commitments and common approaches from African States to effectively achieve its objective. The continental project is in a critical operational phase, with 47 out of 54 Member States depositing instruments of ratification and submitting schedules of tariff concession which set out how far Countries are able to liberalise customs duties reducing barriers to trade.[3] Most efforts up to this point have been focused on trade and services related issues.[4] Domestic taxation has largely been absent from negotiations and the AfCFTAs legal instruments, despite tax playing a key role in regional integration in redressing disparities caused by integration through harmonisation, and improving domestic revenue performance.[5].

The AfCFTA Agreement acknowledges the importance of non-trade related issues, specifically integrating key aspects into the legal framework through specific protocols, specifically; intellectual property rights, investment, and competition policy. These protocols were concluded in Phase 2 of the implementation plan.[6] The instruments ensure minimum standards in order to create conducive environments for traders. There are a number of similarities that tax and trade policy share at a regional and national level. First, trade policy [specifically] national strategy on tariff duties, VAT and customs-control, and tax policy form part of wider fiscal and investment policy. Second, the Revenue from VAT and tariff-duties contributes to national fiscus. Despite the above, tax policy issues have not been fully incorporated into the AfCFTA legal framework – with tax only appearing in best-practice and coordinative provisions under the draft Investment Protocol specifically Article 40, as will be examined in section 3 of this paper. Tax, furthermore, was excluded from primary operational provisions.

2 The Agreement Establishing the African Continental Free Trade Area (hereinafter, "AfCFTA Agreement") African Union (May 30, 2019). Article 4(1) and (2) of the Agreement seeks to progressively eliminate tariffs and non-tariff barriers ("NTBs"), and progressively liberalise trade in services.

3 The operational phase of the AfCFTA was launched during the 12th Extraordinary Session of the Assembly of the Union on the AfCFTA in Niamey, Niger on 7 July 2019. For ratification, *see* Tralac, *Status of AfCFTA Ratification*, AGOA.info (Aug. 13, 2024), https://www.tralac.org/resources/infographics/13795-status-of-afcfta-ratification.html.

4 Phase 1 protocols required tariff reduction commitments. Current rules of Origin negotiations are ongoing with and almost concluded.

5 Rodney Ludema & Iam Wooton, *Economic geography and the fiscal effects of regional integration*, 52(2) J. of Int'l Econ. 331, 357 (2000).

6 AfCFTA Agreement, Article 4(c) recognises cooperation on investment, competition and intellectual property as an objective of attaining integration.

The ultimate aim of the AfCFTA is to liberalise goods and services in order to increase continental trade volume. This has varied revenue implications on revenue generated from tariff duties and other types of income (such as indirect taxes), which diverges from Country-to-Country.[7] The short-term picture, however, is bleak. The AfCFTA will result in a decline of much needed developmental revenue, as States reduce their tariff-rates. African countries are estimated to lose US$ 4.1 billion in tariff revenue.[8] This comes at a time where revenue is required following a period where African States are recovering from the socio-economic impact of the Covid-19 pandemic,[9] with increased sovereign-debt distress and actual restructuring (Chad, Ethiopia and Zambia),[10] slowing of infrastructural projects, and increased inflation. The AfCFTA instrument provides no solution to Member States to redress revenue mobilisation, which will affect development and trade flows. Africa requires revenue for infrastructure to actualise trade benefits and synergies from the AfCFTA.

The UN Sustainable Development Goals ("SDGs") recognise the need to mobilise additional finance to existing public budgets, in particular domestic resources, to fund public goods and services. The AfCFTA objective of creating a single market for goods and liberalise both goods and service,[11] to contribute towards continental inclusive growth and sustainable development in order to have a higher standard of living and quality of life for All Citizens,[12] in accordance with Agenda 2063 requires revenue mobilisation. Revenue mobilisation has been incorporated in Sustainable Development Goal 17 and Target 17.1, which recognises that *"the ability of a State to mobilize its own resources and collect taxes to pay for essential services (education, health, social protection, security, and the like) is at the very heart of a properly functioning government."* African countries have historically collected lower taxes than other counterparts, with the tax to GDP ratio a less than half of OECD Countries in 2021.[13] In this breath, it is imperative to examine revenue related tax implications that will

7 Lawrence Edwards et al., *Quantifying Tariff Revenue Losses From the African Continental Free Trade Area* (PRISM Working Paper Series 2023-5, 2023).

8 Mesut Sayigili et al., *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions* 12 (UNCTAD Research Paper No. 15, UNCTAD/SER.RP/2017/15, 2017).

9 Dean Karlan & Christopher Udry, *Measuring COVID's Devastating Impact on Low and Middle-Income Countries*, KelloggInsight (July 1, 2021), https://insight.kellogg.northwestern.edu/article/covids-impact-on-low-and-middle-incomecountries [https://perma.cc/KD7C-T5LU].

10 United Nations Department of Economic and Social Affairs, Report of the Inter-agency Task Force on Financing for Development 202 (2022). Around sixty percent of LDCs and other low-income countries are now assessed at a high risk of debt distress or in debt distress. Many Middle-Income Countries ("MICs") and Small Island Developing States ("SIDS") also saw significant increases in public debt.

11 AfCFTA Agreement, Article 3(a).

12 African Union, Goals & Priority Areas of Agenda 2063, https://au.int/en/agenda2063/goals (last visited July 4, 2024).

13 *See* OECD & African Union, Revenue Statistics in Africa 2023, https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-tax-revenues/brochure-revenue-statistics-africa.pdf (last visited July 4, 2024).

arise from implementing the AfCFTA, and fiscal options and measures Member States can exercise to meet developmental and SDG objectives.

The paper further examines areas of international taxation that the AfCFTA has not addressed, however that has significant trade and economic implications on States, such as tax competition and incentives, which may drive multinationals ("MNEs") to utilise tax treaty networks, low-tax African jurisdictions, or Special Economic Zones ("SEZs") to obtain tax advantages.[14] It examines possible common approaches and international tax framework that African states may implement to raise increased revenue particularly that address three critical revenue areas of intervention, namely increasing domestic revenue mobilisation, improving tax compliance, and addressing base-erosion and profit shifting which partially also falls under illicit financial flows.[15]

The current landscape present a unique opportunity for the AfCFTA and regional institutions such as the African Tax Administration Forum ("ATAF"), and Regional Economic Communities ("RECs") to address challenges, and possibly utilise the legal architecture of the AfCFTA to reach consensus on critical fiscal issues. Fiscal coordination is critical in improving in order to attain Agenda 2063 and to improve the standard of living and quality of life for all citizens. The aforementioned Agenda 2063 is Africa's blueprint for achieving inclusive and sustainable socioeconomic development.[16] The blueprint is a precursor to the AfCFTA, prioritizing continental and regional integration, calling for the fast-tracking of the AfCFTA.[17] Agenda 2063 further sets out the first-10-year implementation plan for flagship projects, which require every [AU] member state to develop policies and strategies adapted to their circumstances *in relation* to (i) the establishment of an African Continental Free Trade Area ("AfCFTA"); and (ii) the establishment of an African passport and free movement

14 For a preliminary take on Special Economic Zones ("SEZs") in the context of the AfCFTA, *see* Regis Y. Simo, *Special Economic Zones in an Era of Multilateralism Decadence and Struggles for Post-Pandemic Economic Recovery: Perspectives from the Global South*, 24(1) German L. J. 199–226 (2023).

15 United Nations Office on Drugs and Crime ("UNODC") and Organization for Economic Co-Operation and Development ("OECD"), *Coherent Policies for Combatting Illicit Financial Flows*, July 2016. IFFs are defined broadly as all cross-border financial transfers, which contravene national or international laws. This wide category encompasses *inter-alia* several proceeds of crime (for example tax evasion, money laundering, fraud and corruption), and transfers that seek to evade anti-money laundering/counter-terrorist financing measures or other legal requirements (such as transparency or capital controls).

16 Agenda 2063, Adopted at the 24th Summit of the African Union (January 23–31, 2015), Addis Ababa, Ethiopia, https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf.

17 *Id.* at 133.

of people and capital.[18] Both the AfCFTA and Agenda 2063 reaffirm that Africa has turned to regionalism as a means of economic and political growth.[19]

Section one of the paper provides an introduction and overview of the article. Section 2 examines the role movement of capital plays in regional integration, and critically examines taxation in comparable Free Trade Areas (FTAs). Section 3 identifies and examines specific tax related issues that the AfCFTA has incorporated, and revenue opportunities that may be available within the legal framework of the continental project. These include;

a) VAT harmonisation which is critical for ultimately forming a single market, and preventing abuse which results in loss of income for African States;
b) developing minimum standards on tax incentives.
a) alignment of Customs administration with transfer-pricing legislation; and
b) exchange of information legal framework in Africa for domestic tax and customs administration;

Section 4 provides a summary of critical findings and advances recommendations which fall under the AfCFTA framework.

2. The AfCFTA and the Movement of Capital

The text of the AfCFTA Agreement essentially serves as a regulatory and facilitatory function for liberalisation of tariffs and services, and cooperation in customs and trade facilitation.[20] Integration, however, also requires a coordinated legal framework on capital, particularly the freedom of capital. Capital was included within the framework of Agenda 2063, which calls to accelerate progress towards economic integration-at regional and continental level "to meet the needs for sustained growth, trade and exchanges of services, capital and free movement of people.[21] It therefore falls within the long- aspirations of the AU's plans for Continental integration, despite largely being excluded from the AfCFTA, as will be examined below.

18 *Id.* at 17.
19 Joseph Kwabena Manboah-Rockson, *Launch of the African Continental Free Trade Area (AfCFTA) within Agenda 2063: an assessment of the "Actorness" of the African Union (AU) in International Relations (IR)*, 5(1) Int'l J. of Rsch. & Innovation in Soc. Sc. 278 (Jan. 2021). Available at https://rsisinternational.org/journals/ijriss/Digital-Library/volume-5-issue-1/278-286.pdf.
20 AfCFTA Agreement, Article 3(a).
21 Agenda 2063, *supra* note 16, at 133.

Capital plays a significant role in the AfCFTA - it is key to financing African corporation to scale operations and projects in order to successfully increase trade within the continent, attain export diversification, and to further finance key infrastructure projects to facilitate trade. The AfCFTA agreement itself seeks to contribute to the movement of capital, in recognition of its role in economic integration,[22] however has little regulatory rules on capital itself.

The draft Protocol to the AfCFTA Protocol on Investment (Investment Protocol) operates as the primary instrument which prescribes for protection of capital.[23] The instrument protects investors and parties against arbitrary, illegal or discriminatory restrictions and interventions of the transfer of capital by State Bodies through Article 22(1).[24] The provision mandates that "…all transfers relating to an investment to be made freely and without delay…". The text provides limited exceptions to the rule, which is a positive step to ensuring decisions by governments do not interfere with the movement of capital. Exceptions include serious balance-of-payments deficits that threaten to cause serious economic or financial difficulties in the State Party concerned under paragraph 2 – this safeguard is congruent with Article 28 on Balance of Payments under the AfCFTA Protocol on Goods. State safeguard measures have to be notified to the AfCFTA Secretariat, should avoid unnecessary damage to economic and financial investors, be undertaken in a proportional manner with circumstances, and phased out.[25]

The protocol also establishes much needed rules on the management and settlement of disputes to ensure investors and other interested parties have access to remedies. It does so by;

a) prescribing resolution through various dispute forums, specifically consultations, negotiations, conciliation, mediation or other amicable dispute resolution mechanisms available in the Host State, under Article 46(1); and

b) enabling the investor to seek remedy through Article 46(3) of the Investment Protocol, the which directs investors to the [annexed] Protocol on Rules and Procedures of the Settlement of Disputes, - which provides for the establishment

22 AfCFTA Agreement, Article 3(a).
23 Draft released during the Seventh Extraordinary Session of the Specialized Technical Committee on Justice and Legal Affairs (Experts Meeting) (Jan. 16 –21, 2023) in Accra, Ghana. Available at https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_investment.pdf (last visited May 4, 2023).
24 *Id.*
25 AfCFTA Draft Investment Protocol, Article 22(4).

of Dispute Settlement Body, and with authority to establish panels to receive and determine interstate trade disputes.

While the protection of capital through restrictions on movement of transfers, and a dispute settlement mechanism is an important provision in upholding and securing investor rights, the AfCFTA legal framework does not comprehensively address critical issues relating to domestic taxation and freedom of capital. Article 3(4)(e) of the Investment Protocol outrightly prescribes that the Protocol *shall not* apply to "… taxation measures taken in accordance with the applicable laws and regulations of a State Party." The effect of this provision, is that any tax related provisions, measures or restrictions by a state relating to investments under the Protocol fall outside of the scope of protection of the instrument. This particularly means that regulatory measures (tax laws) and tax authority decisions targeting non-resident investors and individuals which are of a discriminatory nature (relative to treatment of residents) are not protected under the investment protocol.

This is also apparent from Article 22(1) which prescribes that "…all transfers relating to an investment to be made freely and without delay in and out of the territory after payment of the respective taxes and duties,". Domestic taxation therefore falls out of the scope of the investment protocol and has no legal remedy under dispute settlement architecture. This is not to be confused with other taxes imposed on goods at the time of entry – as Article 7(1)(3) of the Protocol on Goods widens the scope of liberalisation to apply to other taxes at time of import. The primary issue is that domestic taxation (income tax rules) are excluded from protection under the Investment Protocol. This may mean that Revenue Authorities in host countries may legislate or keep discriminatory measures which prescribe for higher withholding fees on income for non-residents, special recovery measures applicable to foreign corporations, and apply domestic laws at a higher standard to non-residents than residents. All of these which do not constitute a violation of movement of capital.

The European Union takes a divergent approach to the protection of capital. The FTA protects movement of capital from a wide range of forms of discrimination, which include from domestic tax measures. Article 63 of the founding instrument,[26] prohibits all restrictions on movement of capital, without excluding domestic tax measures from the scope of application of the rules. This is also apparent from case-law. Critically, a number of high-profile cases have emerged from this, which include

26 Treaty on the Functioning of the European Union ("TFEU"), European Union, Dec. 1, 2009, OJ C115/13.

the Danish Interest Case which examined anti-abuse law by Danish tax authority,[27] and the *FFI Glo (II)* case where the court held foreign-sourced dividends are not subject to a higher rate that nationally-sourced dividends when examining double-taxation relief and consistency of measures with community rules.[28]

Protection of movement of capital in the EU provides a useful and comparative lesson of the importance of domestic taxes in regionalism and common capital approaches and minimum standards. Free movement cases involving direct taxation systems have more cases than all the non-tax cases combined.[29] Free movement cases in this regard, have been adjudicated to determine whether national measures which restrict payments, and therefore constitute discrimination.[30] Cases address issues of interest taxation, capital gains, wealth and inheritance taxes and charitable donations and there are many more pending.

Should domestic taxes be included in the scope of freedom of movement of capital, Article 3(4)(e) which excludes domestic taxation from the Investment Protocol would have to be amended or deleted. Furthermore, on implementation, African States, specifically revenue administrations and relevant ministries [of finance] would have to adjust restrictive or discriminatory measures which are applied to non-resident taxpayers who are members of the AfCFTA. This would require 43 African Countries signatory to the Agreement to adjust to the requirements. Protection from discrimination could possibly also be extended to third-party investors who are not signatory to the AfCFTA through an amended provision in the Investment Protocol.[31]

The drawback of incorporating domestic tax into the scope of freedom of capital is that it raises complexities in interpretation, and competent bodies to resolve issues. The EU cases are significantly complex, ranging on issues of compatibility of tax treaties (exemption and imputation) as was mentioned above in the *FFI Glo (II)* 0063 case, and reviewing domestic measures, which have also led to inconsistent application of law,

27 Skatteministeriet v. T Danmark (C-116/16); Y Denmark Aps (C-117/16), Feb. 26, 2019.

28 Franked Investment Income Group Litigation (Respondents) v. Commissioners for Her Majesty's Revenue and Customs, FII GLO II (C-35/11), Nov. 13, 2012.

29 *See* Martha O'Brien, *Free movement of capital, taxation and third countries: The European Court of Justice and cross-border dividends* 10, European Union Studies Association ("EUSA") Biennial Conference (May 17–19, 2007), available at http://aei.pitt.edu/7987/.

30 *Id.*

31 The French Administrative Supreme Court ruling, Conseil d'Etat, decision n° 421524, *Sté AVM International Holding,* on 14 October 2020 (holding that the non-resident French capital gains tax generally creates discrimination inconsistent with EU principles when imposed in circumstances where a French tax resident transferor would have been subject to a lower level of tax in similar circumstances).

controversial topics, and complex cases.[32] The AfCFTA would require a robust, and well-versed judiciary, competent in commercial, trade, and tax law. This is necessary in order to preserve investor and taxpayer rights under rules on protection of freedom of capital.

It is imperative to note that the Abuja treaty already prescribed for the elimination of restrictions on the transfer of funds between States.[33] Article 45 established a general obligation for Member States to ensure the free movement of capital within the Community through the elimination of restrictions on the transfer of capital funds between Member States in accordance with a timetable to be determined by the Council.[34] The AfCFTA established slightly more detailed modalities of the extent to which the movement of capital is to be safeguarded, however only so far as it relates to actionable goods and services covered by the Agreement.

The exclusion from protection against discrimination by state actors on investors means that the AfCFTA runs the risk of not establishing comprehensive capital freedoms within the continent. Fiscal Sovereignty with domestic taxes excluded from the scope is prioritised over complete market access and equal treatment principles. The above-notwithstanding, non-tax related mobility of capital rules for traders, and dispute resolution legal mechanism to enforce rights are however positive steps in ensuring capital restriction does not circumvent objectives of integration.

3. Fiscal Issues and Revenue in Africa

This section examines trade-related and non-trade related fiscal issues which have not been addressed in the AfCFTA framework, however, which are related to Agenda 2063 and prospects of attaining the desired objectives.

3.1 VAT: Harmonisation of Systems, Fraud and Mispricing

VAT has largely been excluded from the scope of the AfCFTA Agreement and protocols. While it is covered in relation to general national treatment rules which apply to all taxes on goods at entry, such as the aforementioned Article 7(1)(3) of the Protocol on Goods, there are no explicit dedicated VAT rules. Agenda 2063 Technical and academic

32 Ana Paula Dourado, *The EU Free Movement of Capital and Third Countries: Recent Developments*, 45(3) Intertax 192, 193 (2017).

33 Treaty Establishing the African Economic Community, African Union, adopted in Abuja, Nigeria (June 3, 1991).

34 *Id.*

legal discussions on the AfCFTA have been focused on traditional trade-related aspects of the continental project. This reflects and underlines the primary objectives of the Agreement, which ultimately serve a regulatory and facilitatory function focused on pursuing economic integration of the continent to create a single market for goods and services.[35] A single market cannot exist without VAT harmonisation, in systems and in addressing prevailing common challenges in the continent.

One of the trade-offs or revenue foregone through reduced customs duties on account of tariff liberalisation, is increased long-term broad-based consumption tax in the form of value-added tax and an expanded tax base emanating from trade creation.[36] It is therefore necessary to adopt fiscal measures, at a domestic and potentially continental level, to address revenue shortfalls. A number of proposed theories have been advanced to address foregone customs tariff revenue, one specific to LDCs is to offset tariff cuts through a point-for-point increase in consumption taxes, so long as the tariff reforms increased production efficiency.[37] The two primary challenges this raises is the final burden of tax being passed on to the consumer (potentially low-income earners), and the second, that most domestic industries in LDCs have low production efficiencies.[38]

VAT, like other national domestic taxes, is shaped by national country fiscal policy with revenue mobilisation, trade and commerce, and investment objectives considered in developing its design. States set various VAT tiers to meet national needs, firstly zero-rated essential items, secondly providing exemptions, and lastly setting other single standard rates. VAT rates and thresholds ,therefore, vary and fluctuate in the African continent. The average standard VAT rate in 2020 in countries examined in ATAF's African Tax Outlook report was 16%, slightly lower than the OECD average of 21.8%, with the highest rates emanating from Morocco and Madagascar at 20% and the lowest in Nigeria (7.5%).[39] Thresholds also vary, with the highest threshold being USD 510,690.33 in Morocco, and the lowest in Malawi at USD 33,465.07.[40]

Harmonisation of rates and thresholds may not be feasible, as sovereign states need to

35 AfCFTA Agreement, Preamble.

36 African Tax Administration Forum, *Africa Integration: Does Taxation Matter? An ATAF Policy Research Blog* (July 7, 2020), available at https://www.ataftax.org/africa-integration-day.

37 Michael Keen et al., *Coordinating Tariff Reduction and Domestic Tax Reform*, 56(2) J. of Int'l Econ. 489–507 (2002).

38 Dennis Ndonga et al., *Assessing the Potential Impact of the African Continental Free Trade Area on Least Developed Countries: A Case Study of Malawi*, 46 J. of S. Afr. Stud. 773–92 (2020).

39 African Tax Administration Forum, *African Tax Outlook* (2021), available at https://www.ataftax.org/african-tax-outlook.

40 *Id.*

adjust and design their VAT regimes to support various industries and sectors and various economic demographic groups. Harmonisation of VAT systems through simplified compliance regimes, often administered by the same Revenue Administrations which administer tariff-related cross-border supply of goods and services under the AfCFTA, may reduce cost-of-business and ease multiplicity of requirements in the continent. Coordinating processes and rules, and standardised approaches also reduce administrative burden through digital technology, specifically in information sharing, record keeping and auditing.

Challenges to cross-border e-commerce cut across custom duties and custom procedures, and VAT. They include; i) imports of low-value goods, ii) VAT fraud, which has often been broadly incorporated into the definition of "illicit financial flows"; ii) high compliance costs of administration; and iv) untaxed or under-taxed digital services and goods purchased on digital platforms.[41] VAT harmonisation provides a critical intervention to the aforesaid challenges, with prominent continental proposals advanced include establishing a common simplified registration and collection regime. is critical in addressing the particular issues which have emerged as a challenge in the African context.

The first proposition, therefore, in addressing a number of trade-related issues above, is to implement a simplified compliance regime for supplies of services and intangibles by non-resident suppliers across the continent.[42] The AfCFTA is strategically placed to facilitate and develop coordinated approaches alongside tariff-related objectives. Under the AfCFTA, the authors proposal advanced [based on ATAFs VAT digital toolkit] is to coordinate multiple jurisdictions to operate similar administrative and operational infrastructure to extend its application to supplies of low-value imported goods by non-resident suppliers. Harmonising administration and operations in this way may produce significant cost savings for tax authorities. The proposed approach would allow non-resident suppliers and digital platforms to submit consolidated VAT returns and make consolidated payments covering all supplies that are subject to a VAT obligation under the simplified compliance regime,[43] making it simple for traders, easier for tax administrations, and simultaneously address mis-invoicing in digital transactions.

The suggested approach the author proposes to develop a top-down common

41 OECD/WBG/ATAF (2023), *VAT Digital Toolkit for Africa*, OECD, Paris, https://web-archive.oecd.org/2023-06-27/651045-vat-digital-toolkit-for-africa.pdf (last visited July 11, 2024).

42 *Id.*

43 *Id.* at 127.

approach and prescribe minimum VAT standards on harmonisation of tax regimes, utilising the AfCFTAs legal framework –through an annex on VAT in the Protocol on trade in Goods. This approach was also vaguely advanced by Banga et.al, stating that "…the AfCFTA could provide a guiding framework for applying indirect tax to digitally traded goods."[44] The authors, however, did not specify the modalities of such a framework. The most effective method of advancing for common approaches is through rule-based directive approach, as has been adopted in the EU.[45] This is secondary law that arises from treaties that binds Member States, and which become law through transposition with each state responsible for implementing the laws domestically.

An alternative approach is to widen the scope under the AfCFTA and incorporate VAT into the investment protocol, specifically under Article 40 which generically addresses taxation. The recommendation proposed by the author of this paper, is for the inclusion of an explicit provision which prescribes for common approaches and harmonisation of VAT systems, Specific references to information sharing and digitalisation should be inserted to address common challenges as identified earlier in this sub-section, with modalities developed between Member States within a specified period of time.

Reconciling the two proposals - VAT harmonisation does not entirely fall within the scope of the investment protocol, however Article 40 it is well suited to address tax related issues. Whereas incorporating VAT harmonisation into the AfCFTA is critical in ensuring tariff-reduction and trade facilitation components of the agenda coincide with VAT, which is closely related to import of goods. A similar approach has been adopted at a regional Customs Unions level within the continent, such as SACU, which have legislated measures for adopting common approaches for simplification and harmonisation of trade documents,[46] and is a critical component of forming a single market which agenda 2063 envisions. Furthermore, fragmented rules have currently been developed to address VAT and the digital economy through expansion

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44 *See* Karishma Banga et al., *Digital trade provisions in the AfCFTA: What can we learn from South–South trade agreements?* (Apr. 2021), available at https://set.odi.org/wp-content/uploads/2021/04/Digital-trade-provisions-in-the-AfCFTA.pdf (last visited June 8, 2023).

45 Treaty of the Functioning of the European Union ("TEFU"), Article 288.

46 Southern African Customs Union Agreement ("SACU"), 1969. Article 18 of the Agreement prescribes for customs duty-free movement of domestic goods and previously taxed goods between signatory states, specifically between Botswana, Lesotho, Namibia, South Africa and Eswatini. Article 23 prescribes for members to undertake measures ". . . as are necessary to facilitate the simplification and harmonization of trade documentation and procedures.".

of nexus rules and registration requirements in multiple jurisdictions, presenting increased complexity for service-providers and traders in the continent. The author therefore advances that the first proposal is the most comprehensive and well-suited option.

Lastly, VAT fraud remain a priority in Africa, under the general umbrella of Illicit Financial Flows (IFF). A significantly high number of IFFs are accompanied by trade misinvoicing, which affects VAT component of goods. There are multiple types of VAT evasion which include mis-classification and failure to register, however VAT fraud is the most challenging in the African context, which comprises of bogus traders setting up Companies may be set up solely to generate invoices that allow recovery of VAT, and through taxes collected and not remitted through false accounting, by engineering bankruptcy before tax is paid, but crucially also, through missing trader fraud.[47] African countries are extremely dependent on revenue arising from indirect tax,[48] consequently the number of legal or administrative measures, directed towards combating VAT fraud, have significantly increased in various African countries.[49] Domestic measures include introducing electronic invoicing requirements which record business transactions, automatically apply the correct taxes, issues accurate and traceable invoices, and reports sales data to the revenue authority, in real time. Success stories have emerged in Ethiopia and Rwanda.[50]

Exchange of information in cross-border transactions is a critical feature to address VAT fraud. The exponential growth of the digital economy, B2B and B2C platforms has increased the risks of under-reporting, as it is difficult for tax administrations to know when and where a sale has been made.[51] While regional indirect tax efforts have been adopted under RECs, if continental exchange of goods and services is to increase under the auspices of the AfCFTA information sharing through automatic exchange of information is critical to addressing issues of fraud. The AfCFTA is well situated to incorporate top-down VAT mechanisms, namely spontaneous exchange, exchange on request, and automatic exchange of information.

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47 Rita De La Feria et al., *Addressing VAT Fraud in Developing Countries: The Tax Policy-Administration Symbiosis*, 47(11) Intertax 950–67 (2019).

48 James Alm et al., *'Sizing' the Problem of the Hard-to-Tax*, 268 Contributions to Econ. Analysis 11–75 (2004).

49 *See* De La Feria, *supra* note 47.

50 Andrew Zeitlin & Nada Eissa, *Evaluation of electronic billing machines: Effectiveness of tax administration* (2016), available at https://www.theigc.org/sites/default/files/2016/02/Zeitlin-Eissa-2015-Project-memo.pdf; *see also* Merima Ali et al., *Building Fiscal Capacity in Developing Countries: Evidence on the Role of Information Technology*, 74(3) Nat'l Tax J. 1 (2021).

51 International Monetary Fund ("IMF"), Current Challenges in Revenue Mobilization: Improving Tax Compliance 9 (Jan. 29, 2015).

The AfCFTA Agreement already prescribes customs coordination under Annex 3of the Protocol on Trade in Goods, under Customs Co-operation and Mutual Administrative Assistance. Article 7 prescribes for advance exchange of information on goods and comprehensive exchange under Article 9 with detailed rules on requests.[52] The author therefore further proposed that the scope of the agreement be extended to cover VAT Exchange of Information (EoI) request to address cross-border fraud through verification and information requests, which would run parallel with the AfCFTAs customs EOI regime in relation to goods. This option could compliment both aforementioned proposals above.

3.2 Minimum Standards on Tax Incentives

As the AfCFTA enters into operation it is anticipated that fiscal and investment measures will be utilised by Member States to attract investment and maximise intra-African exports. The most variable factors which states employ to attract investment are sectoral liberalisation and tax incentives. The invariable factors are population, market-size, and natural resources. African countries have notoriously utilised tax incentives to attract mobile capital, or relocation of multinationals or subsidiaries, particularly using special economic zones which exist in 47 out of 54 African countries.[53] Incentives and SEZ are utilised with the objectives of;

a) attracting investment (FDI);
b) promoting industrialisation for job creation and value addition;
c) promoting exports to generate foreign exchange; and
d) fostering private-sector development (which includes micro-small and medium sized enterprises).[54]

There are trade-related incentives which fall under AfCFTAs scope are rebates, reduced excise and customs duties, expedites customs processes, such as Authorised Economic Operator regimes, which also fall under the ambit of WCO, regional bodies such as SACU.[55] Domestic tax measures include *inter-alia* tax holidays, preferential tax

52 African Union, AfCFTA Compiled Annexes to the Establishment of the AfCFTA, at Annex 3, https://au.int/sites/default/files/documents/37121-doc-Compiled-Annexes_AfCFTA_Agreement_English.pdf.

53 *See* African Free Zones Organisation, *African Economic Zones Outlook*, available at africaeconomiczones.com/wp-content/uploads/2020/03/African-Economic-Zones-Outlook-1.pdf.

54 United Nations Economic Commission for Africa, *Harnessing the Potential of Special Economic Zones for Private Sector Development and Inclusive Industrialization in Southern Africa* (2022), available at https://repository.uneca.org/handle/10855/47557.

55 AfCFTA Agreement, Part II (on non-discrimination applies to the trade measures), Article 4 (on MFN), and Article 5 (on National Treatment). *See also* Southern African Customs Union ("SACU"), *Joint Media Release SACU Members Sign Mutual Recognition Arrangement* (May 31, 2023), available at https://www.sacu.int/docs/pr/2023/SACU-AEO-Media-Release.pdf.

rates, accelerated depreciation allowances, VAT exemptions and zero-rated VAT. The incentives are tax expenditure,[56] with trade-incentives and domestic tax incentives potentially resulting in foregone revenue, at a time where AfCFTA Member States may lose up to 5% of GDP due to the anticipated tariff reduction or elimination.[57] There has already been an exponential rise in SEZ and tax holidays in Sub-saharan Africa,[58] an indicator of the high level of tax competition in the region with new investment incentives in *inter-alia* Angola, Botswana and Mauritius.[59] The corporate income tax incentives have a significant potential risk to the revenue base of African Countries.

Africa has not been transparent about tax expenditure, only eleven out of 54 African countries publish figures on tax expenditures, the most under-reported continent.[60] As economies adjust fiscal policies and incentives to maximise on AfCFTA, it is essential to address tax competition, in order to attain UN Sustainable Development Goals (SDGs), which recognise the need to mobilise additional finance, and agenda 2063, which requires revenue mobilisation.

The AfCFTA is already a monumental feat garnering political and technical commitments to liberalise trade for continental economic prosperity. The AfCFTAs draft Investment Protocol, which already prescribes for tax related cooperation and reporting on use of incentives,[61] is well placed to develop a framework or committee coordinating common approach on tax incentives, with the ultimate objective of developing a minimum effective tax rate for Africa. This may incorporate "developmental carve-out" which may enable lower-income countries to utilise incentives in specific-agreed under-developed industries and markets, particularly those relating to developmental areas

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56 Tax expenditure is defined as ". . . departures from the normal tax structure, designed to favor a particular industry, activity, or class of persons. They take many forms, such as permanent exclusions from income, deductions, deferrals of tax liabilities, credits against tax, or special rates.". *See* Stanley Surrey, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20(2) Boston Coll. L. Rev. 225–369 (1979).

57 On average, the revenue loss would amount to about 0.5–0.8 percent of GDP, depending on the assumed elasticities. However, in a few countries, revenue losses may be as large as 3–5 percent of GDP. *See* IMF, The Regional Economic Outlook: Sub-Saharan Africa 52 (Apr. 2019).

58 Michael Keen et al., *Revenue Mobilization in Sub-Saharan Africa: Challenges from Globalisation II—Corporate Taxation*, 28 Dev. Pol'y Rev. 573–96 (2010); *see also* IMF, Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment (2015).

59 UNCTAD, World Investment Report 2022: International Tax Reforms and Sustainable Investment 61, available at unctad.org/system/files/official-document/wir2022_en.pdf.

60 Agustin Redonda et al., *Tax Expenditure and the Treatment of Tax Incentives for Investment*, 13 Economics: The Open-Access, Open-Assessment E-Journal 1–11 (2019).

61 AfCFTAs Draft Investment Protocol, Articles 2(e) and 7(f) set out cooperation modalities; Article 9(2)(b) of the AfCFTA Agreement prescribes rules on reporting on use of incentives.

such as food-safety, health, energy and environment. This is in line with Article 6 of the AfCFTA agreement on S&DT, which recognises capacity and needs of respective countries, a principle well founded on equity.

Global Minimum Tax rules (GloBE), also referred to as "Pillar 2" of the OECD/G20 Inclusive Framework currently reduces policy options of developing countries that use low-tax rates. The rules ensure the total amount of taxes paid on a MNEs excess profit in a jurisdiction is up to at least 15% by allowing foreign jurisdictions to tax the difference between the low-tax-rate and 15%.[62] While this external solution to addressing low tax rates could pressurize developing countries to change, an African solution, or "inside-out" continental position on tax-competition may be more effective and comprehensive in addressing tax incentives and reduce tax expenditure, as opposed to measures under Pillar 2. The proposal is to set an agreed Continental or regional minimum tax rate under RECs and enable Countries the ability to set tax rates aligned with continental rates may also follow a similar Annex 1 Schedule of Tariff Concessions, where parties deposit an instrument committing to the rates. Rates lower than the continental or regional rates would follow notification procedures under existing S&DT rules. The objective of the policy is to restrict use of [inefficient] incentives, to reduce tax expenditure and to ensure much needed corporate tax revenue at a time of increased trade volumes and economic activity.

3.3 Transfer Pricing: Simplified and approaches, and Comparables

Transfer pricing has emerged as one of the primary areas of prioritisation in Africa. Transfer pricing is the prices at which an enterprise sells its intangible goods or assets or renders services to associated enterprises.[63] It is a legal fiction applied to determine the arms-length standard, the true taxable income of a controlled taxpayer.[64] Transfer pricing is one of the most important tax and customs-related policy issues of importance on the continent in the past decade, specifically in the international and domestic tax arena.[65]

62 This is through the Income Inclusion Rule, Article 2.1 of the Pillar 2 Model Rules. *See* OECD (2021), *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, OECD Publishing, Paris, available at https://doi.org/10.1787/782bac33-en.

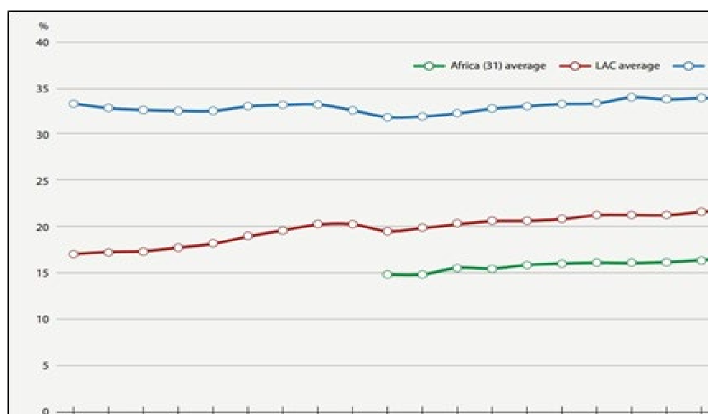
63 OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (1995).

64 United States Internal Revenue Service, Treasury §1.482(1)(b)(1), 26 CFR § 1.482-1(b)(1) (describing how to determine the true taxable income of a controlled taxpayer).

65 Anett Oguttu, *OECD's Action Plan on Tax Base Erosion and Profit Shifting: Part 1 – What Should Be Africa's Response?*, 69 Bull. Int'l Tax'n 11 (2015).

Transfer pricing has the ability to significantly address Illicit Financial Flows ("IFF") specifically relating to multinational organisations. There are varying definitions of IFF, however, it can ultimately be defined as '"…all cross-border financial transfers which contravene national or international laws.".[66] African countries are concerned that their tax bases are being eroded by IFF due to MNEs artificially shifting profits to jurisdictions where the profits are subject to minimal or no tax.[67] Incidents of IFF continue to prevail in many countries around the world, however 'the social and economic impact on developing countries is more severe given their smaller resource base and markets'.[68]

The primary reason that this remains a particular concern and challenge in Africa is that they deprive developing countries of resources that could be used to finance much-needed public services such as education, healthcare, and the infrastructure. Transfer pricing has emerged as potentially transformative solution to increasing revenue from the existing MNE tax-base. Africa has the highest Corporate Income Tax ("CIT") to tax GDP rate in the world, relative to other continents, which means it is potentially more reliant on income from multinationals to finance development.[69] Africa has had the lowest tax to GDP ratio for decades,[70] ultimately, the objective is for Africa to self-finance development through fiscal measures and improved revenue administration.



66 United Nations, Coherent Policies for Combatting Illicit Financial Flows 3 (2016)

67 African Tax Administrative Forum ("ATAF"), Inclusive Framework Proposals to Address the Tax Challenges from the Digitalisation of the Economy, ATAF 3rd Technical Note CBT/TN/03/2019 (2019).

68 OECD, Illicit Financial Flows from Developing Countries: Measuring OECD Responses 15 (2014).

69 In 2018, corporate tax revenues were a larger share of total tax revenues on average in Africa (19.2% in the 30 jurisdictions) and LAC (15.6% in the 27 jurisdictions), than the OECD (10.0%). *See* OECD, Corporate Tax Statistics (2023), available at https://www.oecd.org/en/publications/2023/11/corporate-tax-statistics-2023_068828ca.html.

70 *See* OECD, Revenue Statistics in Africa (Nov. 14, 2022), available at https://www.oecd.org/en/publications/2022/11/revenue-statistics-in-africa-2022_fdf56bd7.html.

The text of the AfCFTA draft Investment Protocol prescribes for three main binding obligations that investors are to subscribe to in relation to transfer pricing. The Article firstly obligates investors to subscribe to minimum standard, specifically to;

a) "…ensure that all transactions with related or affiliated companies are arm's length transactions … in accordance with the domestic regulations of the Host State… and relevant international best practices";
b) "conduct their operations in a manner that fully complies with all applicable tax laws and international standards relating to ensuring that tax benefits are not reduced through base erosion and profit shifting practices; and
c) provide the financial information required by the Host State to ensure compliance with the applicable laws relating to taxation."

The second obligation the draft-protocol prescribes for, is on cooperation, specifically with regards to detection and prevention of transfer pricing manipulation by investors, exchange of information, and Joint Audits within the framework of mutual administrative assistance in tax matters, under Article 40(2).

While the above is critical in ensuring base-erosion and profit-shifting do not occur, the obligations established in the protocol merely buttress national rules and binds them to investors, which is redundant. Cooperative rules under Article 40(2) positively address exchange of information and joint audits, which is critical in ensuring joint approaches which is critical in transfer-pricing where multinationals establish regional networks, and profit-shift based on national tax rates. The above-notwithstanding, the AfCFTA does not address the two primary TP related challenges in the continent, specifically;

a) administrative complexity of transfer pricing rules; and
b) lack or low number of comparable in the Continent, which are needed to appropriately undertake benchmarking and enforce Transfer Pricing rules.

Both issues have extensively been raised as issues in the African context. On the first issue, African tax administrations often report that the complexities in the application of the arm's length principle make it extremely challenging to stop artificial profit shifting by abusive transfer pricing practices.[71] The OECD itself at the inception of developing the rules acknowledged complexities in use of transactional pricing

71 AFAF, *ATAF's opinion on the Inclusive Framework Pillar One (including the Unified Approach) and Pillar Two proposals to address the tax challenges arising from the digitalisation of the economy*, available at https://events.ataftax.org/includes/preview.php?file_id=44&language=en_US (last visited June 5, 2023).

methods, and even impracticable in certain cases due to the complexities of real life business situations.[72] TP regimes in Africa have been not been implemented effectively since adaptation of [largely] OECD rules, in the metric of number of investigations undertaken, cases concluded by dispute-settlement bodies (which include settlements), or re-assessment or adjustments based on TP investigations. This is due to numerous factors, which include lack of capacity in set up specialised units with sufficient skill to tackle audits due to the complex nature of TP.[73] A significant number of African States introduced the "arms-length" principle in domestic tax law, however OECD international standards which are the most technically detailed and structures approach, have largely been introduced following the BEPS 2.0, and the movement to join the OECD/G20 inclusive framework. BEPS deliberations, there were concerns among participants that the transfer pricing guidelines have become uncertain and obscure: making the transfer pricing process 'far more complex'.[74]

Africa's challenge of comparable within a geographical region emanates from a lack or low financial information at the firm level. Availability of local comparables is especially low in developing and emerging economies.[75] Africa hardly has any benchmarking databases.[76] This is highlighted by the statistic that the coverage of all active companies based in non-OECD countries in publicly available financial reporting databases is only 26.6% of all covered firms, and the proportion of active companies based in Far Eastern, Middle Eastern, Central Asian, and African countries is even far lower and reaches only 0.4%. Advanced African economy.[77]

72 OECD, Transfer Pricing and Multinational Enterprises Report of the OECD Committee on Fiscal Affairs 12 (OECD Publishing, 1979).

73 Annet W. Oguttu, *The Challenges of Applying the Comparability Analysis in Curtailing Transfer Pricing: Evaluating the Suitability of Some Alternative Approaches in Africa*, 48(1) Intertax 84 (2020).

74 Richard Collier & Joseph L. Andrus, Transfer Pricing and the Arm's Length Principle After BEPS Ch. 6 (Oxford University Press, 2017); *see also* BEPS Monitoring Group, *Submission to the UN Subcommittee on Article 9 (Associated Enterprises) on the Revision of the UN Practical Manual on Transfer Pricing for Developing Countries* 3 (Sept. 2018), available at https://static1.squarespace.com/static/5a64c4f39f8dceb7a9159745/t/5bac9e071905f4689fd51b02/1538039306826/BMG+Submission+to+UNTC+article+9+final.pdf.

75 Samuel Pinto Ribeiro et al., *The OECD ORBIS Database: Responding to the need for firm-level micro-data in the OECD*, 2010/01 OECD Statistics Working Papers 1–33 (2010), available at https://www.oecd.org/en/publications/the-oecd-orbis-database_5kmhds8mzj8w-en.html. *See also* EuropeAid - Implementing the tax and development policy agenda, *Transfer pricing and developing countries (Final Report)*, available at https://aei.pitt.edu/38951/1/transfer_pricing_dev_countries.pdf.

76 UN, Practical Manual on Transfer Pricing for Developing Countries (2017), at ¶ B.1.10.6.

77 Bart Steens et al., *Transfer Pricing Comparables: Preferring a close neighbour over a far-away peer?*, 47 J. of Int'l Acct., Auditing and Tax'n 2–18 (June 2022, 100471)

One of Africa's leading economies, South Africa, acknowledged challenges in finding local comparable information available and provided specific guidance on the use of foreign comparable.[78] Regulatory groups such as the South African Institute of Chartered Accountants have noted the key variance in the lack of comparable data applicable to South Africa (unlike most OECD countries) and requested for further guidance on the use of foreign comparable data specifically in determining (transactional profit methods).[79]

To this end, it is imperative that AfCFTA's approach, support, or influence regarding transfer pricing should be geared towards common and simplified approaches to transfer pricing within the continent. Furthermore, AfCFTA in carrying out its coordinative function, should focus on a common approach in addressing comparables through developing linkages between investors, traders and financial service providers, and utilise national customs data and tax information to develop geographically reliable data.

On the first issue, alternative simplified approaches have been raised in international tax literature which could be considered. Simpler rules should enable African tax administrations to protect the tax base from artificial profit shifting and provide greater tax certainty for both governments and taxpayers.[80] Recent proposals that have been advanced which are noteworthy, and worth considering, are that of adopting a unified approach to introduce rules that go beyond the arm's length principle with more simplified approaches to profit allocation to market jurisdictions.[81] This approach was advanced by ATAF, in relation to proposals on taxation of the digital economy under OECD/G20 Inclusive Framework (Pillar 1 proposals), however is very much relevant to a common-approach in the continental TP landscape. This could be through formulary apportionment, which is the allocation of an MNE's global consolidated profits based on "a predetermined and mechanistic formula."[82] Two major obstacles appear though; the OECD transfer pricing guidelines rejects this approach, which have largely been adopted by African States, and secondly, it requires global coordination.

78 South African Revenue Service ("SARS") (1999), Practice Note 7 at § 12.

79 South African Institute of Chartered Accountants ("SAICA"), *Comments on a Suggested Draft Interpretation Note on Transfer Pricing to Replace Practice Note 7* (July 13, 2022), available at https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_submission_on_TP_IN_to_replace_PN7.pdf.

80 ATAF, *Media Statement on the Outcomes of the Inclusive Framework Meeting 29 to 30 January 2020*, (Jan. 31, 2020), https://www.ataftax.org/media-brief-inclusive-framework-jan-2020.

81 *Id.*

82 Sol Picciotto & Jeffrey M. Kadet, *The Transition to Unitary Taxation*, 108(4) Tax Notes Int'l 460 (2022).

The first alternative proposal advanced, therefore, is that of a unitary proposal, in the form of a common formulaic African approach to calculating taxable base and allocation of profits between African Member States. Prospects may reduce administrative complexities TP presents. This approach is similar to the EU proposal for a common consolidated corporate tax base (CCCTB) opted to aggregate the national level accounts, which has progressed to "Business in Europe: Framework for Income Taxation" (BEFIT) in accordance with which the Commission aims to propose a directive by the third quarter of 2023.[83] Regional apportioned formula's in revenue already exist in Africa, however in the Customs domain, specifically SACU's revenue sharing agreement operating, which is not based on actual import numbers, but also considers development components.[84] Domestic tax presents far more complexities and variables, however a common approach may provide a solution that would no longer require firms to allocate income or expenses across countries for tax purposes. This would address continental-wide TP related issues, however would leave international TP issues unresolved, in a continent where most investment is made from outside the continent. This approach, therefore would partially assist with simplifying inter-continental TP multinational issues, which could run parallel to domestic TP rules where inapplicable.

Other alternative simplified TP approaches which are highly notable, and worth considering developing continental-wide common approaches for are on safe harbour rules, particularly those that relate to Low-risk distribution, manufacturing, contract research and development functions.[85]

Countries could also begin to apply a formulary approach more widely by building on the profit-split method accepted in the OECD transfer pricing guidelines.[86] Simplified Method for Low Value Adding Intra-Group Services, and advanced pricing arrangements are also common and useful approaches, however, they are approaches that address components of transactions or apply to specific circumstances, and do not simplify TP system wholistically. Ultimately, the objective is to harmonise approaches to reduce administrative processes, to ensure investors and traders compliance burden

83 Legislative Train Schedule European Parliament, *Common corporate tax base (CCTB)*, available at https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-common-corporate-tax-base-(cctb) (last visited June 15, 2023).

84 Southern African Customs Union, *Factsheet: Understanding the SACU Revenue Sharing Arrangement*, available at https://www.sacu.int/uploads/documents/4974d29d897474a901e5fe22b6c420d2cd2991c8.pdf.

85 *See* Oguttu, *supra* note 73, at 84.

86 *See generally* Picciotto, *supra* note 82.

is reduced throughout the continent through common rules, and simplified systems, while enabling African states to apply specific and special domestic rules (which include anti-avoidance rules) such as as the sixth method,[87] which was effectively utilised in the *Zambian Mopani Copper Mines PLC v. Zambia Revenue Authority TP* case.[88]

3.4 Exchange of Information

It was examined in section 3.1 that comprehensive modalities for the exchange of information have been set-out in the AfCFTA Agreement and Annex 3 of the Protocol on Trade in Goods, namely the Customs Co-operation and Mutual Administrative Assistance Annex. The primary scope of EoI under the AfCFTA is in relation to cooperation regarding customs investigations relating to offences relating to goods under Article 8 of the aforementioned Annex, and requests in relation to declarations [of goods].

The AfCFTA does, however, provide a gateway for the exchange of information and joint-audits relating to domestic taxes, through cooperative rules set out under Article 40(2) of the draft Investment Protocol. The clause specifically calls for:

> *"…detection and prevention of transfer pricing manipulation by investors, including in the provision of information necessary to identify and prevent such practices and providing opportunities for Joint Audits within the framework of mutual administrative assistance in tax matters.*

The provision's reference to the "mutual administrative assistance in tax matters" is non-specific and could apply to ATAFs Agreement on Mutual Assistance in Tax Matters,[89] or OECD Convention on Mutual assistance, both critical instrument in the African context enabling signatories to assist each other in the exchange of information, carrying out of tax examinations abroad, carrying out of simultaneous tax examinations and in the collection of taxes. No additional instrument or framework is required under the AfCFTA, with the agreement adequately referencing the most comprehensive continental instrument through a competent continental authority.

87 The sixth method uses a relatively objective point of reference for pricing commodities since they are traded on public exchanges. *See* Section 97A(13) of Zambia's Income Tax Act refer to, the use of a 'reference price' for pricing transactions involving the sale of base or precious metals directly or indirectly between related or associated parties using *inter-alia* monthly average London Metal Exchange cash price.

88 Mopani Copper Mines PLC v. Zambia Revenue Authority, Appeal No. 24/2017. The Court found that the price of copper sold to related party Glencore International AG had been significantly lower than the price of copper sold to third parties.

89 South African Revenue Service, *African Tax Administrative Forum Agreement on Mutual Assistance in Tax Matters*, Article 2 (2022), available at https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-IntA-EIA-2022-01-Notice-2523-GG-46959-ATAF-Agreement-on-Mutual-Assistance-in-Tax-Matters-23-September-2022.pdf.

The AfCFTA, however, should create linkages between customs and tax related cooperation, given the fact that AfCFTA addresses both domestic taxes and customs mutual assistance provisions.

EOI in the cross-border tax context is critical to investigations of addressing high-net-worth-individuals and multinational operations (particularly in transfer pricing). A number of success stories have emerged with nine African countries collecting EUR 233 million between 2014 and 2021,[90] and Uganda experiencing successful recovery of revenue following the establishment of dedicated EOI units.[91] Customs mis-pricing, VAT fraud and transfer pricing all require cross-border information sharing. Significance of transfer pricing and custom valuation is ever-increasing since multinational enterprises possess more shares in the volume of world trade with the effect of globalization, for instance 80% of trade takes place in 'value chains' linked to transnational corporations.[92]

The AfCFTA prescribes the general framework for cooperation, however does not explicitly set-out cooperation in investigations and audits which cut across various taxes and customs. As intra-African trade increases, which places lower-income-African economies likely to experience of market-entry of African transnational corporations, it is essential to empower joint operations to address base erosion and profit-shifting through architecture of the AfCFTA rules through a multidisciplinary EoI framework. EoI linkages between domestic tax and customs-administration should be considered in the AfCFTA legal framework as the project gathers steam.

4. Conclusion

The AfCFTA incorporates limited tax rules in its scope of coverage, which is understandable, given the trade-oriented nature of the continental project. Most instruments are geared towards the primary objective of tariff liberalisation. The above-notwithstanding, free movement of services and capital forms part of the objectives

90 OECD & ATAF, *Tax Transparency in Africa 2022 Africa Initiative Progress Report* (June 14, 2022), available at https://web-archive.oecd.org/temp/2023-05-12/632173-tax-transparency-in-africa-2022.htm. The Countries are Ghana, Kenya, Mauritius, Morocco, Nigeria, Seychelles, South Africa and Uganda.

91 OECD, Tax Transparency Report on Progress (2016). Uganda established an independent EOI office, obtaining information through her treaty network which was used to raise assessments and tracking the value chain arising from the information obtained. Between 2014 to 2016, Uganda obtained information from her treaty partners under the EOI framework that gave rise to nine million dollars (USD $9,000,000) in tax revenues.

92 UNCTAD, *Global Economy Global Value Chains and Development: Investment and Value Added Trade in the Global Economy*, United Nations (2013), available at https://unctad.org/system/files/official-document/diae2013d1_en.pdf.

of the project, with provisions on the latter making their way into the [final] draft investment protocol. The protocol prescribes protection to investors and traders through prohibiting restrictions on capital transfers, and dispute resolution legal mechanisms to enforce rights. Both are progressive steps in economic integration, however do not comprehensively facilitate free movement of capital. A critical intervention, which would require political commitment, would be to extend protection of capital to non-resident investors from domestic tax measures and decision by revenue administrations. This will prevent discrimination undertaken through arbitrary enforcement and laws which may impede non-resident investor rights, in order to enhance movement of capital and attain the objective of becoming a single common market.

VAT has been excluded from the scope of the AfCFTA notwithstanding its importance and contribution to the African fiscus, and the fact that goods are subject to both tariff duties and VAT at the time of import. Cooperation on digital services tax under VAT is recommended, to prevent fragmentation of rules and ease of trade under the legal architecture of AfCFTA where the ultimate aim of a single market of goods. Addressing VAT fraud remain a priority in Africa, under the general umbrella of Illicit Financial Flows (IFF), with priorities on the continent being digitalisation and low valued goods and harmonisation of systems. Annex 3 of the AfCFTA Protocol on Trade in Goods which prescribes for Customs Co-operation and Mutual Administrative Assistance under Article 7 be well situated to extend to cover VAT EoI which addresses the above. It is therefore recommended that a top-down common approach that prescribes minimum VAT standards on harmonisation of tax regimes be set out by developing an annex on VAT in the Protocol on trade in Goods. Furthermore, it is therefore recommended that the scope of Article 7 be extended to address VAT. The same recommendation is advanced regarding EoI under domestic taxes, which should be able to build from the umbrella economic framework that the AfCFTA provides, particularly considering the fact that most competent parties exchanging information are revenue authorities.

Transfer pricing was included in the draft Investment Protocol under Article 40, with focus on coordination of rules. The priority and focus of such coordination should be common simplified to enable African tax administrations to protect the tax base from artificial profit shifting and provide greater tax certainty for both governments and taxpayers. The measures above will ensure preservation of investor rights and enhanced revenue administration to ensure revenue mobilisation and secure a "…High Standard of Living, Quality of Life and Well Being for All Citizens," in line with Agenda 2063.