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**IMPLEMENTATION OF SAFEGUARD MEASURES IN DIGITAL TRADE TO
PROTECT AFRICAN DOMESTIC INDUSTRIES AND PLATFORMS**

**A DOCTORAL THESIS SUBMITTED TO THE FACULTY OF LAW IN PARTIAL
FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF A DOCTOR OF
LAWS (LLD)**

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Declaration

I declare that this doctoral thesis which I hereby submit for the award of a Doctor of Laws (LLD), is my original work and has not been submitted to any other institution of higher learning except to the Faculty of Law, University of Pretoria.



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NELLY C ROTICH

This doctoral thesis has been submitted for an award of a Doctor of Laws (LLD) with my approval as the student supervisor.

.....

DR GUSTAV BRINK

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Dedication

To my late mother:

(She is my biggest inspiration)

To myself:

(For completing this research despite all odds)

Abstract

As technology continues to advance, more trade is moving online. The increase in digital trade brings with it both opportunities and challenges in the international trade field. The increase in digital trade could for instance result in a spike in digital trade imports which may subsequently cause or threaten to cause serious injury to domestic industries and platforms dealing in like or directly substitutable digital data/content and services. This would necessitate the application of safeguard measures to avert any such serious injury or threat to serious injury caused to the domestic industries and platforms. The procedure for applying safeguard measures to digital trade currently is unclear. The current legal framework on safeguard measures does not apply to digital trade despite increased digital trade over the years. Thus, this study explores the prospects and practical challenges relating to safeguard measures' application to digital trade with a specific focus on African domestic industries and platforms.

While domestic industries and platforms in any part of the world could be affected by surges in digital trade imports, Africa is in a precarious position. Intra-Africa digital trade volumes could be increased and disadvantages of African domestic industries and platforms by surges in digital trade imports could be prevented through regulation and judicious use of safeguard measures. This study established the need to regulate to tap into the potential of digital trade and prevent African industries and platforms from falling behind and from the disadvantage of market dominance by big techs from outside Africa. In conclusion, the study noted legal and institutional gaps in the application of safeguard measures to digital trade. The study has recommended that specific institutions at the global, continental and national levels take necessary actions to build a clear and robust framework for safeguard measures in digital trade.

List of acronyms and abbreviations

AB	Appellate Body
AfCFTA	African Continental Free Trade Area
AFREXIMBANK	African Export Import Bank
AGOA	African Growth and Opportunity Act
APEC	Asia-Pacific Economic Cooperation
ART	Article
ASEAN	Association of Southeast Asian Nations
ATEX	African Trade Exchange
AU	African Union
AUC	African Union Commission
CEN-SAD	Community of Sahel-Saharan States
CCDCOE	Cooperative Cyber Defence Centre of Excellence
CCIA	COMESA Common Investment Area
CE	Common External Tariff
COMESA	Common Market for Eastern and Southern Africa
COVID-19	Corona Virus Disease 2019
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DEA	Digital Economy Agreement
DEPA	Digital Economy Partnership Agreement
DFTA	Digital Free Trade Area
DITE	Digital Identity, Digital Trade and Digital Economy
DPA	Data Protection Act

DRC	Democratic Republic of Congo
DSB	Dispute Settlement Body
DST	Digital Service Tax
DSU	Dispute Settlement Understanding
DTA	Digital Trade Agreement
EAC	East African Community
EC	European Communities
E-Commerce	Electronic Commerce
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
EU	European Union
EU-ACP	European Union – African, Caribbean and Pacific
FED	Friends of E-commerce for Development
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Council
GDPR	General Data Protection Regulation
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH

GST	Goods and Services Tax
ICT	Information Communications Technology
IGAD	Intergovernmental Authority on Development
IMF	International Monetary Fund
ITA	Information Technology Agreement
ITC	International Trade Centre
ITO	International Trade Organization
ITU	International Telecommunication Union
JSI	Joint Statement Initiative
MC	Ministerial Conference
METI	Ministry of Economy, Trade and Industry
MFN	Most Favoured Nation
MIKTA	Mexico, Indonesia, South Korea, Türkiye and Australia
MPIA	Multi Party Interim Appeal Mechanism
NAFTA	North American Free Trade Agreement
NT	National Treatment
OACPS	Organisation of African, Caribbean and Pacific States
OECD	Organization for Economic Co-operation and Development
PAPSS	Pan-African Payment and Settlement System
POPIA	Protection of Personal Information Act
PRIDA	Policy and Regulation Initiative for Digital Africa
PTA	Preferential Trade Agreement
RECs	Regional economic communities
RCEP	The Regional Comprehensive Economic Partnership

REPSS	Regional Payment and Settlement System
RTA	Regional Trade Agreement
SACUM	Southern African Customs Union member states and Mozambique
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SDT	Special and Differential Treatment
SEC	Section
SMEs	Small and medium sized enterprises
SPF	Spruce, Pine, Fir
STIP	Strategic Trade and Investment Partnership
TBT	Technical Barriers to Trade
TFA	Trade Facilitation Agreement
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UNECA	United Nations Economic Commission for Africa
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UN-OHRLLS	United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States
US	United States of America
USD	United States Dollar
USMCA	United States-Mexico-Canada Agreement
USTR	United States Trade Representative

VAT	Value Added Tax
WEF	World Economic Forum
WHO	World Health Organization
WTI	World Trade Institute
WTO	World Trade Organization

List of key terms

Digital trade; electronic commerce; safeguard measures; emergency safeguard measures; African domestic industries; African trade; world trade.

CHAPTER ONE: INTRODUCTION

Introduction

This chapter lays the foundation for the doctoral thesis. It gives a background to the study, discusses the research problem, identifies the research objectives and questions, sets out the thesis statement, describes the research methodology, discusses the literature review and finally, sets out a synopsis of the subsequent chapters.

1.1 Background to the application of safeguard measures to digital trade

Safeguard measures are emergency actions on imports of a particular product.¹ They are applied if as a result of unforeseen developments a product is imported in increased quantities under such conditions as to cause or threaten to cause serious injury to a domestic industry dealing in like or directly competitive products.² Prior to the application of a safeguard measure, investigations are conducted, notifications made to affected parties, interested parties and relevant institutions, including the WTO Committee on Safeguards, and consultations done in line with the governing rules under international, regional and domestic setups depending on which regime is guiding the application of the safeguard measure. The measures can be applied to trade in goods and take the forms of tariffs, quotas or a combination thereof.³

The processes and forms of safeguard measures are guided and regulated by rules on safeguard measures at the international, regional and domestic levels. The existing rules on safeguard measures were developed following a series of negotiations under the General Agreement on Tariffs and Trade (GATT) system and the World Trade Organization (WTO) system.⁴ These rules have been replicated and adapted to regional and domestic laws.

¹ World Trade Organization 'Technical Information on Safeguard Measures' https://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm (accessed 20 March 2023).

² General Agreement on Tariffs and Trade (GATT), 30 October 1947 art XIX.1.

³ Agreement on Safeguards art 5.

⁴ World Trade Organization (n 1).

Safeguard measures were first introduced to the multilateral trading system by the United States (US) and later the US in collaboration with Mexico. The US Reciprocal Trade Agreements Act of 1934 provided a framework for negotiating reciprocal trade agreements by the US.⁵ The Act informed the negotiation of the US-Mexico Reciprocal Trade Agreement of 1942 which introduced safeguard measures in the form of an 'escape clause'.⁶ Escape clauses were used only where it was established that a reduction of sales and profits of a domestic industry was caused by increased imports of a particular product.⁷ The escape clause under the US-Mexico Reciprocal Trade Agreement was adopted to cushion the US from impacts that could result from the reduction of tariff measures in bilateral agreements.⁸ It over time became a norm that the US would include an escape clause in all bilateral agreements that they negotiated.⁹ Similarly, a procedure for safeguard petitions was set up such that the US Tariff Commission would, on a petition by an industry, grant tariff relief if it was shown that serious injury had been caused by reduced tariffs.¹⁰ The decision whether or not to grant the relief was decided on merit.¹¹ In so doing, it had to be demonstrated that the circumstances were unforeseen, that there was an increase in imports which threatened or caused serious injury to a domestic industry and that the obligation arose out of the agreement.¹² Drawing from this practice, the US made a proposal for the development of an agreement under the GATT system to have a similar bearing as the escape clause.¹³

In 1947, GATT introduced a clause similar to the escape clause under Article XIX.¹⁴ The GATT provision was however clearer and more elaborate as it necessitates a

⁵ The Trade Agreements Act of 1934 (1937) 46(4) *The Yale Law Journal* 647–670.

⁶ G Messenger *The Development of World Trade Organization Law: Examining Change in International Law* (Oxford University Press 2016) 91.

⁷ IB Kravis 'The Trade Agreements Escape Clause' (1954) 44(3) *The American Economic Review* 319-338, 319.

⁸ Messenger (n 6) 91.

⁹ Messenger (n 6) 91.

¹⁰ Messenger (n 6) 91.

¹¹ Messenger (n 6) 91.

¹² Messenger (n 6) 91-92.

¹³ Messenger (n 6) 92.

¹⁴ GATT 1947 art XIX is on 'emergency action on imports of particular products'. It allows a Member to, for reason of 'unforeseen circumstance' and GATT obligations, such as 'tariff concessions', prevent injury or a threat to injury caused by increased quantities of imports by either suspending the obligation, remedying the injury or withdrawing or modifying the concession.

Contracting Party before imposing the safeguard measure to notify the exporting Member of the injury or threat of injury and give it the opportunity to consult.¹⁵ It also allows for the imposition of temporary safeguard measures without prior consultation where delay will exacerbate the injury.¹⁶ It is only after the parties have failed to reach an agreement that the affected Member is allowed to impose a safeguard measure.¹⁷ This provision of the GATT was incorporated into the GATT of 1994 and has been retained by the WTO to date.

Particularly, safeguard measures under GATT take the form of an emergency action on the importation of a particular product.¹⁸ GATT Contracting Parties could apply safeguard measures if as a result of unforeseen developments, a product was being imported in increased quantities and under conditions that caused or threatened to cause serious injury to domestic producers of like or directly competitive products.¹⁹ As remedial measures, the Contracting Party can wholly or partially suspend the obligation or modify or withdraw a concession.²⁰ Notice is given to Contracting Parties before taking any action under this provision and an opportunity for consultations is granted to them. A provisional measure could however be taken where delay caused by consultations could result in damage that would be difficult to repair. This does not, however, waive the requirement for consultation as consultations must take place immediately after the provisional measure has been imposed.²¹

Generally, GATT 1947 was provisionally applied. Thus, safeguard measures were less frequently applied and were mostly applied by developed economies.²² The procedures for imposing safeguard measures under GATT 1947 were not elaborated upon.²³ The manner in which the measures were imposed was also discriminatory as

¹⁵ See GATT 1947 art XIX.2.

¹⁶ GATT 1947 art XIX.2.

¹⁷ See GATT 1947 art XIX.3.

¹⁸ GATT 1947 art XIX.

¹⁹ GATT art XIX.1 (a).

²⁰ GATT art XIX.1 (a) & (b).

²¹ GATT art XIX. 2; Art 12.4 of the Agreement on Safeguards.

²² RK Gupta 'Safeguard Measures' <https://www.unescap.org/sites/default/files/Safeguard%20Measures.pdf>.

²³ World Trade Organization 'Agreement on Safeguards' https://www.wto.org/english/tratop_e/safeg_e/safeint.htm (accessed 15 November 2021).

there was no uniform structure for so doing.²⁴ As a result of these inadequacies under GATT 1947 most of the countries that applied safeguard measures opted for voluntary export restrictions, i.e., 'grey area measures'. Grey area measures are 'bilateral voluntary export restraints, orderly marketing agreements, and similar measures'.²⁵ The measures were imposed outside the GATT system. There was, therefore, a need to develop more elaborate rules to address these 'grey area measures'. Other Contracting Parties such as Nigeria had applied trade restrictive measures pursuant to Article XIX of GATT.²⁶ At the time of entry into force of the Agreement establishing the WTO (Marrakesh Agreement), Nigeria had in place five import prohibition measures which it later eliminated.²⁷

During the Uruguay Round, WTO Members negotiated the Agreement on Safeguards as a stand-alone agreement on safeguards to provide for more elaborate and clearer provisions and procedures for the imposition of safeguards on goods by WTO Members.²⁸ It was also necessary to address the growth and change in trade patterns, characterised by increased competition in the years after 1947.²⁹ Thus, the Agreement is applicable where there are unforeseen developments after GATT obligations, including tariff concessions, have been negotiated. The Agreement on Safeguards sets out the conditions for applying safeguard measures, investigation procedures, how to determine serious injury or threat to serious injury, requirements for applying safeguard measures including provisional safeguard measures, the duration and review of safeguard measures, levels of concessions and related obligations, exceptions pertaining to developing countries, notification and consultation procedures, dispute settlement and the mandates of the WTO Committee on Safeguards to survey safeguard measures applied and review Members' legislation.³⁰

The use and application of the WTO Agreement on Safeguards has continuously grown through case law at the WTO and replication in multilateral and bilateral trade

²⁴ As above.

²⁵ World Trade Organization (n 1).

²⁶ WTO 'Notification of Pre-existing Article XIX Measures: Nigeria' G/SG/N/2/NGA, 16 March 1998.

²⁷ As above.

²⁸ GATT 1947 art XIX.3.

²⁹ Messenger (n 6) 92-93.

³⁰ Agreement on Safeguards arts 1-14.

agreements and domestic legislations.³¹ In Africa for instance, regional economic bodies have negotiated regional trade agreements that contain substantive provisions on safeguard measures. Notably, the East African Community's (EAC) rules on safeguards are contained in the EAC Customs Union (Safeguard Measures) Regulations.³² The Southern African Development Community (SADC) allows for the application of safeguard measures under its Protocol on Trade.³³ The Common Market for Eastern and Southern Africa (COMESA) provides for safeguard measures under the Treaty establishing COMESA³⁴ and the COMESA Regulations on Trade Remedies.³⁵ The Economic Community of West African States (ECOWAS) permits for application of safeguard measures under its Revised Treaty³⁶ and Common External Tariff (CET).³⁷ It also has in place Regulation C/REG.4/06/13 on safeguard measures.³⁸ Under the African Continental Free Trade Area (AfCFTA), the AfCFTA Protocol on Trade in Goods expressly provides that the application of global safeguard measures is as per the Agreement on Safeguards and GATT 1994, Article XIX.³⁹ This is in addition to AfCFTA Guidelines on Implementation of Trade Remedies and Annex 9 of the Protocol on Trade in Goods on Trade Remedies.⁴⁰ A quick reading of relevant provisions in these agreements show their relation to the rules under the Agreement on Safeguards. In addition, these agreements have been notified to the WTO under Article XXIV of GATT and Article 12 (6) of the Agreement on Safeguards.⁴¹

³¹ WTO 'Dispute by Agreement: Safeguards' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm.

³² EAC Information Repository 'The East African Community Customs Union (Safeguard Measures) Regulations: Annex VI' available at: <http://repository.eac.int/handle/11671/24282?show=full>.

³³ SADC Protocol on Trade, signed 1 August 1996 and entered into force 25 January 2001 (was amended in 2010), available at: https://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf.

³⁴ COMESA Treaty art 61. The Treaty is available at <https://www.comesa.int/wp-content/uploads/2020/07/Comesa-Treaty.pdf>.

³⁵ COMESA Regulations on Trade Remedy Measures part II.

³⁶ ECOWAS Revised Treaty art 49.

³⁷ ECOWAS Trade Information System 'Trade Policy: ECOWAS Common External Tariff (CET)' <https://ecotis.projects.ecowas.int/policy-development/common-external-tariff-cet/> (accessed 10 January 2022).

³⁸ WTO 'Notification of Laws and Regulations under Article 12.6 of the Relevant Agreement: Liberia' G/SG/N/1/LBR/, 1 December 2017.

³⁹ Protocol on Trade in Goods art 18; see also Annex 9 to the Protocol on Trade in Goods art 3.

⁴⁰ Protocol on Trade in Goods art 18.

⁴¹ Together, these provisions require that Members notify all WTO Members of regional agreements that extend preferential treatment on goods, and in this instance, agreements that relate to

At the domestic level, only twelve out of fifty-five African countries have domestic laws on safeguards, i.e., Cameroon on 7 June 2017 adopted Draft Decree No. 2017/6523/pm that contain provisions on safeguard measures;⁴² Egypt's Decree 569 of 2008 contains provisions on safeguard measures;⁴³ Ghana has in place the Ghana International Trade Commission Act of 2016 which contains provisions on safeguard measures;⁴⁴ Kenya enacted the Kenya Trade Remedies Act in July 2017 which contains provisions on safeguard measures;⁴⁵ Liberia has in place Regulation C.REG.4/06/13 Relating to Safeguard measures adopted in June 2013;⁴⁶ Madagascar's 2017 Regulations on Trade Remedies and Law No. 2018-020 of 23 August 2018 allow for the imposition of safeguard measures;⁴⁷ Mauritius enacted in 2022 the Trade (Anti-dumping, Countervailing and Safeguard Measures) Act;⁴⁸ Morocco on 18 February 2013 adopted a domestic law of Trade Defence Measures;⁴⁹ South Africa has in place the International Trade Administration Act of 2002, and Amended Safeguards Regulations of 2005 that regulate the imposition of safeguard measures;⁵⁰ Tunisia on 18 December 1998 adopted a domestic law on Import Safeguard Measures;⁵¹ Zambia in 2004 passed the Control of

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- safeguard measures.
- ⁴² WTO 'Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements: Cameroon' G/ADP/N/1/CMR/2/Suppl.1, G/SCM/N/1/CMR/2/Suppl.1, G/SG/N/1/CMR/2/Suppl.1, 23 February 2022.
- ⁴³ WTO 'Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements: Egypt' G/ADP/N/1/EGY/2/Rev.1/Suppl.1, G/SCM/N/1/EGY/2/Rev.1/Suppl.1, G/SG/N/1/EGY/2/Suppl.1, 22 August 2008.
- ⁴⁴ WTO 'Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Relevant Agreements: Ghana' G/ADP/N/1/GHA/2, G/SCM/N/1/GHA/2, G/SG/N/1/GHA/2, 16 December 2019.
- ⁴⁵ Kenya Trade Remedies Act No. 32 of 2017, assented 21 July 2017, commenced 16 August 2017.
- ⁴⁶ WTO 'Notification of Laws and Regulations under Article 12.6 of the Relevant Agreement: Liberia' G/SG/N/1/LBR/1, 1 December 2017.
- ⁴⁷ WTO 'Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements: Madagascar' G/ADP/N/1/MDG/2, G/SCM/N/1/MDG/1, G/SG/N/1/MDG/2, dated 20 November 2018. See also WTO, 'Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements: Madagascar' G/ADP/N/1/MDG/2, G/SCM/N/1/MDG/1, G/SG/N/1/MDG/2, 20 November 2018.
- ⁴⁸ Mauritius Trade (Anti-dumping, Countervailing and Safeguard Measures) Act No. 19 of 2022, assented 2 December 2022.
- ⁴⁹ WTO 'Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements: Morocco' G/ADP/N/1/MAR/3, G/SCM/N/1/MAR/3, G/SG/N/1/MAR/2, dated 01 March 2013.
- ⁵⁰ WTO Notification of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures: South Africa' G/SG/N/1/ZAF/2, 27 September 2004; see also South Africa Amended Safeguard Regulations of 8 July 2005, N 662 in GG27762.
- ⁵¹ WTO 'Notification of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures: Tunisia' G/SG/N/1/TUN/2, dated 22 December 2000.

Goods (Amendment) Act No. 12 of 2004 which contains provisions on safeguard measures;⁵² and Zimbabwe adopted the Competition (Safeguards) (Investigation) Regulations in 2006.⁵³ A glimpse of these laws demonstrates that they have been adapted from the WTO Agreement on Safeguards.

Statistics at the WTO show that most of the safeguard measures, if not all, have been applied pursuant to the Agreement on Safeguards.⁵⁴ African states under the WTO framework, regional frameworks and domestic regimes have applied safeguard measures, albeit sparingly. Between 1995 and 2023, 57 safeguard investigations were initiated by six African Members and notifications made to the WTO.⁵⁵ In particular, fifteen by Egypt, thirteen by Morocco, twelve by Madagascar, nine by South Africa on behalf of the Southern African Customs Union (SACU),⁵⁶ seven by Tunisia, and one by Zambia.⁵⁷ This thesis will later demonstrate why few African countries are active participants in the WTO safeguard measures regime. Nonetheless, the procedures for applying safeguard measures to goods have been tried and tested severally and have proven to be effective, notwithstanding the limited use and application by a majority of African states.

In terms of services, the General Agreement on Trade in Services (GATS) allows for the imposition of emergency safeguard measures.⁵⁸ Emergency safeguard measures on services were first introduced into the field of international trade during the Uruguay Round of Negotiations at the WTO.⁵⁹ It was expressly set out under the GATS that further

⁵² WTO 'Notification of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures: Zambia' G/SG/N/1/ZMB/2, 27 August 2009.

⁵³ WTO 'Notifications of Laws and Regulations under Article 12.6 of the Relevant Agreement: Zimbabwe' G/SG/N/1/ZWE/3, 28 February 2020.

⁵⁴ See WTO Statistics at WTO 'Safeguard Measures' [WTO | Trade topics - Safeguards Gateway](#) (accessed 20 March 2023).

⁵⁵ WTO 'Safeguards Initiations by Reporting Member: 01/01/1995 to 31/12/2023' [SG_InitiationsByRepMember.pdf \(wto.org\)](#) (accessed 20 March 2024).

⁵⁶ This statistic also represents safeguard measures initiated by Southern African Customs Union (SACU) Members; see WTO 'Safeguards Initiations by Reporting Member: January 1995-December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf, footnote 4.

⁵⁷ WTO 'Safeguards Initiations by Reporting Member: January 1995-December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

⁵⁸ General Agreement on Trade in Services (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

⁵⁹ M Marconini 'Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable' (2005) *United Nations Conference on Trade and Development*, UNCTAD/DITC/TNCD/2005/4.

deliberations on emergency safeguard measures were to be carried out.⁶⁰ The multilateral negotiations on emergency safeguard measures were to be carried out on the basis of the 'principle of non-discrimination'.⁶¹ The outcome of the negotiations was expected to enter into force within three years following the entry into force of the Agreement Establishing the WTO.⁶² Following this, the first deadline for further deliberations on emergency safeguard measures was set to be December 1997.⁶³ This deadline passed without any discussions on the same. There have not been any negotiations on the subject to date. While this is the case, it has been proposed that the imposition of emergency safeguard measures would adopt the same process as those of safeguard measures applicable to traded goods.⁶⁴ However, no emergency safeguard measures on services have been applied to date.

Significantly, the existing rules on safeguard measures apply only to physically traded goods and not digital data. At the time of negotiations of the GATT 1947 and Agreement on Safeguards, there was no development of digital trade in the multilateral trading system. Under Article XIX of GATT, emergency actions are imposed on imports of particular 'products'. The Agreement on Safeguards also refers to 'products'. The term 'products' as used under the GATT system and, subsequently, the WTO system relates only to those that are traded in their physical form and not digitally. This study seeks to extend the investigations and imposition of safeguard measures to digitally traded data.

Digital services constitute trade in services under GATS and would be covered by emergency safeguard measures under Article X of GATS. For instance, consumption abroad as a mode of trade in services constitutes digital trade in services since services are provided to a consumer who is in one territory by a provider in another WTO Member's territory.⁶⁵ However, owing to the lack of elaborate rules on emergency safeguard

⁶⁰ GATS Annex 1B of the Agreement Establishing the WTO art X.

⁶¹ GATS art X.1.

⁶² GATS art X.3

⁶³ Marconini (n 59) 3.

⁶⁴ Marconini (n 59) 9.

⁶⁵ M Hart and R Chaitoo 'Electronic Commerce and International Trade Rules' (1999) 2(6) *Journal of World Intellectual Property* 911-938.

measures under GATS, there currently are no rules for the imposition of safeguard measures to digital services.

This study in addition to exploring the application of safeguard measures to digital data would also investigate the application of safeguard measures to digital services. Thus, this study proceeds on the basis that the existing safeguard measures rules do not extend to digital trade, both in data/content and services, but that it should be extended to cover both of these.

As it exists currently, there is no universal definition of digital trade. Some of the existing definitions encompass wholly digital aspects⁶⁶ while others have both digital and physical aspects which are characterised by physical delivery while orders are made digitally.⁶⁷ There is, however, a growing consensus that digital trade covers trade in goods and services that are traded wholly online. Digital data/content and digital services would, therefore, constitute digital trade. This perspective is reaffirmed in the WTO definition of electronic commerce that connotes 'production, distribution, marketing, sale or delivery of goods and services by electronic means'.⁶⁸ To this extent, an electronic commerce transaction is complete when a good is searched, ordered, paid for and delivered electronically.⁶⁹ Thus, the WTO definition refers to digital trade notwithstanding the specific reference to 'electronic commerce'.

Digital trade is a fairly new concept while e-commerce has existed for much longer and has undergone several historical evolutions. Electronic commerce was birthed as a result of the increased usage of internet services which saw the introduction of the exchange of goods and services through electronic means.⁷⁰ At the inception stages, e-commerce was conducted in an unrestricted space and was largely based on trust. Electronic commerce as a term was yet to receive a universally agreed upon definition.⁷¹

⁶⁶ See for instance World Trade Organization 'Work Programme on Electronic Commerce' Adopted by the General Council on 25 September 1998, 'WT/L/274' (20 September 1998), para 1.3.

⁶⁷ See for instance OECD 'Unpacking E-commerce: Business Models, Trends and Policies' <https://www.oecd-ilibrary.org/sites/1885800a-en/index.html?itemId=/content/component/1885800a-en#n-ch01-2> (accessed 5 June 2022).

⁶⁸ WTO 'WT/L/274' (n 65) para 1.3.

⁶⁹ Hart & Chaitoo (n 65) 912.

⁷⁰ Hart & Chaitoo (n 65) 912.

⁷¹ AE Darsinouei 'Understanding E-Commerce Issues in Trade Agreements: A Development

Wigand noted that e-commerce was at the time generally understood as the sale and delivery of products and services through the internet.⁷² Electronic commerce received increased public attention in the 1980s and was formally recognised in commercial transactions in the mid-1990s.⁷³ The WTO Members in 1998 became the first to formally recognise electronic commerce in the international trade sphere.⁷⁴ E-commerce has grown steadily since then.

It is against this backdrop that this research seeks to explore the linkage between safeguard measures and digital trade. In particular, this study investigates the procedures for applying safeguard measures if as a result of unforeseen developments, there is an importation of digital data and services in increased quantities that causes or threatens to cause serious damage to a domestic industry or platform dealing in a like or directly competitive data or service. The circumstances for the imposition of safeguard measures to digital trade are explored to identify the prospects and problems for protecting African domestic industries that are likely to be injured by surges in digital trade.

1.2 Research problem

Electronic commerce is the current key driver of international trade in goods and services.⁷⁵ The United Nations Sustainable Development Goals (SDGs) foresee the potential of e-commerce to increase economic development in the world.⁷⁶ It is particularly viewed to be a 'potential game-changer'.⁷⁷ The United Nations Conference on Trade and Development (UNCTAD) highlights the increased digitalisation of global value chains with the increased use of online platforms.⁷⁸ In addition, the WTO notes that e-commerce was

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- ⁷² Perspective Towards MC11 and Beyond' (2017) *CUTS International*, Geneva 10.
As above; see also RT Wigand 'Electronic Commerce: Definition, Theory, and Context' (1997) 12(1) *The Information Society* 1-16.
- ⁷³ JK Winn and B Wright *Law of Electronic Commerce* (2021) 1-5.
- ⁷⁴ World Trade Organization 'Work Programme on Electronic Commerce' adopted by the General Council on 25 September 1998, WT/L/274 of 20 September 1998.
- ⁷⁵ World Trade Organization 'E-Commerce, Trade and the COVID-19 Pandemic' Information Note of 4 May 2020.
- ⁷⁶ UNCTAD 'Maximizing the development gains from e-commerce and the digital economy' Trade and Development Board Intergovernmental Group of Experts on E-commerce and the Digital Economy, TD/B/EDE/1/2 (26 July 2017), 2.
- ⁷⁷ As above.
- ⁷⁸ UNCTAD 'Digital trade: Opportunities and actions for developing countries' Policy Brief 92 of 2022, available at: [Digital trade: Opportunities and actions for developing countries - UNCTAD Policy](#)

a key economic driver during the Covid-19 pandemic.⁷⁹ It noted in a May 2020 Information Note that there had been a surge in online demand for certain products as a result of the coronavirus disease.⁸⁰ Business-to-consumers and business-to-business electronic transactions were specifically noted to have increased. In the same breath, there has been increase in the demand and supply of online services.⁸¹

While there is variance in digital trade readiness across countries, there has been increased importance of digital economies in supporting international trade.⁸² Further, while digitalisation of an economy is country-specific since countries are affected differently, regional and international efforts are also significant. Collective efforts through regional and international bodies can be instrumental in creating policies and platforms that provide a level ground for electronic commerce and in collecting data for cross-border electronic commerce.⁸³ It is also a good initiative to support countries that have financial and infrastructural challenges in setting up and policing digital platforms.

In Africa, the African Union (AU) adopted the African Union Convention on Cybersecurity and Personal Data Protection (Malabo Convention) to regulate Africa's cyberspace, electronic transactions and the protection of personal data.⁸⁴ In 2015, the African Union Agenda 2063 was adopted to leverage the digital economy in attaining full economic integration in Africa.⁸⁵ The African Union Digital Transformation Strategy (2020-2030) seeks to strengthen existing digital trade frameworks and initiatives at the African Union.⁸⁶

[Brief No. 91.](#)

⁷⁹ World Trade Organization 'E-Commerce, Trade and the COVID-19 Pandemic' Information Note of 4 May 2020, 7.

⁸⁰ World Trade Organization (n 79).

⁸¹ World Trade Organization (n 79).

⁸² World Trade Organization (n 79).

⁸³ M Kituyi 'The intricacies, impact and opportunities of e-commerce for trade and development' (22 June 2020) *United Nations Conference on Trade and Development*. <https://unctad.org/news/intricacies-impact-and-opportunities-e-commerce-trade-and-development> (accessed 10 December 2020).

⁸⁴ See African Union Convention on Cybersecurity and Personal Data Protection, Adopted 27 June 2014, available at https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf.

⁸⁵ African Union 'Agenda 2063: The Africa We Want' (2015) available at https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf

⁸⁶ African Union 'The Digital Transformation Strategy for Africa (2020-2030)', available at

Further, the AU, in February 2020, agreed to include digital trade in Phase III of the AfCFTA negotiations.⁸⁷ The African Union Commission (AUC) was tasked with preparing for the negotiations. The AU Decision called for collaborative efforts by AfCFTA member states in bringing into fruition the AfCFTA Protocol on Digital Trade.⁸⁸ The negotiations for the Protocol to the AfCFTA on Digital Trade concluded in February 2024 and was subsequently adopted by African Heads of State and Government.⁸⁹

To give effect to electronic commerce under the AfCFTA, the United Nations Economic Commission for Africa (UNECA) in November 2020 launched the African Trade Exchange (ATEX), an electronic commerce platform that facilitates business-to-business e-commerce.⁹⁰ The basis for ATEX's creation is to provide a platform for cross-border electronic commerce under the AfCFTA trade rules. ATEX could be a key platform for monitoring data on electronic commerce, this way, surges in digital data and services could be monitored.

To facilitate intra-African e-commerce, the Pan-African Payment and Settlement System (PAPSS) was launched in 2019 to provide a platform for paying and settling intra-African trade transactions by African companies in local currencies.⁹¹ It was set up as an arm of the African Export-Import Bank (Afreximbank).⁹² It also gives effect to the AfCFTA by aiding greater levels of integration. This platform could be leveraged to grow African volumes in e-commerce transactions. COMESA has also put in place measures to develop applications to facilitate its virtual trade facilitation system, electronic certificates

⁸⁷ <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>.
The Assembly 'Decision of the African Continental Free Trade Area (AfCFTA) Doc. Assembly/AU/4(XXXIII)' Assembly/AU/Dec.751(XXXIII) para 23.

⁸⁸ The Assembly (n 87) para 24.

⁸⁹ Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, adopted 18 February 2024.

⁹⁰ UNECA 'ECA launches ATEX, e-commerce platform that will support transactions when AfCFTA starts next year' <https://www.uneca.org/stories/eca-launches-atex-e-commerce-platform-will-support-transactions-when-afcfta-starts-next-year> (accessed 10 December 2020).

⁹¹ Global Trade Review 'Africa's continent-wide payment and settlement system launched' <https://www.gtreview.com/news/africa/africas-continent-wide-payment-and-settlement-system-launched/> (accessed 10 December 2020).

⁹² AFREXIMBANK 'The Governing Council of the Pan-African Payment and Settlement System Holds Inaugural Meeting' <https://www.afreximbank.com/the-governing-council-of-the-pan-african-payment-and-settlement-system-holds-inaugural-meeting/> (accessed 4 February 2021).

of origin and COMESA Centre based applications for cross-border trade.⁹³ These applications could be the basis for creating more effective and efficient platforms for monitoring digital trade at the COMESA and African levels.

In addition, there is increased participation by African states in digital trade initiatives at the multilateral level. This is seen for instance in the communication by the African Group to the WTO on their proposals on what should be the subject of negotiations on digital trade at the WTO.⁹⁴ Further, eight African countries; Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Gambia, Kenya, Mauritius and Nigeria, are Members to the Joint Statement Initiative (JSI) on E-commerce at the WTO.⁹⁵ Under the JSI, discussions were initiated plurilaterally by about 71 WTO Members on e-commerce with the hope that their input would influence further discussion on e-commerce at the WTO.⁹⁶ Like other WTO Members, African Members' contribution to the work of the Work Programme on E-commerce has been minor considering the insignificant progress the Work Programme has made in realising its mandate.⁹⁷

At the domestic level, thirty three African countries had electronic transactions legislations in place in 2023.⁹⁸ There were also in place thirty eight legislations on data protection.⁹⁹ A majority of these laws contain provisions on cross-border data flows. In addition, twenty eight African countries had domestic legislations on online consumer

⁹³ COMESA 'COMESA leaps into digital integrated regional economy' <http://www.comesaria.org/news/comesa-leaps-into-digital-integrated-regional-economy.53973.64.html> (accessed 10 December 2020).

⁹⁴ WTO 'Work Programme on Electronic Commerce: Report of Panel Discussion on "Digital Industrial Policy and Development"' JOB/GC/133 (21 July 2017).

⁹⁵ WTO 'Joint Initiative on E-commerce' https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm (accessed 10 February 2024).

⁹⁶ As above. As of June 2024, the number had increased to 91, the Gambia being the latest African country to join.

⁹⁷ G Govindrajana & A Singh 'Curb Your Enthusiasm: The WTO E-Commerce Negotiations and the Developing World' (2021) 13 *Trade Law & Development Journal* 1-37, 6.-7.

⁹⁸ UNCTAD 'E-transactions Legislation Worldwide' <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide> (accessed 10 May 2023).

⁹⁹ Data Protection Africa 'Mapping 55 African countries | 36 data protection laws | 3 draft laws' <https://dataprotection.africa/> (accessed 10 February 2024). Ethiopia and Malawi's laws were enacted in 2024, bringing the total number of African data protection laws in force to 38.

protection.¹⁰⁰ These legislations, in one way or the other, regulate digital trade in Africa. They also facilitate the flow of data from one country to another.

All of the above efforts at the domestic, regional and international levels have contributed to the increase in digital trade volumes over the years. Past statistics are indicative of increased digital trade over the years. In 2018, cross-border electronic commerce was valued at USD 404 billion.¹⁰¹ Further, WTO in 2018 estimated that the share in global trade by developing countries could increase to about 57% by 2030 and would more likely than not result from increased digital trade.¹⁰² In 2021, Africa's annual digital economy growth rate was estimated at 40%.¹⁰³ It is further estimated that by 2025, Africa's digital economy would have grown to about USD 180 Billion and USD 712 Billion by 2050.¹⁰⁴

UNCTAD statistics for the period 2005 to 2020 indicated that there had been increased digitally deliverable services to about sixty-four percent of global services exports which was amplified by the Covid-19 pandemic in 2020.¹⁰⁵ The statistics indicated an annual increase at the rate of twelve percent between 2005 and 2019 of digitally deliverable services. Further, the statistics also showed that in 2020, forty percent of firms placed orders online while twenty-four percent received orders online.¹⁰⁶ The WTO also estimated that digitally delivered services grow fourfold between 2005 and 2023.¹⁰⁷ The statistics show that the annual value of digitally delivered services exports grew from USD

¹⁰⁰ As above.

¹⁰¹ UNCTAD 'UNCTAD ESTIMATES OF GLOBAL E-COMMERCE 2018' UNCTAD Technical Notes on ICT for Development N°15. The statistics are from European, Asian and American-based countries.

¹⁰² M Smeets *Adapting to the Digital trade era: challenges and opportunities* (WTO 2021) 110-111.

¹⁰³ Smeets (n 102) 111.

¹⁰⁴ International Finance Corporation 'e-Economy Africa 2020 Report' (10 November 2020), available at <https://www.ifc.org/en/insights-reports/2020/google-e-economy>.

¹⁰⁵ UNCTAD (n 101) 1-2.

¹⁰⁶ UNCTAD (n 101) 2.

¹⁰⁷ WTO 'Digitally delivered services trade dataset' https://www.wto.org/english/res_e/statistics_e/gstdh_digital_services_e.htm (accessed 10 February 2025).

One Million in 2005 to over USD 4, 250, 209 million in 2023.¹⁰⁸ In Africa, the annual value grew from USD 20, 263 million in 2015 to over USD 36, 719 million in 2023.¹⁰⁹

While other continents have recorded significant increases in digital trade, developing countries, and African countries in particular, have recorded a low rate of digital trade.¹¹⁰ The key hindrances faced by developing countries in digital trade relate to internet accessibility, payment methods, online purchases trust issues, electricity connections and costs for cross-border online purchases.¹¹¹ There is therefore a need to bridge the digital divide. The coronavirus disease also commenced a lasting spike on digital trade and as more trade moves online, there is continuing need for its regulation.

Despite the dynamic nature and significant growth of digital trade in the past years, it is inhibited by lack of up-to-date rules and regulations, protectionist measures and lack of international collaboration on the governance of digital trade.¹¹² The resulting effect has been market dominance by big techs to the disadvantage of start-ups that are, of relevance to this study, situated within the African continent. Global digital platforms such as Amazon, Google, Facebook, Apple, Microsoft, WeChat, Alibaba, Baidu and Tencent, situated in America and China, have made significant contributions to electronic commerce.¹¹³ At the African level, start-ups such as Jumia, Jiji, Kilimall, Konga, Masoko, Bidorbuy and takealot are major e-commerce platforms.¹¹⁴ Compared to big techs that have gained global market dominance, African e-commerce platforms have not grown beyond the African continent and have only been used by select African countries.

¹⁰⁸ As above. The services were traded through computer networks such as internet, applications, emails, video call, voice calls and other platforms for digital intermediation, for instance, those used for music, online gaming and others.

¹⁰⁹ WTO 'Digitally delivered services trade dataset' (n 108).

¹¹⁰ Kituyi (n 83).

¹¹¹ Kituyi (n 83).

¹¹² World Economic Forum 'Digital Trade' [Digital Trade | World Economic Forum \(weforum.org\)](https://www.weforum.org/digital-trade) (accessed 9 May 2023).

¹¹³ B Chakravorti and RS Chaturvedi 'Digital Planet 2017: How Competitiveness and Trust in Digital Economies Vary Across the World' (2017) *The Fletcher School, Tufts University* 44.

¹¹⁴ M Smeets (ed) *Adapting to the digital trade era: challenges and opportunities* (World Trade Organization 2021) 89. See United Nations Economic Commission for Africa, African Union, African Development Bank and United Nations Conference on Trade and Development 'Assessing Regional Integration in Africa: Next Steps for the African Continental Free Trade Area' (ECA 2019), 231.

There is therefore a need to regulate to tap into the potential of digital trade and prevent African industries and platforms from falling behind and from the disadvantage of market dominance by big techs from outside Africa. To this extent, the increase in digital trade points to a potential spike in digital trade volumes in a manner that is likely to cause or threaten to cause serious injury to African domestic industries dealing in like or directly competitive data or services. Safeguard measures is one way of regulating this. Thus, there is a need to examine the applicability of safeguard measures to surges in digital trade. As pointed out previously, the current legal framework on safeguard measures do not apply to digital trade despite increased digital trade over the years.

Thus, arising from the foregoing and in seeking to apply a safeguard measure to digital trade, certain elements need to be demonstrated: first, there must be an agreement negotiated between two or more states agreeing to grant tariff concessions (or the non-imposition of duties) for the importation of a data or service on the digital platform. Secondly, imports should increase as a result of the agreement to limit or prohibit the imposition of duties, and such increased imports must cause or threaten serious injury to a domestic industry or platform dealing in the same data or service. The abnormal development must be strictly proven and not merely asserted. Thirdly, relevant notifications must have been submitted¹¹⁵ and room for consultations given. Fourthly, a provisional safeguard measure could be imposed where delay could cause an injury that cannot be remedied. Fifthly, investigations should be carried out before a safeguard measure can be imposed. Lastly, safeguard measures can then be imposed for a limited period to remedy the injury caused to a domestic industry or platform.¹¹⁶ These aspects that currently apply to trade in goods and services shall be explored and their applicability to digital trade examined.

¹¹⁵ Agreement on Safeguards art 12.1.

¹¹⁶ While there is no express provision governing imposition of safeguard measures on digital trade, lessons are drawn from the practices under GATT and the Agreement on Safeguards. It also borrows the precedent used in the imposition of safeguards on services, taking into consideration the lack of a substantive law governing imposition of safeguard measures on services.

1.3 Research objectives

The overall objective of this study is to examine the prospects and problems that would result in the use of safeguard measures in digital trade to protect African domestic industries and platforms.

This study is underpinned by the following six specific objectives:

- i) To examine the key terms and concepts applicable to digital trade and safeguard measures.
- ii) To examine digital trade rules under international economic law.
- iii) To review the status of digital trade under African regional law.
- iv) To examine the WTO rules surrounding the imposition of safeguard measures.
- v) To analyse the prospects and practical challenges for applying safeguard measures to digital trade to protect African domestic industries.
- vi) To assess the legislative and institutional reforms that should be made to enhance the protection of African industries and platforms from surges in digital trade through imposition of safeguard measures.

1.4 Research questions

Against the background set and the problem statement described, this study is premised on the following general research question: what prospects and problems would result in the use of safeguard measures in digital trade to protect African domestic industries and platforms?

This study is underpinned by the following six specific research questions:

- i) What are the key terms and concepts applicable to digital trade and safeguard measures?
- ii) What are the existing digital trade rules under international economic law?
- iii) What is the status of digital trade under African regional law?
- iv) To what extent can WTO rules surrounding the imposition of safeguard measures be applied to digital trade?

- v) What are the prospects and practical challenges for applying safeguard measures to digital trade to protect African domestic industries and platforms?
- vi) What are the legislative and institutional reforms necessary to enhance the protection of African industries and platforms from surges in digital trade through imposition of safeguard measures?

1.5 Thesis statement

The central argument of this study is that the increase in digital trade points to the need to put in place strategies for imposing safeguard measures to avert surges in digital trade imports that may cause or threaten to cause serious injury to African domestic industries and platforms. There are prospects and practical challenges relating to safeguard measures' application to digital trade. Intra-Africa digital trade volumes could be increased and disadvantages of African domestic industries and platforms by surges in digital trade imports could be prevented through regulation and judicious use of safeguard measures.

1.6 Research methodology

This research, which is doctrinal in nature, examines both primary and secondary sources of data relating to digital trade and the imposition of safeguard measures. Literature speaking to the historical evolutions, definitions and present status of digital trade, safeguard measures and their co-relation are reviewed. Importantly, domestic, regional and international laws, bilateral and multilateral agreements, peer reviewed articles, books, book chapters, reports, organisations' websites, reviewed proposals put forth on the area, and other developments in the area will be explored.

Notably, the rules surrounding the imposition of safeguard measures and digital trade in WTO, OECD, UNCTAD, AfCFTA, RTAs, bilateral and multilateral agreements will be examined. Relevant laws and journal articles, books and reports that speak to the WTO rules on national treatment, most-favoured nation, safeguards, transparency, likeness of services/data/products and other rules surrounding the imposition of safeguard measures in digital trade will be explored. WTO and AfCFTA negotiation instruments on electronic commerce and safeguard measures are also reviewed.

Measures put in place at the African level, particularly by the AU, AfCFTA and regional groupings on digital trade are examined. In particular, COMESA, EAC and SADC laws and strategies on e-commerce will be assessed. Select African-domestic, regional and bilateral laws that have digital trade provisions shall be analysed. Amongst others, the laws of South Africa, Egypt, Nigeria, Rwanda, Mauritius, and Kenya on e-commerce and safeguard measures will be analysed. Global and African data on cross-border and domestic digital trade volumes shall also be analysed. The viability of African e-commerce platforms and e-payment systems shall also be reviewed.

1.7 Literature review on safeguard measures and digital trade

This research study investigates the prospects and problems that might arise in the application of safeguard measures on digital trade. While this research study pioneers literature speaking specifically on this topic under review, various literature on subjects pertinent to this study, in particular, digital trade and safeguard measures, are explored. To this extent, therefore, this study is not a pioneer of literature on safeguard measures and digital trade, as shall be espoused further below.

This section puts forth arguments espoused by other scholars in response to four key areas that make up the substantive chapters of this research. First, literature that examines safeguard measures at the international, regional and domestic levels shall be explored. Secondly, literature that speaks to national treatment, most-favoured nation, technological neutrality, likeness analysis and other rules surrounding the imposition of safeguard measures shall be reviewed. A contextual analysis will be made on the application of the rules to digital trade. Thirdly, literature that speaks to digital trade shall be explored. Fourthly, literature that speaks to the imposition of safeguard measures to avert the effects of surges in digital trade imports shall be reviewed. All the existing literature is reviewed with the bigger aim of identifying the research gaps that presently exist in these pertinent subjects of this study. They also create a roadmap for further deliberations in this research. More importantly, the literature reviewed are those that very closely respond to the key issues of this study. The literature are explored at length below.

1.7.1 Literature relevant to safeguard measures

The rules relating to the application of safeguard measures have been in existence for almost a century now. Similarly, the practices of investigating and applying safeguard measures date back to the early 20th century. The field is therefore not novel, albeit, compared to other trade remedies, safeguard measures have very limited literature. The subsequent paragraphs selectively examine existing literature so far as they facilitate the responses to the core research questions of this study. The study will also attempt to show a nexus between the literature and the key issues under investigation in this study.

Piérola examines the various principles and the procedure for applying safeguard measures in goods under the WTO framework.¹¹⁷ He details the rationale for imposing safeguard measures.¹¹⁸ Noteworthy, Piérola highlights that flexibility, compensation and adjustment, and addressing political economy concerns are key objectives in imposing safeguard measures in goods.¹¹⁹ He notes that safeguard measures in goods address political concerns that might undermine decision-making in the multilateral trading system.¹²⁰ Piérola observes that before a safeguard measure can be applied to goods, the first step is to indicate the period for investigation and the second is to define the product under investigation.¹²¹ Importantly, he notes that a safeguard measure can be applied to goods once it is established that there is (a) a significant increase in imports, as a result of unforeseen developments and the effect of obligations a WTO Member incurred under the GATT; (b) the domestic industry producing the like or directly competitive product is experiencing serious injury or a threat of serious injury; and (c) there is a causal link between the increased imports and injury.¹²² This study will thus evaluate how these requirements apply to safeguards in digital trade. Additionally, drawing from Piérola's discussion, this study will explore the applicability of safeguard measures in digital trade as is the case with trade in goods, of product scope,

¹¹⁷ F Piérola *The Challenge of Safeguards in the WTO* (Cambridge University Press 2014).

¹¹⁸ Piérola (n 117) 83-98.

¹¹⁹ Piérola (n 117) 83-98.

¹²⁰ Piérola (n 117) 97.

¹²¹ Piérola (n 117) 99-262.

¹²² Piérola (n 117) 163-262. See also GATT 1994 art XIX:1(a).

geographical scope and form, and the extent and duration of the measure imposed.¹²³ Contextually, digital trade scope and form, extent and duration of the measure will be examined in relation to services.

In a 2023 study Piérola observed that compared to 2020 when safeguard activities were at their peak, in 2022 there was a decline in safeguard activities in national safeguard authorities.¹²⁴ The article attributes the decline in 2022 to Governments' reaction to the protection measures imposed during COVID-19 and trade frictions between some WTO Members. Subsequently, there was a decline in new safeguard measures and most of the activities revolved around existing safeguard measures.¹²⁵ The sixth chapter of this study shall build on these discussions by Piérola in its analysis of safeguard measures imposed from 1995 to 2023 at the WTO and through regional and domestic regimes by African countries. The statistics are useful in assessing the trends of safeguard measures applications by African countries and in predicting the potential impact safeguard measures applicable to digital trade will have on African digital trade.

Lee examines safeguard measures in goods under the WTO framework.¹²⁶ He notes that safeguard measures restrict trade in goods.¹²⁷ Lee notes that safeguard measures if improperly applied, undermine the objectives of the WTO.¹²⁸ He notes further that safeguard measures interfere with 'the normal stream of trade'.¹²⁹ Lee further explores the mechanism for resolving disputes arising from the application of safeguard measures on goods.¹³⁰ Rai, in turn, observes that in the imposition of safeguard measures, there is a need to establish that there is a correlation between the increase in

¹²³ Piérola (n 117) 262-322

¹²⁴ F Piérola-Castro 'Safeguard Activity in 2022: An Overview of Notifications Made to the WTO Committee on Safeguards' (2023) 18(5) *Global Trade and Customs Journal* 192-199, 192.

¹²⁵ As above, 192.

¹²⁶ YS Lee *Safeguard Measures in World Trade: The Legal Analysis* (3rd ed) (Edward Elgar, Cheltenham 2014).

¹²⁷ Lee (n 126) Part I on the Development of International Rules on Safeguards

¹²⁸ Lee (n 126) Part I.1 on the Politics and Economics of Safeguard Measures.

¹²⁹ Lee (n 126) Part II on the Application of Safeguard Measures.

¹³⁰ Lee (n 126) Part III.

imports and ‘unforeseen developments’.¹³¹ Bown,¹³² with reference to several authors,¹³³ considers the economic theory of making sense of import-restricting safeguard policies¹³⁴ and the design of safeguard provisions.¹³⁵ He also considers the theory behind a safeguard allowing an industry the opportunity to ‘adjust’ to international trade.¹³⁶ This is especially the case where the domestic industry is falling behind technologically and needs an opportunity to implement the new technology.¹³⁷ In such instances, care needs to be taken that the industry actually adjusts and that temporary protection in the form of a safeguard does not become permanent protection.¹³⁸

Elenor explores the extent to which safeguard measures are applied non-discriminatively to all.¹³⁹ She gives an historical evolution of safeguard measures and how they compare with anti-dumping duties and countervailing measures. She explores the concept of ‘applicability to all’ of safeguard measures under the Agreement on Safeguards. She discusses that discrimination is allowed in the application of safeguard measures.¹⁴⁰ Her discussions inform various aspects of this study, in terms of the history of the application of safeguard measures and the non-discrimination rules surrounding the application of safeguard measures. Jurisprudence on safeguard measures,

¹³¹ S Rai *Recognition and Regulations of Safeguard Measures Under GATT/WTO* (Routledge 2011) 33-49.

¹³² CC Bown (ed) *The WTO, Safeguards, and Temporary Protection from Imports* (Edward Elgar Publishing Limited 2006).

¹³³ See for instance JN Bhagwati ‘Market Disruption, Export Market Disruption, Compensation and GATT Reform’ (1976) 4(12) *World Development* 989-1020; M Mussa ‘Dynamic Adjustment in the Hecksher-Ohlin-Samuelson Model’ (1978) 86 (5) *Journal of Political Economy* 775-91; RW Staiger & G Tabellini ‘Discretionary Trade Policy and Excessive Protection’ (1987) 12 (1) *The American Economic Review* 823-837; K Bagwell & RW Staiger *A Theory of Managed Trade* (National Bureau of Economic Research 1988); RD Fischer & TJ Prusa ‘WTO Exceptions as Insurance’ (2003) 11(5) *Review of International Economics* 745-757; K Myagiwa & Y Ohno ‘Closing the Technology Gap under Protection’ (1995) 85 (4) *American Economic Review* 755-70; and C Davidson & SJ Matusz ‘An Overlapping-generations Model of Escape Clause Protection’ (2004) 12(5) *Review of International Economics*, Wiley Blackwell 749-768.

¹³⁴ See Bhagwati (n 133) 81-112; Mussa (n 133) 113-129; Staiger & Tabellini (n 133) 130-146.

¹³⁵ Bagwell & Staiger (n 133) 147-163; Fischer & Prusa (n 133) 164-176; Bagwell and RW Staiger (n 133) 177-222.

¹³⁶ See Myagiwa & Ohno (n 133) 223-238; Davidson & Matusz (n 133) 264-286.

¹³⁷ Myagiwa & Ohno (n 133) 223.

¹³⁸ Myagiwa & Ohno (n 133) 224-225; K Matsuyama ‘Perfect Equilibrium in a Trade Liberalization Game’ (1990) 84(1) *American Economic Review* 480-492.

¹³⁹ L Elenor ‘Safeguard Measures: A non-discriminative measure applicable to all?’ (2021) Doctoral Thesis submitted to the Faculty of Law, Lund University.

¹⁴⁰ As above.

highlighted in the thesis, shall also be selectively applied in this study, so far as they respond to the core research question of this study.

Finger and Nogués indicate that in some countries applications for safeguards must include a plan setting out the investments that will be made in the industry and the structural reforms it will undergo to compete with imports once the safeguard lapses and thus to overcome its competitive disadvantage.¹⁴¹ They also indicate that in Argentina the industry's failure to provide proper turn-around plans resulted in several safeguard applications being turned down.¹⁴² This study builds on these analyses by examining their relevance to safeguard measures on digital trade.

1.7.2 Literature on the rules surrounding the application of safeguard measures

Existing literature speaks broadly about national treatment (NT), most-favoured nation (MFN) and likeness analysis surrounding the imposition of safeguard measures. Marconini discusses that emergency safeguard measures should be applied on an MFN basis.¹⁴³ This, according to him, calls for specific commitments suspension.¹⁴⁴ He notes however that compensation needs not be applied on a MFN basis.¹⁴⁵ He notes further that there are no clear rules for the imposition of emergency safeguard measures on an NT basis since national and foreign suppliers are defined differently by states.¹⁴⁶ There is also variance as to what constitutes like services.¹⁴⁷ This study builds on this literature with a specific focus on digital data and services.

Ullah examines the efficacy of MFN and NT in eliminating discrimination.¹⁴⁸ He discusses that while safeguard measures are applied on an MFN basis, i.e. without discriminating on all importing countries, there are exceptions where imports from a particular Member have increased disproportionately vis-à-vis the total increase of

¹⁴¹ MJ Finger & JJ Nogués (eds) *Safeguards & Antidumping in Latin American Trade Liberalization: Fighting Fire with Fire* (World Bank/Palgrave MacMillan 2006) 4-5.

¹⁴² Finger and Nogués (n 141) 5.

¹⁴³ Marconini (n 59).

¹⁴⁴ Marconini (n 59) 17.

¹⁴⁵ Marconini (n 59) 19.

¹⁴⁶ Marconini (n 59) 11.

¹⁴⁷ Marconini (n 59) 12.

¹⁴⁸ I Ullah 'Most Favoured Nation Principle and National Treatment Obligation and Their Efficacy in Elimination of the Discrimination' (2022) 2(2) *Al Manhal Research Journal* 1-15.

imports of the product in question. A member can also depart from the general rules of MFN upon giving reasons and the conditions for the departure applied equitably to all suppliers.¹⁴⁹ The paper further highlights that safeguard measures are not applied to products from developing countries whose share of imports of the concerned product do not exceed three per cent individually and collectively the developing countries do not exceed nine percent of the total imports of the concerned product.¹⁵⁰ Ullah has also examined the use of 'like product' under GATT and its application under the Agreement on Safeguards. He points out the case-by-case criteria that have been used in interpreting 'like' or 'similar' products.¹⁵¹ These requirements shall inform further discussions in this study in relation to their application to digital trade. In particular, the debate on like or similar products shall be examined to the extent that they apply to digital data and service. The application of MFN to digital trade shall also be explored.

Elenor examined two fundamentals of non-discrimination; the 'intent' and the 'effect' of discrimination.¹⁵² She notes that intent prevents conduct through regulation while effect means that discrimination has an 'effect against imports'.¹⁵³ Elenor further distinguishes between *de facto* and *de jure* discrimination, such that safeguard measures are applied against all imports irrespective of their source on one hand and on the other hand, developing countries' imports are exempted under certain conditions.¹⁵⁴ This, therefore, allows for the interpretation of the non-discrimination requirement in two ways. The extent to which this criteria applies to digital trade shall be explored at length in this study.

The foregoing discussions give a synopsis of how the discussions on WTO rules surrounding the application of safeguard measures would likely be interpreted in the case of digital trade. The discussions would revolve around whether the rules should be applied in the same context as has been applied to trade in goods under the Agreement on

¹⁴⁹ Ullah (n 148) 4-5.

¹⁵⁰ Ullah (n 148) 5.

¹⁵¹ Ullah (n 148) 5-6.

¹⁵² Elenor (n 139) 126-127.

¹⁵³ Elenor (n 139) 127.

¹⁵⁴ Elenor (n 139) 127-128.

Safeguards or whether modifications should be made to reflect the dynamic nature of digital trade.

1.7.3 Literature relevant to digital trade

While there exists myriad literature that defines what constitutes electronic commerce, none of the definitions put forth is exhaustive. Notable definitions that define electronic commerce are those put forth by the WTO and OECD. The OECD definition of e-commerce contains both digital and physical aspects, such that orders are made online while delivery is physical.¹⁵⁵ The WTO definition on the other hand contains wholly digital aspects.¹⁵⁶ These definitions are explored further in a subsequent chapter of this study.

Kutz defines e-commerce as ‘the exchange of goods and services between independent organisations and/or persons with the support of powerful ICT systems and a globally standardised network infrastructure’.¹⁵⁷ He identifies a 5-c-Model strategy for defining e-commerce which is characterized by Commerce, Collaboration, Communication, Connection and Computation.¹⁵⁸ Kutz examines business-to-business and business-to-consumers forms of e-commerce.¹⁵⁹ He details the procedures for attaining these forms of e-commerce. This study builds on this literature by analysing the relation between these and other forms of e-commerce to digital trade.

The volumes of electronic commerce transactions have continuously grown over the years.¹⁶⁰ There is also a rising trend of inclusion of electronic commerce provisions in bilateral and multilateral trade Agreements. In Africa, the AfCFTA has adopted a Digital Trade Protocol with the aim of harmonising African digital trade rules.¹⁶¹ At the regional level, COMESA in 2010 adopted a Model Law on Electronic Transactions and Guide to

¹⁵⁵ Organization for Economic Co-operation and Development ‘Measuring the Information Economy’ (2002) 89-90.

¹⁵⁶ WTO ‘WT/L/274’ (n 66) para 1.3.

¹⁵⁷ M Kutz Introduction to E-commerce Combining Business and Information Technology (2016) 20.

¹⁵⁸ Kutz (n 157) 20-22.

¹⁵⁹ Kutz (n 157) 62-106.

¹⁶⁰ UNCTAD ‘Global e-Commerce hits \$25.6 trillion – latest UNCTAD estimates’ UNCTAD/PRESS/PR/2020/007

¹⁶¹ The Assembly ‘Decision of the African Continental Free Trade Area (AfCFTA) Doc. Assembly/AU/4(XXXIII)’ Assembly/AU/Dec.751(XXXIII) para 23.

Enactment.¹⁶² The Southern African Development Community (SADC) has also put in place a strategic framework to facilitate e-commerce in the region.¹⁶³ At the bilateral level, the United States-Morocco Free Trade Agreement dedicates a whole chapter to electronic commerce.¹⁶⁴ Noteworthy, it prohibits the imposition of fees or customs duties on products traded through electronic means.¹⁶⁵ The recently proposed United States-Kenya Strategic Trade and Investment Partnership (STIP) also has provisions for digital trade.¹⁶⁶ It proposes to create a framework for cross-border data flow between the US and Kenya. These are some of the laws and strategies on e-commerce and digital trade currently in place in Africa that would inform extensive discussions on digital trade in this study.

Ismail discusses the historical developments in electronic commerce within the auspices of the WTO and particularly developments under the Joint Statement Initiative on E-commerce negotiations.¹⁶⁷ He emphasizes that the moratorium on the imposition of customs duties on electronic transmissions that has been in place since 1998 and the stalemates of e-commerce negotiations at the WTO have been the major hindrances to the growth of an e-commerce legal and institutional framework. Ismail's article is pertinent to this research as it largely informs the discussions in this research insofar as electronic commerce under the WTO is concerned. Noteworthy, Ismail's research is limited to e-commerce developments at the WTO. While he discusses the relationship of WTO principles to e-commerce, he does not speak specifically to its relationship to safeguard measures, in the context of this research.¹⁶⁸

¹⁶² Model Law on Electronic Transactions and Guide to Enactment, United Nations. <https://unov.tind.io/record/41921> (accessed 12 December 2020).

¹⁶³ See Southern African Development Community 'Information and Communication' <https://www.sadc.int/issues/information-communication/> (accessed 12 December 2020); see also SADC 'E-Commerce in the SADC Sub-Region: Strategy Framework'. Economic Commission for Africa and African Trade Policy Centre.

¹⁶⁴ Signed 15 June 2004, entered into force 1 January 2006, Chapter Four.

¹⁶⁵ Art 14.3.

¹⁶⁶ Office of the United States Trade Representative 'United States and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership' (July 14, 2022) [United States and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership | United States Trade Representative \(ustr.gov\)](#) (accessed 10 May 2023).

¹⁶⁷ Y Ismail 'E-commerce in the World Trade Organization' (2020) *International Institute for Sustainable Development*.

¹⁶⁸ As above; see also UNCTAD 'Friends of E-commerce for Development Launch Roadmap for

The Mexico, Indonesia, South Korea, the Republic of Türkiye and Australia (MIKTA) group noted in their 2016 WTO workshop on electronic commerce that there was a need to develop policies that address ‘data flows and data localisation’ in electronic commerce and to focus more on electronic commerce.¹⁶⁹ Kenya and Nigeria together with other countries constituting the Friends of E-commerce for Development (FED) group made recommendations during UNCTAD’s Electronic Commerce Week in Geneva in 2017 on seven important issues for review in electronic commerce.¹⁷⁰ Regulatory frameworks and e-payment solutions are among the issues that were identified.¹⁷¹

E-commerce has continuously grown over the years in terms of trade volumes and the attention it is attracting in the regional and international trade fields.¹⁷² In 2017, for example, exportation of ICT services amounted to \$568 billion. In 2018, the value went up to \$2.9 trillion.¹⁷³ Kituyi notes however that the growth rate in Africa in comparison to other continents, for example Asia, is low and called for policy adoption to factor in the changes that have occurred in electronic commerce.¹⁷⁴ Kituyi notes that in developing countries, the electronic system is not well developed since a majority of them are not ‘digitally ready’.¹⁷⁵ In Africa, Kituyi notes that save for four countries in the Sub-Saharan region, i.e. Kenya, South Africa, Mauritius and Namibia, whose shares in digital trade are above 8%, the shares of digital trade in other African countries are less than 5%.¹⁷⁶ Connectivity in many African countries is a major hindrance to electronic commerce.¹⁷⁷ Kituyi observes that the move to electronic commerce is driven by governments, mostly

International Trade and Development Policy’ 4 May 2017, Available at <https://unctad.org/news/friends-e-commerce-development-launch-roadmap-international-trade-and-development-policy>.

¹⁶⁹ MIKTA ‘MIKTA E-Commerce Workshop Reflections’, dated 5 July 2016. <http://mikta.org/document/others.php?pn=1&sn=&st=e-commerce&sc=&sd=&sdate=&edate=&sfile=&sort=&at=view&idx=235&ckattempt=1> (accessed 12 December 2020).

¹⁷⁰ FED ‘Developing Countries Launch Roadmap for International Trade and Development Policy’ Press Release FED Ministerial Meeting, 25 April 2017, para 1.

¹⁷¹ As above.

¹⁷² Kituyi (n 83) Kituyi observes that electronic commerce in services has grown significantly over the years.

¹⁷³ Kituyi (n 83).

¹⁷⁴ Kituyi (n 83).

¹⁷⁵ Kituyi (n 83).

¹⁷⁶ Kituyi (n 83).

¹⁷⁷ Kituyi (n 83).

through policy formulation.¹⁷⁸ In terms of taxation of digital services, Kituyi notes that is a challenge since the point and values to be taxed are not clearly set out. Currently, Kenya, Tanzania, Uganda and Zambia are the only African countries that have tax policies for internet services.¹⁷⁹ The statistics that informed Kituyi's article are based on statistics for 2018 and older. Changes that occurred in 2019 and 2020, more so, due to increased e-commerce following the spread of Covid-19, are therefore not captured. This study builds on the recommendations given by Kituyi in terms of developing a taxation framework and policy formulation.

According to Gaitan, worldwide online sales were expected to reach 'US \$4 trillion by 2020'.¹⁸⁰ Gaitan notes that as at June 2019, 84 regional trade agreements (RTAs) had provisions on electronic commerce.¹⁸¹ Of these, 74 RTAs have developing countries as parties and 32 RTA have small developing country members' participation.¹⁸² The study further notes that there has been increased usage of electronic commerce by WTO developing country Members.¹⁸³ Gaitan notes that developing countries are hindered from actively participating in cross-border e-commerce because of challenges such as poor identification of applicable law, poor infrastructure and the low use of the online platforms.

According to Bekkers and others, information and communications technology have transformed the manner in which trade in services and goods are conducted.¹⁸⁴ They note that there has been an increase in cross-border trade in goods and services and it is likely to increase further as a result of technology advances.¹⁸⁵ They note further that for developing countries to increase their participation in international trade they need to prioritise investing in ICT and policy formulation to provide a more conducive environment for digital trade.¹⁸⁶ Seetanah and others examine the benefits and challenges

¹⁷⁸ Kituyi (n 83).

¹⁷⁹ Kituyi (n 83).

¹⁸⁰ LAG Gaitan 'Electronic Commerce in Trade Agreements: Experience of Small Developing Countries' (2020) *CUTS International*, Geneva.

¹⁸¹ Gaitan (n 180) 9.

¹⁸² Gaitan (n 180) 38.

¹⁸³ Gaitan (n 180) 14.

¹⁸⁴ E Bekkers, R Koopman, G Sabbadini & R Teh 'The impact of digital technologies on developing countries' trade' in M Smeets (eds) *Adapting to the digital trade era: challenges and opportunities* (2021) World Trade Organization 38.

¹⁸⁵ Bekkers, Koopman, Sabbadini & Teh (n 184) 38.

¹⁸⁶ Bekkers, Koopman, Sabbadini & Teh (n 184) 48.

of e-commerce in Mauritius.¹⁸⁷ They observe usage of internet in Mauritius has significantly risen over years and is now the second highest ranked country in Africa (Libya is the first) with high volumes of online purchases.¹⁸⁸ It is also the most ready African country for Business-2-Consumers e-commerce according to UNCTAD statistics on e-readiness.¹⁸⁹ To respond to the regulatory gaps that currently exist at the WTO on e-commerce, Mauritius adopted a national law to facilitate and establish uniform standards/rules for e-commerce.¹⁹⁰ It further has national legislation that facilitates cross-border e-commerce payments. Noteworthy, in adherence to the WTO moratorium calling upon Members not to impose customs duties on e-commerce, Mauritius does not charge customs duties on e-commerce.¹⁹¹ The chapter argues further that Mauritius applies the principle of NT to foreign and local digital goods.¹⁹² This will be interrogated further in this study. This literature gives an overview of the benefits and challenges encountered in many African states. In light of these, this study will interrogate Africa's participation in the WTO Work Programme on E-commerce. At present, only Kenya, Benin, Côte D'Ivoire, Nigeria, and Cameroon are participants.¹⁹³

Ndonga discusses the challenges and possible solutions for electronic commerce in Africa.¹⁹⁴ He notes that lack of ICT infrastructure and knowledge and cybercrimes are the major hindrances to effective e-commerce in Africa.¹⁹⁵ African Small and Medium Enterprises are yet to fully utilize the e-commerce space. He notes that if fully utilized, e-commerce has the potential of revolutionising intra-Africa trade.¹⁹⁶ According to research done by Chakravorti and Chaturvedi, more GDP growth nationally is as a result of digital

¹⁸⁷ B Seetanah, K Padachi, S Fauzel, V Sannassee & S Boodoo 'Opportunities and challenges of e-commerce in Mauritius' in M Smeets (ed) *Adapting to the digital trade era: challenges and opportunities* (2021) World Trade Organization 71.

¹⁸⁸ Seetanah, Padachi, Fauzel, Sannassee & Boodoo (n 187) 71.

¹⁸⁹ Seetanah, Padachi, Fauzel, Sannassee & Boodoo (n 187) 74-75.

¹⁹⁰ Seetanah, Padachi, Fauzel, Sannassee & Boodoo (n 187) 83.

¹⁹¹ Seetanah, Padachi, Fauzel, Sannassee & Boodoo (n 187) 83.

¹⁹² Seetanah, Padachi, Fauzel, Sannassee & Boodoo (n 187) 83.

¹⁹³ M Smeets (ed) *Adapting to the digital trade era: challenges and opportunities* (2021 World Trade Organization 2021) 90.

¹⁹⁴ D Ndonga 'E-Commerce in Africa: Challenges and Solutions' (2012) 5(3) *African Journal of Legal Studies* 243-268.

¹⁹⁵ Ndonga (n 194) 245.

¹⁹⁶ Ndonga (n 194) 243.

flows as opposed to ‘trade in traditional goods’.¹⁹⁷ Kenya is considered as a ‘break-out’ country in Africa since its digital economy is evolving rapidly.¹⁹⁸ It notes further that electronic commerce in Egypt is marred with trust issues and constant friction.¹⁹⁹ This, the online users do not have patience for.²⁰⁰ This is also a reflection of the perceptions of other users in other parts of the continent that have registered low rates of e-commerce.²⁰¹

Igue, Alinsato and Agadjihouédé in their book chapter explore the challenges that exist in e-commerce in Africa.²⁰² They observe that increases in e-commerce in Africa result from increased use of mobile telephony and increased financial system use.²⁰³ They note that the major challenges facing e-commerce in Africa relate to inadequate laws, low banking rates and lack of harmonized laws on cross-border e-commerce.²⁰⁴ Cybersecurity is another threat to e-commerce Africa.²⁰⁵ Noteworthy, few African countries have frameworks for monitoring cross-border movement of data in the e-commerce platform.²⁰⁶ This study builds on this literature by examining these challenges in the context of imposition of safeguard measures.

Pogorletskiy and Sutyrin examine the structure for taxing cross-border e-commerce under the Russian legislative framework.²⁰⁷ They observe that though cross-border e-commerce makes up a small percentage of global retail sales, the sector has a high potential for growth.²⁰⁸ They argue that taxation of cross-border e-commerce should be aimed at supporting the growth of e-commerce and not the collection of direct and/or

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- ¹⁹⁷ B Chakravorti & RS Chaturvedi ‘Digital Planet 2017: How Competitiveness and Trust in Digital Economies Vary Across the World’ (2017) *The Fletcher School at Tufts University*.
¹⁹⁸ Chakravorti & Chaturvedi (n 197) 9 & 19.
¹⁹⁹ Chakravorti & Chaturvedi (n 197) 10.
²⁰⁰ Chakravorti & Chaturvedi (n 197) 10.
²⁰¹ Chakravorti & Chaturvedi (n 197) 12.
²⁰² C Igue, A Alinsato & T Agadjihouédé ‘E-commerce in Africa: issues and challenges’ in M Smeets (ed) *Adapting to the digital trade era: challenges and opportunities* (2021) World Trade Organization 116.
²⁰³ Igue, Alinsato & Agadjihouédé (n 202) 118-122.
²⁰⁴ Igue, Alinsato & Agadjihouédé (n 202) 117.
²⁰⁵ Igue, Alinsato & Agadjihouédé (n 202) 124-125.
²⁰⁶ Smeets (ed) (n 184) 137.
²⁰⁷ A Pogorletskiy & S Sutyrin ‘Taxation of international e-trade: Russian particularities’ in M Smeets (eds) *Adapting to the digital trade era: challenges and opportunities* (World Trade Organization 2021) 178.
²⁰⁸ Pogorletskiy & Sutyrin (n 207) 182

indirect taxes.²⁰⁹ They observe that in taxing cross-border e-commerce the principles of international taxation, residence principle, source principle and destination of the good/service are applicable.²¹⁰ They further observe that taxation of remotely purchased goods is easier since its movement can be tracked, but that it is complicated in the case of purchase and consumption of digital content.²¹¹ They note that implementation of taxation on e-commerce should be undertaken in a cautious manner, slowly and moderately.²¹² These discussions inform the discussions in this paper. They will be contextualised to reflect the structures in place in African countries.

Lastly, the WTO and the World Economic Forum acknowledge in a 2022 report that there is need for digital trade rules to encourage regulatory cooperation, harmonization and coherence, prevent the introduction of discriminatory measures, ensure transparency in regulation and processes, enhance market access and facilitate foreign direct investment in ICT and contribute to the adoption of tradetechs.²¹³ The report recognises the increasing inclusion of e-commerce and digital trade provisions in RTAs since 2010. It also identifies five building blocks to trade digitalisation, i.e. 'global data transmission and liability frameworks; global legal recognition of electronic transactions and documents; global digital identity of persons and objects; global interoperability of data models for trade documents and platforms; and global trade rules access and computational law'.²¹⁴ The report highlights that connectivity, data sharing and e-signatures have not been adequately utilised to facilitate digital trade.²¹⁵ It argues that trade agreements are avenues for adopting and applying digital technologies.²¹⁶ All the arguments in the report are explored at length in the subsequent chapters of this study.

²⁰⁹ Pogorletskiy & Sutyurin (n 207) 182.

²¹⁰ Pogorletskiy & Sutyurin (n 207) 183-184.

²¹¹ Pogorletskiy & Sutyurin (n 207) 184.

²¹² Pogorletskiy & Sutyurin (n 207) 180.

²¹³ WTO and WEF 'The Promise of TradeTech: Policy approaches to harness trade digitalisation' Report published 12 April 2022, available at [The promise of TradeTech: Policy approaches to harness trade digitalization | World Economic Forum \(weforum.org\)](https://www.weforum.org/publications/the-promise-of-tradetech-policy-approaches-to-harness-trade-digitalization/).

²¹⁴ WTO & WEF (n 213) 4.

²¹⁵ WTO & WEF (n 213) 4.

²¹⁶ WTO & WEF (n 213) 9.

1.7.4 Literature on the nexus between safeguard measures and digital trade

Hart and Chaitoo in their paper discuss the trade-related aspects of electronic commerce transactions.²¹⁷ Their paper notes that government regulation is necessary to achieve the full potential of electronic commerce. It discusses the applicability of GATT and GATS to electronic commerce.²¹⁸ They observe that electronic commerce is covered under GATS and would therefore be guided by all the principles under it. They analyse the application of likeness and MFN to electronic services.²¹⁹ They discuss that in assessing likeness of electronic and physical products their substitutability is examined.²²⁰ They note that the WTO moratorium of customs duties on electronic goods discriminates directly against substitutable physical goods.²²¹ They observe that competition is a major issue in e-commerce. For this, they encourage Members to ensure that they do not violate their MFN obligations and also regulate e-commerce to restrict competition.²²² This study builds on this literature in light of the recent developments in the electronic commerce and international trade fields.

Mitchell and Mishra discuss that the multifaceted nature of digital trade and conflict amongst countries on the regulation of the digital environment and development have slowed the WTO's response to the challenges arising cross-border e-commerce.²²³ They argue that the current legal framework is inadequate to address current digital trade issues.²²⁴ They note that preferential trade agreements have been shown to be instrumental and are currently ahead in regulating digital trade but do not provide a lasting solution.²²⁵ The paper argues that GATS is inadequate in gradually liberalising the digital economy on account of legal obligations, for instance, NT and MFN, that are dependent on the scope of commitments contained in the schedules²²⁶ and an old Services Sectoral

²¹⁷ M Hart & R Chaitoo 'Electronic Commerce and International Trade Rules' (1999) 2(6) *Journal of World Intellectual Property* 911-938.

²¹⁸ Hart & Chaitoo (n 217) 915.

²¹⁹ Hart & Chaitoo (n 217) 915-916.

²²⁰ Hart & Chaitoo (n 217) 916.

²²¹ Hart & Chaitoo (n 217) 916.

²²² Hart & Chaitoo (n 217) 924.

²²³ AD Mitchell & N Mishra 'Data at the Docks: Modernizing International Trade Law for the Digital Economy' (2017) 20(4) *Vanderbilt Journal of Entertainment and Technology Law* 1073-1134.

²²⁴ Mitchell & Mishra (n 223) 1076.

²²⁵ Mitchell & Mishra (n 223) 1078.

²²⁶ Mitchell & Mishra (n 223) 1088-1089.

Classification List that does not represent industries or platforms that currently exist in the digital economy.²²⁷ The paper recommends to the WTO for multi-layered and multi-stakeholder discussions on digital trade.²²⁸ The arguments put forth in this paper informs the arguments in chapters three to six of this study.

Data inadequacy remains the biggest challenge in the evaluation of trade volumes in Africa and globally.²²⁹ Thus, assessing whether or not there have been surges in electronic commerce transactions has not been done so far. This notwithstanding, various measures have been put in place in Africa to tax and monitor e-commerce transactions.²³⁰ Notably, the AfCFTA included in the negotiations for digital trade discussions for imposition of customs duties in electronic commerce where it agreed to adopt the WTO moratorium on customs duties.²³¹

Insofar as the imposition of safeguard measures on services is concerned, Marconini evaluates the feasibility of applying emergency safeguard measures under GATS.²³² He notes that safeguard measures could be more necessary in services than goods due to trade in services specificity.²³³ He observes that imposition of safeguard measures in traded services are necessary to protect domestic sectors from injuries that could be caused to them by liberalized trade in services environment. He analyses that the nature of trade in services does not necessitate investigations prior to the imposition of safeguard measures. He therefore proposes for the establishment of an emergency safeguard measures agreement.²³⁴ While the article has elaborately assessed the use of emergency safeguard measures in services, it does not speak specifically to electronic

²²⁷ Mitchell & Mishra (n 223) 1089-1090.

²²⁸ Mitchell & Mishra (n 223) 1132.

²²⁹ B Chakravorti & R S Chaturvedi 'Digital Planet 2017: How Competitiveness and Trust in Digital Economies Vary Across the World' (2017) *The Fletcher School at Tufts University* 54.

²³⁰ C Igue, A Alinsato and T Agadjihouédé 'E-commerce in Africa: issues and challenges in' M Smeets (ed) *Adapting to the digital trade era: challenges and opportunities* (World Trade Organization 2021) 123.

²³¹ Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, 9 February 2024 Draft shared for legal scrubbing at the Ninth Extraordinary Session of the Special Technical Committee on Justice and Legal Affairs held in Durban, South Africa from 7th to 10 February 2024 art 6.

²³² Marconini (n 59) 8.

²³³ Marconini (n 59) 6.

²³⁴ Marconini (n 59) 8.

commerce in services. This study will build on this literature by assessing the threats of injuries caused to the domestic sectors in Africa by liberalised trade in electronic services.

Thus, this study builds on the above and other existing literature in the area to discuss the problems and prospects of applying safeguard measures to electronically traded services and data to protect African domestic industries and platforms from surges in digital trade imports.

1.8 Chapter synopsis

This chapter introduced the study on the prospects and problems arising from the application of safeguard measures on digital trade to protect African domestic industries and platforms. It covered the background to the study, research problem, research objectives, research questions, thesis statement, research methodology, literature review and overview of chapters. The subsequent six chapters of this study shall be explored as follows:

Chapter two examines the key terms applicable to digital trade and safeguard measures. Some of the key digital trade terms that will be explored are digital trade, electronic commerce, electronic product, digital data, electronic service, electronic transmission, cross-border data flows and others. For safeguard measures, this chapter will define safeguard measures, like and directly competitive products and services, serious injury or threat to serious injury, increased quantities of imports and others.

Chapter three interrogates digital trade rules under international economic law. Herein, the development of digital trade at the WTO and other international organisations shall be examined. Digital trade rules in regional agreements and groupings from outside Africa are examined.

Chapter four reviews the status of digital trade under African regional law. Digital trade development at the continental and regional economic communities' levels is examined. This chapter shall also identify and examine relevant domestic instruments on digital trade. In addition, this chapter shall explore existing African institutions created to boost intra-African e-commerce.

Chapter five examines the WTO rules surrounding the imposition of safeguard measures to digital trade. WTO rules on national treatment, most-favoured nation, transparency, technological neutrality, likeness analysis and other relevant rules surrounding the imposition of safeguard measures on digital trade are explored in detail.

Chapter six analyses the prospects and practical challenges for applying safeguard measures on digital trade to protect African domestic industries. Specifically, the strategies that have been put in place under the WTO, AfCFTA, and under bilateral agreements in Africa shall be explored. This chapter also explores the statistics of safeguard measures applied by African states. In addition, it will highlight the challenges faced by African countries in the digital space and the impact the challenges have on digital trade and ultimately, the prospects of applying safeguard measures in the event of surges in digital trade imports to an African country.

Chapter seven concludes and gives recommendations on the research findings. Particularly, the legislative and institutional changes that should be made to enhance the protection of African industries from serious injury caused or threatened to be caused by surges in digital trade imports through imposition of safeguard measures shall be espoused

CHAPTER TWO:

ANALYSIS OF KEY TERMS AND CONCEPTS APPLICABLE TO DIGITAL TRADE AND SAFEGUARD MEASURES

2.1 Introduction

In the previous chapter, this study initiated discussions on the application of safeguard measures to digital trade. The growing digital economy impacts international trade as more and more trade moves online.¹ The evolving nature of electronic commerce and digital trade creates ambiguities in the overall understanding of the digital trade environment and key terms and concepts used to describe the digital economy. The existing ambiguities impact the interpretation of digital trade and related concepts in this study. Thus, before delving into the procedural aspects for applying safeguard measures to digital trade, this chapter sheds light on the meaning and use of digital trade and related concepts in this study. In addition, this chapter examines the meaning given to safeguard measures as well as the interpretation and application of conditions that should be met prior to the application of safeguard measures to trade in goods. The discussions put forth herein, inform this study's understanding and provide a context for the application of safeguard measures to digital trade.

In furtherance of the above discussions, this chapter is structured in two parts; the first part examines key concepts and terms applicable to digital trade while the second part relates to safeguard measures. In the first part, this chapter interrogates the meaning and usage of e-commerce and digital trade in this study. In addition, terms relevant to digital trade are discussed, for instance, the meaning of electronic transactions, digital data versus digital content, digital product versus electronic product, digital service versus electronic service, cross-border data flows, and electronic transmission. In the second part, the focus is on safeguard measures' key terms and concepts such as the definition of safeguard measures, interpretation and use of like and directly competitive products

¹ The International Monetary Fund, the Organisation for Economic Co-operation and Development, the United Nations and the World Trade Organization *Handbook on Measuring Digital Trade* (2023) 3.

and services, serious injury and threat thereof, and increased quantities of imports. These terms and concepts are explored at length below.

2.2 The broad and narrow definitions of digital trade

To understand the context in which digital trade is referred to and used in this research, this Chapter defines what constitutes digital trade and electronic commerce. Noteworthy, there is no single and/or universally agreed-upon definition of digital trade.² It has been defined and used differently in diverse contexts and by different organizations, agencies and scholars. There is, however, a growing consensus, and as shall be demonstrated herein, that digital trade encompasses trade that takes place wholly on the digital platform.³ This section proceeds to selectively identify and examine notable definitions of digital trade. As shall be established, digital trade has in some instances been used interchangeably with the words ‘cross-border data flows’, ‘digital content’ and ‘digital data’.⁴ Further, e-commerce constitutes digital trade only to the extent that the service or data is ordered and delivered in the digital space and not physically. Thus, e-commerce is broader than digital trade.⁵

In the international trade sphere, WTO Members were the first to recognise electronic commerce through a May 1998 declaration of global electronic commerce.⁶ The Declaration recognised that e-commerce was growing and subsequently created new trade opportunities.⁷ In a July 1998 Note, the WTO defined ‘electronic commerce’ within the context of ‘services trade’ to mean:

² J López-González & MA Jouanjean ‘Digital Trade: Developing a Framework for Analysis’ OECD Trade Policy Papers No. 205 (July 2017) 6.

³ See for instance United Nations Conference on Trade and Development ‘Digital trade: Opportunities and actions for developing countries’ Policy Brief 92 of 2022, 1-2.

⁴ See I Ogo ‘An Agenda for the AfCFTA Protocol on E-commerce’ (25 June 2020) <https://www.tralac.org/news/article/14692> (accessed 24 August 2021); See also AD Mitchell & N Mishra ‘Data at the Docks: Modernizing International Trade Law for the Digital Economy’ (2018) 20(4) *Vanderbilt Journal of Entertainment and Technology Law* 1073, 1076; World Trade Organization ‘Work Programme on Electronic Commerce: Ways to Move Forward’ Communication from the Russian Federation JOB/GC/131 (14 July 2017), para 3.2.

⁵ Mitchell & Mishra (n 4) 1076; see also UNCTAD ‘Maximizing the development gains from e-commerce and the digital economy’ Trade and Development Board Intergovernmental Group of Experts on E-commerce and the Digital Economy, TD/B/EDE/1/2 (26 July 2017), para 11.

⁶ WTO ‘Declaration on Global Electronic Commerce’ WT/MIN(98)/DEC/2, 25 May 1998.

⁷ As above.

a) the provision of internet access services themselves – meaning the provision of access to the net for businesses and consumers; (b) the electronic delivery of services, meaning transactions in which services products are delivered to the customer in the form of digitised information flows; (c) the use of the internet as a channel for distribution services, by which goods and services are purchased over the net but delivered to the consumer subsequently in non-electronic form.⁸

Arising from the above definition, electronic commerce arises through two forms, first, sale and delivery of a service in a 'digitised form' and, secondly, electronic purchase but delivery of a good and service through 'non-electronic form'.⁹ Noteworthy, while modes 3 and 4 services can be delivered electronically, this definition speaks largely to modes 1 and 2 which entail cross-border supply and consumption abroad.¹⁰ This is because modes 1 and 2 take place in an environment where there is distance between the consumer and supplier of a service.¹¹ The WTO Note highlighted four forms of services that could be delivered in digitised form, i.e. 'financial services, telecommunications, the entertainment sector and many professional services'.¹²

Later that year, in September 1998, the WTO established the Work Programme on E-commerce with the overarching mandate of examining all forms of digital trade.¹³ The WTO, for the purpose of aiding the Work Programme on E-commerce in performing its mandate, defined digital trade within the context of 'electronic commerce' to mean;

..the production, distribution, marketing, sale or delivery of goods and services by electronic means.¹⁴

⁸ WTO 'WTO Agreements and Electronic Commerce' WT/GC/W/90 (14 July 1998), paragraph 2.

⁹ WTO 'WT/GC/W/90' (n 8) para 10.

¹⁰ WTO 'WT/GC/W/90' (n 8) para 6.

¹¹ As above. Article 1.2 of the WTO's General Agreement on Trade in Services (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994) (GATS) defines "trade in services" as "services from the territory of one Member into the territory of any other Member" (mode 1-cross-border supply); "service in the territory of one Member to the service consumer of any other Member" (mode 2-consumption abroad); "services by a service supplier of one Member, through commercial presence in the territory of any other Member" (mode 3-commercial presence); and "services by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member" (mode 4-presence of natural persons).

¹² World Trade Organization 'WT/GC/W/90' (n 8) para 10.

¹³ WTO 'WT/MIN(98)/DEC/2' (n 6).

¹⁴ World Trade Organization 'Work Programme on Electronic Commerce' Adopted by the General Council on 25 September 1998, 'WT/L/274' (20 September 1998), para 1.3.

Preceding this definition is the use of the word ‘exclusively’¹⁵ to connote that the definition was to be used by the Work Programme only for the purpose of achieving the mandate given to them by the WTO General Council.¹⁶ The definition was also meant not to prejudice the outcome of the Work Programme’s mandate.¹⁷ Importantly, the definition speaks to the use of the internet, i.e. ‘electronic means’, to produce, distribute, market, sell or deliver goods and services. The definition, thus, encompasses wholly digital aspects of trade, such that, trade takes place fully online.

Arising from the mandate of the Work Programme on E-commerce, it is evident that the proposed definition of e-commerce was not conclusive. This is evident for example in the mandate of the Work Programme to collaborate with WTO Councils in examining electronic commerce relating to trade in services, intellectual property, trade in goods and development.¹⁸ The mandate was by its nature very broad in scope and has continuously caused confusion at the WTO. The Work Programme was to carry out research and consultations to aid it in its formulation of a clear and precise definition of electronic commerce as well as its scope. This is however yet to be achieved. There has been no consensus to date by WTO Members on what expressly constitutes electronic commerce. The lack of a clear definition and scope of electronic commerce under the WTO brings with it challenges of the applicable law.¹⁹ For instance, electronic purchase of a good or service has been considered a distributional service and thus, covered under the General Agreement on Trade in Services (GATS).²⁰ This would for instance include, sale of air tickets and hotel reservations.²¹

In several WTO Ministerial Conferences and bilateral negotiations by WTO Members, there have been proposals for a concise understanding and scope of e-

¹⁵ WTO ‘WT/L/274’ (n 14) para 1.3.

¹⁶ WTO ‘WT/L/274’ (n 14) para 1.1.

¹⁷ See paragraph 1.3, specifically the statement “...without prejudice to its outcome”

¹⁸ World Trade Organization ‘WT/L/274’ (n 14) paras 2.1, 3.1, 4.1 & 5.1.

¹⁹ See RW Staiger ‘On the implications of digital technologies for the multilateral trading system’ in World Trade Report 2018 (eds) *The future of world trade: How digital technologies are transforming global commerce* (3 October 2018) 151. As it currently exist, digital trade is provided for within the existing WTO Agreements. This is despite the lack of exact reference to “e-commerce”.

²⁰ WTO ‘WT/GC/W/90’ (n 8) para 14.

²¹ WTO ‘WT/GC/W/90’ (n 8) para 16.

commerce.²² For instance, during the 10th Ministerial Conference (MC) it was resolved to continue with proposals of examining the relation between e-commerce and trade in services, trade in goods, intellectual property issues and trade and development.²³ In addition, the definition of e-commerce forms part of the WTO's ongoing discussions on e-commerce. This was after it was submitted by WTO Members since July 2016 following their increased interest to further discussions on e-commerce²⁴ and reaffirmed through the Joint Statements Initiative (JSI) constituted by some of the WTO Members.²⁵ Progress was expected to be made at MC12 in June 2022 in Geneva, but none was made.²⁶ Minimal progress was also made at MC13 in Abu Dhabi.²⁷ Hopefully, progress will be made before or at MC14. A clear and precise definition of 'digital trade' is hoped for should the negotiations materialise.

While the WTO definition of electronic commerce was meant to guide the Work Programme on E-commerce in carrying out its mandate, it set the pace for discussions on digital trade and inspired further definitions of digital trade. The e-commerce definition has for instance been linked to 'digital trade'. According to the WTO E-commerce Jargon Buster digital trade 'involves the use of the Internet to conduct business electronically to

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- ²² WTO 'Electronic Commerce'
https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm
(accessed 11 June 2023); see also WTO 'Work Programme on E-commerce'
https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm (accessed 11 June 2023).
- ²³ WTO 'Work Programme on Electronic Commerce: Ministerial Decision of 19 December 2015' WT/MIN(15)/42, WT/L/977, 21 December 2015.
- ²⁴ Staiger (n 19) 151; See for instance World Trade Organization 'Work Programme on Electronic Commerce: Ways to Move Forward' Communication from the Russian Federation JOB/GC/131 (14 July 2017), paras 2.2 & 2.3. The Russian Federation urges the Work Programme to spearhead discussions on basic terms relating to e-commerce for instance digital trade, e-trade, digital economy, digital products and electronic transmissions to determine the definition and scope, see para 4.4.
- ²⁵ The JSI on e-commerce was started in 2017, during the 11th Ministerial Conference by some of the WTO Members to initiate discussions to develop rules on digital trade. As at June 2024 membership stood at 91 of the 166 WTO Members; see Terence P. Stewart 'Current Thoughts on Trade' (20 February 2021) <https://currentthoughtsontrade.com/2021/02/20/will-india-and-south-africa-and-others-prevent-future-relevance-of-the-wto/> (accessed 25 July 2021).
- ²⁶ World Trade Organization 'Coordinators of joint initiatives cite substantial progress in discussions' https://www.wto.org/english/news_e/news20_e/jsec_18dec20_e.htm (accessed 24 August 2021).
- ²⁷ WTO 'Work Programme on Electronic Commerce: Ministerial Decision adopted 2 March 2024' WT/MIN(24)/38, WT/L/1193, 4 March 2024.

the maximum extent and the promotion wherever possible of paperless trading'.²⁸ Other definitions are espoused further below.

In 2009, the Organisation for Economic Co-operation and Development (OECD) member countries adopted the below definition of e-commerce:

The sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those networks, but the payment and the ultimate delivery of the goods or service do not have to be conducted online.²⁹

The above OECD broad definition notes that while the goods or services are ordered online, delivery and payment need not be online.³⁰ The definition therefore focuses on the method in which the order is made rather than received.³¹ It focuses on methods that are specifically designed for placing and receiving orders.³² This leaves out other activities in computer networks. Additionally, it does not pay attention to the nature of products purchased, modes of payment, and parties.³³ Thus, any orders of a good or service made online fit well within this definition.

The import of the above OECD definition is that since orders are made online but deliveries are physical, the physical aspects bring the goods under the framework of trade in goods, which would mean for instance, the General Agreement on Tariffs and Trade (GATT) under the WTO. This would then mean safeguard measures rules applicable under GATT would apply. The OECD definition, however, mentions that 'the ultimate delivery of the goods or service does not have to be conducted online'. The use of 'do not have to be' implies that deliveries may also be online. To this extent, orders made and delivered online are within the framework of this research as they are currently not covered under the existing rules on safeguard measures. They would also constitute digital trade for the purposes of this research.

²⁸ WTO 'E-commerce Jargon Buster' [WTO | Electronic commerce](#) (accessed 15 April 2023).

²⁹ OECD 'Unpacking E-commerce: Business Models, Trends and Policies' <https://www.oecd-ilibrary.org/sites/1885800a-en/index.html?itemId=/content/component/1885800a-en#n-ch01-2> (accessed 5 June 2022).

³⁰ OECD (n 29) 71.

³¹ OECD (n 29) 71.

³² OECD (n 29) 73.

³³ See OECD (n 29) under 'What is e-commerce?'.

Eurostat has in its statistics adopted a definition of e-commerce that is almost similar to the OECD's narrow definition of 2001.³⁴ Notably, goods and services are ordered online while payment and delivery may be either online or offline. The definition is specific on the parties, such that businesses, households, individuals and private organizations may purchase goods or services online. Eurostat defines e-commerce as follows:

The sale or purchase of goods or services, whether between businesses, households, individuals or private organizations, through electronic transactions conducted via the internet or other computer-mediated (online communication) networks.³⁵

Digital trade and e-commerce have also been defined differently in regional and free trade agreements and frameworks. For instance, the African Union Convention on Cybersecurity and Personal Data Protection (Malabo Convention)³⁶ defines electronic commerce to mean:

The act of offering, buying or providing goods and services via computer systems and telecommunications networks such as the internet or any other network using electronic, optical or similar media for distance information exchange.³⁷

The above definition does not specify the mode of delivery, be it digital or physical. A literal reading of it suggests that delivery is through the internet, going by the word 'providing' and 'use of the internet'. At the same time, it indicates 'offering, buying or providing', which means that as long as one of these criteria is met, it could be classified as e-commerce.

The African Union Digital Transformation Strategy (2020-2030) has adopted the OECD definition of digital trade i.e. it construes digital trade as 'digitally-enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve consumers, firms, and governments'.³⁸ It has also incorporated

³⁴ Eurostat Statistics Explained 'Glossary: E-commerce' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:E-commerce> (accessed 5 June 2022).

³⁵ As above.

³⁶ Adopted 27 June 2014, last signed on 11 May 2020 and is yet to take effect, available at https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf.

³⁷ As above, art 1.

³⁸ The African Union Digital Transformation Strategy (2020-2030), available at [38507-doc-dts-english.pdf \(au.int\)](#), 5

the OECD definition of e-commerce, identified earlier in this study.³⁹ Thus, under the AU, digital trade can take place wholly or partially online.

In terms of African legislation, none speak specifically to either digital trade or electronic commerce, instead, 35 African states have domestic legislation on ‘electronic transactions’.⁴⁰ There are also in place data protection laws that seek to protect data generally and, in particular, personal data and sensitive personal data, as well as consumer protection laws that seek to build trust on the digital platform and cybercrime laws for cybersecurity.⁴¹ All these laws seek to protect and facilitate digital trade and electronic commerce. The laws also define key terms closely linked to digital trade for instance ‘data’ and ‘electronic transaction’, as shall be examined further in the next sections of this chapter.

In addition to the above institutional and legal definitions of digital trade, scholars have similarly participated in defining ‘digital trade’. López-González and Jouanjean for instance define digital trade as:

Digitally enabled transactions in trade in goods and services, which can be either digitally or physically delivered involving consumers, firms and governments.⁴²

This definition by López-González and Jouanjean is characterized by the flow of data across borders. The definition however factors in trade in goods and services that can be delivered physically. This would include goods and services that are ordered online and delivered physically. Noteworthy, this category of digital trade is outside the scope of this research which is limited only to goods and services that are both ordered and delivered online.

According to Sommer and Macleod, digital trade:

Encompasses the effects that emerging digital technologies have on the global economy. This includes technologies such as three-dimensional (3D) printing, or additive manufacturing, in which material is joined or solidified under computer control to create 3D objects; big data, wherein the

³⁹ As above, 5.

⁴⁰ UNCTAD ‘E-transactions Legislations Worldwide: Africa’ [E-transactions Legislation Worldwide | UNCTAD](#) (accessed 10 June 2023).

⁴¹ As above.

⁴² J López-González & MA Jouanjean ‘Digital Trade: Developing a Framework for Analysis’ OECD Trade Policy Papers No. 205 (July 2017) 6.

computational analysis of extremely large datasets reveals valuable patterns, trends and associations; and the concept of “e-commerce” which is defined by the World Trade Organization (WTO) as the production, distribution, marketing, sale or delivery of goods and services by electronic means. It also includes labour-saving technological developments such as robotisation, artificial intelligence and automation.⁴³

Sommer’s definition is all-encompassing and problematic for its lack of precision and adopts the WTO definition within its definition. The first part of the definition speaks to digital technologies in a broader context such that whatever is referred to is not limited to digital trade-enabling technologies. Reference to robotisation, artificial intelligence and automation does not directly speak to digital trade, in as much as they could be enablers. The definition is therefore used sparingly in this research.

Monteiro and Teh in their analysis of e-commerce provisions in Regional Trade Agreements (RTAs) notified to the WTO summarise that e-commerce is characterised by the use of electronic means for commerce or trade.⁴⁴ It also connotes commerce carried out through telecommunications and trade performed or delivered electronically. Several RTAs also adopted the WTO’s definition of e-commerce.⁴⁵ It is evident from the summary that there is no universal definition of e-commerce. Many of the definitions only incorporate the element that commerce takes place electronically. Some of the definitions also include telecommunications.⁴⁶ While context is important in defining e-commerce, a universally agreed definition is necessary for uniformity.

Mitchell and Mishra discuss that a WTO Agreement on digital trade should be negotiated which adopts a definition of digital trade that is clear and technologically neutral.⁴⁷ They note that digital trade liberalisation has been hindered by amongst others, the lack of a clear definition of ‘digital products’.⁴⁸ Interestingly, Mitchell and Mishra observe that developing a clear and comprehensive definition of digital trade is useless

⁴³ L Sommer & J Macleod ‘Updating the policymaker’s toolkit: a new digital trade and development landscape’ in UNECA *et al* (eds) *Digital Trade in Africa: Implications for Inclusions and Human Rights* (2019) 19.

⁴⁴ JA Monteiro & R Teh ‘Provisions on Electronic Commerce in Regional Trade Agreements’ (2017) World Trade Organization Working Paper ERSD-2017-11, 17.

⁴⁵ Monteiro & Teh (n 44) 17.

⁴⁶ Monteiro & Teh (n 44) 17.

⁴⁷ Mitchell & Mishra (n 4) 1127.

⁴⁸ Mitchell & Mishra (n 4) 1118.

owing to the evolving nature of digital trade.⁴⁹ These sentiments were also shared by some delegates during the discussions at the General Council's informal meeting to discuss aspects of e-commerce at the WTO.⁵⁰

Significantly, Alschner discusses that a distinction should be made between e-commerce and digital trade.⁵¹ He notes that e-commerce is 'digitally-enabled trade' for instance trade in 'analog goods and services' and 'their digital avatars' enabled digitally while digital trade is the 'exchange of purely digital assets' or data.⁵² Accordingly, e-commerce and digital trade are covered by different trade rules. Alschner discusses that for two decades 'e-commerce' provisions were included in preferential trade agreements but since 2019, the United States-Mexico-Canada Agreement (USMCA) broke the nomenclature by including a chapter on 'digital trade'.⁵³ Since then, the shift from 'e-commerce' to 'digital trade' has increasingly been used in other trade agreements, in policy discussions, and academic writings.⁵⁴ This shows the increased shift in focus from 'e-commerce' to 'digital trade' in recent times. PTAs today, however, include chapters on either e-commerce or digital trade.⁵⁵

Notwithstanding the foregoing definitional challenges of what constitutes 'digital trade', this research is guided by the following major differences between e-commerce and digital trade: while e-commerce can be delivered either digitally or physically, digital trade is delivered digitally only.⁵⁶ According to Stork, businesses, governments and consumers drive e-commerce which includes digital trade.⁵⁷ In other instances, digital

⁴⁹ Mitchell & Mishra (n 4) 1110. This argument in the Author's view is contradictory of the proposals put forth in the Paper and more specifically, the proposal to formulate a 'clear and technologically neutral' definition of e-commerce. The paper also largely examines the challenges that arise due to lack of definitional clarity on what constitute digital trade. Thus, the pros of a clear definition of digital trade are more than the cons.

⁵⁰ See WTO 'Work Programme on Electronic Commerce: Information provided to the General Council' 'G/C/W/158' (26 July 1999), para 2.1. It was noted by a delegate that since there was no commitments on e-commerce, a definition was not necessary.

⁵¹ W Alschner 'E-Commerce or Digital Trade? Why the Difference Should Matter To Trade Lawyers' in Geist/Collins (eds) *Handbook on Digital Trade* (Edward Elgar 2023), Abstract.

⁵² Alschner (n 51) 1-2.

⁵³ Alschner (n 51) 10-12.

⁵⁴ Alschner (n 51) 1.

⁵⁵ Alschner (n 51) 19.

⁵⁶ See for instance S Kumar 'Regulating Digital Trade' (2015) 67(6) *Florida Law Review* 1909, 1912.
⁵⁷ C Stork 'Situational Analysis of Digital Trade and Digital Economy in Africa' Report presented at the African Union E-commerce Conference held on 23-25 November 2020 available at <https://researchictolutions.com/home/wp-content/uploads/2020/11/AU-23Nov2020-Digital->

trade trends are measured using cross-border data flows.⁵⁸ Additionally, digital trade is enabled by 'connectivity, identity and payment platforms'.⁵⁹

It is also important to note, and as has been earlier discussed, that e-commerce has been used in some instances to refer to digital trade, for example at the WTO. The WTO, OECD, IMF and the UN in their handbook on measuring digital trade adopted the definition that digital trade 'is all international trade that is digitally ordered and/or digitally delivered' for the purpose of digital trade statistics.⁶⁰ 'Digitally ordered trade' is defined as 'The international sale or purchase of a good or service, conducted over computer networks by methods specifically designed for the purpose of receiving or placing orders.'⁶¹ This has been equated to e-commerce. 'Digitally delivered trade', in turn, is defined as 'all international trade transactions that are delivered remotely over computer networks'.⁶² The Handbook notes that only services can be delivered digitally. This leaves out other forms of digital trade such as e-books that do not constitute a service but are rather in the form of digital data. The Handbook also recognises that data flows are manifestations of digital trade.⁶³ Interestingly digitally ordered and delivered goods are considered in measuring digital trade statistics in the Handbook. It is against this backdrop that this study concerns itself with trade in data or content and services that are purchased and delivered in digital form on the digital platform. As has been discussed severally, goods or services that are delivered in physical form are beyond the scope of this study. Hence, any reference to 'digital trade' in this and subsequent chapters of this research refers to data or content and services that are both purchased and delivered in the digital platform.

Trade.pdf 3.

⁵⁸ See for instance S Lund & J Manyika 'Strengthening the Global Trade and Investment System for Sustainable Development: How Digital Trade is Transforming Globalization' (2016) *International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum* available at <http://e15initiative.org/wp-content/uploads/2015/09/E15-Digital-Lund-and-Manyika.pdf>.

⁵⁹ Stork (n 57) 3.

⁶⁰ IMF *et al* (n 1) 23.

⁶¹ IMF *et al* (n 1) 23.

⁶² IMF *et al* (n 1) 24.

⁶³ IMF *et al* (n 1) 18.

2.3 Definition of other key terms relevant to digital trade

In some instances, ‘cross-border data flows’, ‘digital content’ and ‘digital data’ have been used to connote digital trade. Other terms that are important to briefly define for contextual purposes of this research are the definitions of ‘electronic transaction’, ‘digital products’, ‘digital service’ and ‘electronic transmissions’. These and other terms are explored at length below.

2.3.1 Electronic transaction

Closely linked to electronic commerce is the use of the term ‘electronic transaction’ in regional and domestic law. Some of the existing definitions of ‘electronic transaction’ have the same meaning as ‘electronic commerce’. For instance, the EAC Model Policy on Electronic Transactions defines ‘electronic transaction’ as:

...the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organizations, conducted over electronic networks. The goods and services are ordered over those networks, but the payment and the ultimate delivery of the good or service may be conducted on or off-line.⁶⁴

The foregoing definition is similar to the definition adopted by OECD, for instance. In the same breadth, goods and services purchased and delivered online are significant to this study. As indicated above, those that are delivered physically would be regulated under the existing safeguard measures rules on goods delivered physically and would, therefore, fall outside the scope of this study.

The Electronic Transactions and Electronic Commerce: SADC Model Law defines ‘electronic transaction’ as:

...a transaction, action or set of actions of either a commercial or non-commercial nature, and includes the provision of information and/or e-government services.⁶⁵

The foregoing is distinct from the definition adopted by the EAC Model Policy, discussed above, such that, this definition contains aspects of e-government services and actions of a non-commercial nature, which fall outside the scope of this study. This study

⁶⁴ East African Communications Organisation ‘EAC Model Policy on Electronic Transactions’ (2017 EACO), available at [EAC MODEL POLICY ON ELECTRONIC TRANSACTIONS.pdf \(eaco.int\)](https://eaco.int/EAC_MODEL_POLICY_ON_ELECTRONIC_TRANSACTIONS.pdf), 1.2.

⁶⁵ Harmonization of ICT Policies in Sub-Saharan Africa ‘Electronic Transactions and Electronic Commerce: SADC Model Law’ 2012 chapter 1.

concerns itself with trade in goods and services that take place wholly on the digital platform. Trade constitutes commerce.

In addition to the foregoing definitions in African regional instruments, 'electronic transaction' has also been defined by several African legislations, for instance, under the Botswana Electronic Communications and Transactions Act to mean 'a transaction, action or set of actions of either a commercial or non-commercial nature, and includes the provision of information or e-government services';⁶⁶ the Ghana Electronic Transactions Act to mean 'a transaction by an electronic agent';⁶⁷ and the Tanzania Electronic Transactions Act to mean 'a transaction, action or set of transactions of a commercial or non-commercial nature, that takes place electronically'.⁶⁸ The definition adopted by Botswana is similar to SADC Model Law definition. The definitions adopted by Ghana and Tanzania are quite problematic and lack precision. Both definitions have used the word 'transaction' which creates ambiguity. The Tanzanian and Botswana definitions also incorporates 'non-commercial' aspects which fall outside the scope of this study. Thus, these definitions only apply to this study to the extent that they speak to trade in goods and services that take place fully online.

Thus, from the foregoing, it is evident that the elements in electronic transactions are more comparable to the elements in e-commerce. Four elements are satisfied in the case of e-commerce, i.e., a good or service is ordered, paid for, and delivered through a medium which can be the internet or physically. Electronic transactions on the other hand contain all of the e-commerce elements in addition to specific aspects of the action which could be commercial or not, players such as governments or individuals and provision of information or electronic government services. The act of sending money has also been construed to constitute electronic transactions.⁶⁹ In other instances, electronic transactions have been linked to document exchanges, for instance, the exchange of shipment documents, electronic signatures and documents transfer in electronic

⁶⁶ Botswana Electronic Communications and Transactions Act 14 of 2014 sec 2.

⁶⁷ Ghana Electronic Transactions Act 772 of 2008 sec 144.

⁶⁸ Tanzania Electronic Transactions Act 6 of 2015 sec 3.

⁶⁹ Cambridge Dictionary 'Electronic Transaction' [ELECTRONIC TRANSACTION - Cambridge English Dictionary](#) (accessed 10 June 2023).

formats.⁷⁰ Electronic transactions are therefore not in strict sense electronic commerce nor digital trade.

2.3.2 Digital data versus digital content

Digital data is derived from the term ‘data’ which refers to information either in electronic or non-electronic format. Different legislations in Africa construe ‘data’ differently. The South African Electronic Communications and Transactions Act defines data as ‘electronic representations of information in any form’.⁷¹ This definition has also been used in the Tanzania Electronic Transactions Act,⁷² the Zambian Electronic Communications and Transactions Act⁷³ and the Rwanda Law Governing Information and Communication Technologies.⁷⁴ Kenya’s and Ghana’s definitions of ‘data’ under the Kenya Data Protection Act and the Ghana Data Protection Act⁷⁵ respectively are broad and entail:-

...information which— (a) is processed by means of equipment operating automatically in response to instructions given for that purpose; (b) is recorded with intention that it should be processed by means of such equipment ⁷⁶

Data under the Kenyan and Ghana laws refers to data that is stored either electronically or in a physical form, provided that the captured information is accessible. There are specific references to ‘equipment operating automatically’, this would connote a computer or other electronic device. Thus, by and large, the definitions encompass digital data.

Digital data and digital content have in most instances been used interchangeably. For instance, digital content is referred to as data produced and supplied digitally.⁷⁷ Digital content is also referred to as:

⁷⁰ World Trade Organization ‘Global Legal Recognition of Electronic Transactions and Documents’ in World Trade Organization (eds.) *The Promise of TradeTech: Policy approaches to harness trade digitalization* (World Trade Organization 2022) 28-39.

⁷¹ South African Electronic Communications and Transactions Act 25 of 2002 (updated 23 September 2010) sec 1.

⁷² Sec 3.

⁷³ Act 21 of 2009 sec 2.

⁷⁴ Official Gazette 26 of 27/06/2016 art 5(1).

⁷⁵ Act 843 of 2012.

⁷⁶ Kenya Data Protection Act 24 of 2019 sec 2; see also Ghana Data Protection Act sec 96.

⁷⁷ LexisNexis ‘Digital content definition’ <https://www.lexisnexis.co.uk/legal/glossary/digital-content>

Consist[ing] of goods (such as music, video, software, books and documents) that have been converted into an electronic format (digitized) to be used on a computer and delivered via a computer network.⁷⁸

The COMESA Cyber Crime Model Bill of 2011 defines 'content data' as:

...any data whether in digital, optical, or other form, including metadata, that conveys essence, substance, information, meaning, purpose, intent, or intelligence, either singularly or when in a combined form, in either its unprocessed or processed form. Content data includes any data that conveys the meaning or substance of a communication as well as data processed, stored, or transmitted by computer programmes.⁷⁹

In the above examples, digital content has been used in the same manner as digital data. Thus, digital content is in the form of digital data. Therefore, any reference to either data or content in this study includes a reference to the other. Noteworthy, these terms form the focus of this study since this study seeks to examine the application of goods or products that have been converted into a digital format.

2.3.3 Digital products versus electronic products

A digital product is described as a good or service that is available through the Internet.⁸⁰ It has also been defined as any content in digital form.⁸¹ E-books, videos, movies and software are examples of digital products.⁸² Digital products are either delivered in a digital form or paid for but are available in a non-digital form such as a DVD or a USB drive.⁸³

Digital products have been referred to in several digital trade and e-commerce provisions. Trade agreements such as the Digital Economy Partnership Agreement (DEPA) signed between Chile, New Zealand and Singapore;⁸⁴ the United States-Mexico-

(accessed 11 June 2023).

⁷⁸ P Priyadarshini & M Stamp 'Digital Rights Management for Untrusted Peer-to-Peer Networks' in S Lian & Y Zhang (eds) *Handbook on Research on Secure Multimedia Distribution* (IGI Global; Illustrated edition 2009).

⁷⁹ COMESA 'Cyber Crime Model Bill, 2011' Official Gazette, Volume 16 of 2011, available at <https://www.comesa.int/wp-content/uploads/2020/05/2011Gazette-Vol.-16.pdf>, sec 1.

⁸⁰ S Fleuter 'The Role of Digital Products under the WTO: A New Framework for GATT and GATS Classification' (2016) 17(1) *Chicago Journal of International Law* 153-177, 157.

⁸¹ IY Nugraha 'Is Tangibility a Prerequisite? Digital Products as Goods' (2020) 15(2) *Asian Journal of WTO and International Health Law and Policy* 691, 695.

⁸² As above, 695.

⁸³ Fleuter (n 80) 157.

⁸⁴ Digital Economy Partnership Agreement, signed 11 June 2020, available at [DEPA-Signing-Text-](#)

Canada Agreement (USMCA);⁸⁵ and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)⁸⁶ have defined a digital product as:

...computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically.⁸⁷

The above definition refers to products that are encoded and transmitted digitally. A literal reading of the definition suggests that it doesn't give the option of non-digital delivery of digitally encoded products. The USMCA goes further to exclude money or 'other digitalised representation of a financial instrument' in the definition of a digital product.⁸⁸ Thus, digital products as contemplated in these agreements fall within the scope of this study. Linked with the definition of digital trade, digital products that are physically delivered are outside the scope of this study,

Closely linked to digital products are electronic products which refer to 'products that formerly were delivered in tangible form but now can be delivered in electronic form via Internet download'.⁸⁹ Examples of electronic products are electronic books, movies that can be downloaded and mp3 music files.⁹⁰ By virtue of being ordered for, paid and delivered online, they satisfy the elements for digital trade and would therefore be relevant to this study. The products are digital data and not services for the purposes of this study.

2.3.4 Digital service versus electronic service

A digital service is as a service that uses digital technology where information is stored, transmitted, and processed.⁹¹ Digital trade in services is stated to exist in two forms: digitally ordered services and digitally delivered services.⁹² Digitally ordered services

⁸⁵ [11-June-2020-GMT-v3.pdf \(mfat.govt.nz\)](#), United States-Mexico-Canada Agreement. The United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

⁸⁶ Comprehensive and Progressive Agreement for Trans-Pacific Partnership texts, signed 8 March 2018, available at [Comprehensive and Progressive Agreement for Trans-Pacific Partnership texts | New Zealand Ministry of Foreign Affairs and Trade \(mfat.govt.nz\)](#).

⁸⁷ DEPA art 3.1; USMCA art 19.1.

⁸⁸ USMCA art 19.1.

⁸⁹ Fleuter (n 80) 158.

⁹⁰ Fleuter (n 80) 158.

⁹¹ Law Insider 'Digital Service Definition' <https://www.lawinsider.com/dictionary/digital-services> (accessed 10 September 2023).

⁹² IMF *et al* (n 1) 27.

connotes that the service is purchased ‘over computer networks by methods specifically designed for the purpose of receiving or placing orders’.⁹³ This includes services that are ordered online but can be delivered either digitally or not.⁹⁴ Digitally delivered service on the other hand means ‘all international trade transactions that are delivered remotely over computer networks’.⁹⁵ These are enabled through information and communication technology (ICT).⁹⁶ Online platforms have also been defined as ‘a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the internet’.⁹⁷

By and large, digital service is regulated by GATS as it is applicable to ‘measures affecting trade in services’.⁹⁸ The WTO has interpreted ‘affecting’ to connote measures that both directly and indirectly govern service supply. This would include measures governing the digital supply of services.⁹⁹ Digital trade in services include ‘financial services; telecommunications, computer and information services; business services; audio-visual and recreational services’.¹⁰⁰ Digital services inform the discussions in this study.

An electronic service is provided through electronic networks such as the Internet.¹⁰¹ Technology is the medium of delivering an electronic service. Electronic services have been defined precisely as ‘services provided electronically including services provided online or through an electronic network that, due to their nature, are basically automated and require minimum human implication’.¹⁰² Distinct from digital service, electronic service excludes goods ordered electronically, professional services,

⁹³ IMF *et al* (n 1) 13 & 27.

⁹⁴ IMF *et al* (n 1) 27.

⁹⁵ IMF *et al* (n 1) 13 & 27.

⁹⁶ IMF *et al* (n 1) 13 & 27.

⁹⁷ IMF *et al* (n 1) 26.

⁹⁸ GATS art 1.

⁹⁹ WTO ‘WT/GC/W/90’ (n 8) para 4.

¹⁰⁰ UN-OHRLLS & WTO ‘Digital Trade: Opportunities and Challenges’ (2022), available at https://www.wto.org/english/tratop_e/devel_e/digital_trade2022_e.pdf

¹⁰¹ J Salminen ‘Digital services: How are they different?’ (2014) Conference: Proceedings of ICBIC14, available at [PDF\) Digital services: How are they different? \(researchgate.net\)](https://www.researchgate.net/publication/312111111).

¹⁰² Limit Consulting ‘What is meant by electronic service’ <https://www.limitconsulting.com/2020/03/what-is-meant-by-electronic-services/> (accessed 10 September 2023).

and telecommunication services.¹⁰³ The scope of e-services is also broad as it contains both commercial and non-commercial aspects. This understanding of e-service is therefore used sparingly in this study.

2.3.5 Cross-border data flows

As earlier discussed, cross-border data flows have been used interchangeably with digital trade.¹⁰⁴ This is because cross-border data flows involve the transfer of data across borders. This chapter has already discussed what constitutes data. In cross-border data flows, four categories of data are transferred: data traffic of a non-commercial nature; data arising out of a transaction between a buyer and seller, for instance, data on online banking and services transactions; services and data of a commercial nature, for instance, value chain and personnel; and end-users related data showing services or data delivered and received, for instance, information on social media and free email.¹⁰⁵ Voss notes that most of these data flow without human intervention and have contributed to the increase in trade in services.¹⁰⁶

As highlighted above, cross-border data flows involve the transfer of personal data. Personal data is used to refer to information relating to and results in the identification of a natural person.¹⁰⁷ While there has been continuous advocacy for the free flow of data, this is curtailed by measures on data localisation and restrictions on the free flow of personal data.¹⁰⁸ At the African level, the Malabo Convention prohibits the transfer of personal data to non-member states unless it is shown that adequate mechanisms are in place to protect privacy and fundamental rights and freedoms.¹⁰⁹ A majority of the existing 35 data protection domestic legislations in Africa also allow for cross-border transfer of

¹⁰³ As above.

¹⁰⁴ Refer to footnote 8 herein.

¹⁰⁵ G Voss 'Cross-Border Data Flows, the GDPR, and Data Governance' (2020) 29(3) *Washington International Law Journal* 485-532, 488.

¹⁰⁶ Voss (n 105) 488-489.

¹⁰⁷ Malabo Convention art 1.

¹⁰⁸ Voss (n 105) 485

¹⁰⁹ Malabo Convention art 14(6).

data on the basis of reciprocity.¹¹⁰ This is also the case in trade agreements and e-commerce strategies in African regional economic communities.¹¹¹

Arising from the foregoing, it is evident that there is no inconsistency in the definition of 'cross-border-data flows'. What differs are the parameters for the transfer of data across borders. The current fragmented legal frameworks in Africa and at the multilateral levels, complicate cross-border data transfer requirements.¹¹² In circumstances where there is no limitation of data transfer across borders, an environment for the free flow of data is created. The current tensions on data sovereignty, reciprocity in cross-border data flow provisions and the dangers of market dominance by some of the industries and platforms, inhibit the free flow of data across international borders.¹¹³

This study relies on digital data/content and services traded across borders. This is enabled by cross-border data flows.¹¹⁴ This is because digital trade is assessed based on digital data that crosses international borders. The WTO for instance notes that digital trade statistics are built from existing data sources.¹¹⁵ In particular, goods and services that are internationally ordered and delivered remotely over computer networks are examined in digital trade statistics.¹¹⁶

Closely linked to cross-border data flows is the 'cross-border supply of services' which is understood generally as service supply from one territory to another by a person in one territory to another person in another territory.¹¹⁷ Under the WTO, this would

¹¹⁰ There were 35 laws and 3 drafts on data protection in Africa. Data Protection Africa 'Mapping Data Protection Laws in Africa' [Data Protection Africa | ALT Advisory](#) (accessed 20 September 2023); Nelly C. Rotich 'Examining Cross-Border Data Flows Provisions in Africa's Free Trade Agreements' [Examining Cross-Border Data Flows Provisions in Africa's Free Trade Agreements - Centre for Intellectual Property and Information Technology law \(strathmore.edu\)](#) (accessed 20 September 2023).

¹¹¹ As above.

¹¹² AD Mitchell & N Mishra 'Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute' (2019) 22(3) *Journal of International Economic Law* 389-416

¹¹³ YC Chin & J Zhao 'Governing Cross-Border Data Flows: International Trade Agreements and Their Limits' (2022) 11(4) *Laws* 1-22, 2-3.

¹¹⁴ Voss (n 105) 487.

¹¹⁵ IMF *et al* (n 1) 5.

¹¹⁶ IMF *et al* (n 1) 6.

¹¹⁷ RH Weber 'Digital Trade in WTO-Law - Taking Stock and Looking Ahead' (2010) (5) 1 *Asian Journal of WTO & International Health Law and Policy* 1-24, 8.

constitute mode 1 supply of a service under the GATS.¹¹⁸ In this mode of supply of services, each party remains in their territories and services are supplied through means such as telecommunications or computer networks.¹¹⁹ Under the WTO, cross-border internet transactions have been categorized as trade in services.¹²⁰ This is thus relevant to this study as it relates to the cross-border supply of digital services.

2.3.6 Electronic transmissions

Following the declaration of global e-commerce at the WTO in May 1998, Members also agreed to 'continue their current practice of not imposing customs duties on electronic transmissions'.¹²¹ Since then, there has been a continuous extension of this moratorium on taxing electronic transmissions, the latest being an extension at MC13 in 2024 until MC14 or 31 March 2026, whichever is earlier, despite opposition of the extensions by Members such as South Africa and India.¹²² The scope, definition and impact of the moratorium have been up for discussion since it was introduced, and it was reiterated during MC12 that there was a need to intensify discussions on the 'scope, definition, and impact of the moratorium on customs duties on electronic transmissions'.¹²³ In the same vein, WTO Members have raised concerns about the need to define electronic transmissions.¹²⁴

While there appears to be a general understanding of what it is, there is no consensus as to what constitutes and the categorization of 'electronic transmissions' under the WTO and in the context of the moratorium. A summary of informal meetings held by the WTO Council for Trade in Goods between 1998 and 1999 shows that that the categorisation of 'electronic transmission' was central in the discussions between goods

¹¹⁸ GATS art 1.3(a).

¹¹⁹ WTO 'Basic Purpose and Concepts' [WTO | Services - CBT - Basic Purpose and Concepts - Definition of Services Trade and Modes of Supply - Page 1](#) (accessed 20 June 2023).

¹²⁰ E Hernandez-Lopez 'Trade in Electronic Commerce Services under the WTO: The Need to Clearly Classify Electronic Transmissions as Services and Not Tariff-Liable' (2001) 4(4) *Journal of World Intellectual Property* 557-580, 560.

¹²¹ WTO 'WT/L/274' (n 14) para 2.

¹²² WTO 'Work Programme on Electronic Commerce: Ministerial Decision' (17 June 2022) WT/MIN(22)/32, WT/L/1143, 22 June 2022; see also WTO 'Work Programme on Electronic Commerce: Ministerial Decision' (2 March 2024) WT/MIN(24)/38, WT/L/1193, 4 March 2024.

¹²³ As above, para 2.

¹²⁴ R Santana 'Discussions on Electronic Transmissions at the Council for Trade in Goods and its subsidiary bodies' Work Programme on Electronic Commerce Structured discussion (5 July 2021), available at [santana_050721.pdf \(wto.org\)](#).

and electronic commerce.¹²⁵ The discussions were guided by the definition that ‘electronic transmissions’ constituted ‘digitalised information transmitted by electronic means’.¹²⁶ There was, however, no consensus amongst the delegations on how to categorise ‘electronic transmissions’.¹²⁷ The divergent ideas shared suggested that electronic transmissions were services and digital contents delivered electronically such as music downloaded from the internet.¹²⁸ It was resolved to further discuss the circumstances and categorisation of electronic transmissions.¹²⁹

A definition and categorisation of ‘electronic transmissions’ is to date yet to be adopted at the WTO.¹³⁰ In a July 2023 communication on e-commerce by the General Council, it is noted that while there is no single definition of ‘electronic transmissions’, it is understood generally to ‘cover anything transmitted by telecommunications, including over the internet, and from emails and software to digital music, blueprints, movies, and video games’.¹³¹ This is significant to this study as it impacts digital trade.

Electronic transmissions have been described as a ‘dynamic, highly technical, and evolving form of cross-border transactions’.¹³² Scholars such as Hernandez-Lopez argue that electronic transmissions can either be a good or service depending on how you see it.¹³³ This is because they have qualities similar to goods, for instance, music or books that can be downloaded. In such instances, the products received by consumers are the same, whether physically or digitally delivered.¹³⁴ They are services since the ‘customer purchases or uses the service of attaining electronic information’.¹³⁵ Lopez, proposes that electronic transmissions should be categorised as a service because of their dynamic and varying nature.¹³⁶

¹²⁵ WTO ‘G/C/W/158’ (n 50) para 1.3.

¹²⁶ WTO ‘G/C/W/158’ (n 50) para 2.2(iv).

¹²⁷ WTO ‘G/C/W/158’ (n 50) para 2.

¹²⁸ WTO ‘G/C/W/158’ (n 50) para 2.

¹²⁹ WTO ‘G/C/W/158’ (n 50) para 11.1.

¹³⁰ Santana (n 124).

¹³¹ WTO ‘Work Programme on Electronic Commerce: Moratorium on Customs Duties on Electronic Transmissions’ WT/GC/W/889, 10 July 2023, para 2.2.

¹³² Hernandez-Lopez (n 120) 557.

¹³³ Hernandez-Lopez (n 120) 558.

¹³⁴ Hernandez-Lopez (n 120) 558.

¹³⁵ Hernandez-Lopez (n 120) 558.

¹³⁶ Hernandez-Lopez (n 120) 558.

Trade agreements such as DEPA and the Digital Trade Agreement between the UK and Ukraine¹³⁷ define electronic transmission or transmitted electronically as ‘a transmission made using any electromagnetic means, including by photonic means.’¹³⁸

Arising from the foregoing, it is evident that ‘electronic transmissions’ have different meanings depending on the context of use. While it is suggested that it encompasses digital content delivered electronically, the scope of such content has not been clearly set out. Since electronic transmissions touch on digital trade, the moratorium currently in place impacts the application of safeguard measures since customs duties are not imposed on them.

2.4 Definition of key terms relevant to safeguard measures

Compared to digital trade, there is a clear framework and jurisprudence on safeguard measures’ key concepts, their use and application to trade in goods. While the existing safeguard measures’ legal framework may not have expressly defined select concepts relevant to this study, definitions have over time been derived through practices and in many instances the WTO dispute settlement system and previously under GATT have facilitated their interpretation and application. For purposes of understanding the relevance of safeguard measures to digital trade, this section proceeds to examine safeguard measures and essential conditions that must be satisfied prior to the imposition of a safeguard measure. In particular, this section shall define safeguard measures; like and directly competitive products and services; serious injury or threat to serious injury; and increased quantities of imports.

Though relevant to this study, unforeseen developments as a requirement for applying safeguard measures is not discussed in this chapter but is examined in the fifth chapter of this study under the rules relevant to the application of safeguard measures. The justification for not including this discussion in this chapter is that unforeseen developments are dependent on concessions that have been negotiated as is currently the case with GATT obligations. No concessions on digital trade have been negotiated.

¹³⁷ Digital Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Ukraine, 11 May 2023, art 131(p).

¹³⁸ DEPA art 3.1.

Hence, unforeseen developments under the current rules does not apply to digital trade. If it did, construction of unforeseen developments isn't problematic but the rules surrounding their application to goods and services are and therefore informs the discussions in the fifth chapter of this study.

2.4.1 Definition of safeguard measures

The existing trade agreements do not expressly define 'safeguard measures'. Instead, safeguard measures are understood based on the conditions giving rise to their applications and the forms of safeguard measures. For instance, there is no express definition under the WTO Agreement on Safeguards. The Agreement on Safeguards points out that it applies to safeguard measures as understood under Article XIX of GATT.¹³⁹ A look at Article XIX of GATT also shows that an understanding of safeguard measures is derived from the conditions that must be established before an emergency measure is imposed.¹⁴⁰ These conditions are also put forth under the Agreement on Safeguards, in that safeguard measures are applied where it is established that:-

.....such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.¹⁴¹

As a result of the above interpretation and successive applications, 'safeguard measures' have grown to be understood as 'emergency actions with respect to increased imports of particular products, where such imports have caused or threaten to cause serious injury to the importing Member's domestic industry'.¹⁴² This definition has been replicated and adapted in several trade agreements that have been developed and in domestic legislations with safeguard measures provisions. A majority of them have taken a conditions approach to defining safeguard measures, as is the case under the WTO.

In addition, safeguard measures are understood based on the forms that they take, i.e. tariffs, quotas or a combination thereof.¹⁴³ The WTO discusses that safeguard

¹³⁹ Agreement on Safeguards art 1.

¹⁴⁰ GATT 1947 art XIX.1(a).

¹⁴¹ Agreement on Safeguards art 2.

¹⁴² WTO 'Technical Information on Safeguard Measures' [WTO | Safeguard measures - Technical Information](#) (accessed 11 July 2023).

¹⁴³ As above.

measures ‘take the form of suspension of concessions or obligations, can consist of quantitative import restrictions or of duty increases to higher than bound rates’.¹⁴⁴ Existing trade agreements and national legislations have therefore defined safeguard measures based on these forms. For instance, the Kenya Trade Remedies Act defines safeguard measures as ‘the temporary imposition of a tariff or quantitative restrictions or other necessary permissible measures to prevent or remedy serious injury and to facilitate adjustments of the concerned industry’.¹⁴⁵

Arising from the foregoing, therefore, this study contextualises the above understandings of safeguard measures to suit digital trade circumstances. Contextual analysis also extends to emergency safeguard measures, vaguely provided for under GATS.¹⁴⁶

2.4.2 Like and directly competitive products and services

The Agreement on Safeguards and Article XIX of GATT allow for the application of safeguard measures where import surges are causing or threatening to cause serious injury to domestic industries producing ‘like or directly competitive products’.¹⁴⁷ These agreements do not, however, define what constitutes ‘like or directly competitive products’. This sub-section proceeds to examine the interpretation and usage of product likeness, directly competitive products, services likeness and domestic industries under international trade. It will also seek to apply these concepts to digital trade.

2.4.2.1 Product likeness analysis

‘Like’ has been defined generally to mean ‘equal’, ‘identical’ and ‘products with similar qualities’.¹⁴⁸ Owing to the ambiguous nature in which ‘like products’ are used under GATT, it has generally been argued that ‘like products’ should be determined on a product-by-product basis.¹⁴⁹ To however minimize confusion on what constitutes ‘like

¹⁴⁴ WTO (n 142).

¹⁴⁵ Kenya Trade Remedies Act 32 of 2017 sec 2.

¹⁴⁶ GATS art X.

¹⁴⁷ Agreement on Safeguards art 2.1; GATT art XIX.1.

¹⁴⁸ See GATT Panel Report ‘*Spain – Tariff Treatment of Unroasted Coffee* (GD/106)’ para 4.5 See also GATT Panel Report ‘*Japan – Alcoholic Beverages* (GD/167)’ para 5.5.

¹⁴⁹ RE Hudec “Like Product”: The Difference in Meaning in GATT Articles I and III’ in T Cottier & P Mavroidis (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2000) 101-123.

products' the WTO Dispute Settlement Body and, previously, the GATT Council, have offered up a criterion for establishing the likeness of products.

A Report of the Working Party established by the GATT Council in 1968 to examine provisions on border tax put forth three characteristics of a 'like or similar product'.¹⁵⁰ The Report noted that for fair assessment purposes, the likeness of a product is to be assessed on a case-by-case basis.¹⁵¹ The Report called for an analysis of product likeness based on the end-uses of the product in a given market; consumers' habits and tastes; and the quality, nature and property of the product.¹⁵² It was, however, acknowledged that there was uncertainty as to what constitutes 'like or similar products'.¹⁵³ The three characteristics have been adopted in several GATT and WTO decisions, as examined below.

The product likeness characteristics were adopted in *Japan – SPF Dimension Lumber*.¹⁵⁴ This was a dispute involving Canada and Japan concerning the manner in which Japan applied tariffs on SPF dimension lumber from Canada. The case is premised on the most-favoured nation (MFN) principle as set out under Article 1:1 of GATT.¹⁵⁵ Canada sought the Panel's recommendations on whether or not Japan was according less favourable treatment to its SPF dimension lumber than it accorded to like products originating from other countries. Canada was aggrieved by Japan's tariff classification of dimension lumber. The Panel was therefore tasked with examining what constituted 'like products'. In its findings, the Panel put forth the following characteristics for 'like products': physical characteristics of the product; tariff classifications of the product; end use of the product; and consumer's perceptions about the product.¹⁵⁶

¹⁵⁰ Report by the Working Party on Border Tax Adjustments, L/3464, 20 November 1970, available at [3464.PDF \(wto.org\)](https://www.wto.org/Document/English/Trade_Agreements/Border_Tax_Adjustments_Report.pdf).

¹⁵¹ *Border Tax Adjustments* Report (n 150) para 18.

¹⁵² *Border Tax Adjustments* Report (n 150) para 18.

¹⁵³ *Border Tax Adjustments* Report (n 150) para 18.

¹⁵⁴ GATT Panel Report '*Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*' L/6470, 19 July 1989

¹⁵⁵ GATT Panel Report '*Japan - SPF Dimension Lumber*' para 1.1.

¹⁵⁶ GATT Panel Report '*Japan - SPF Dimension Lumber*' paras 3.40-3.53.

The Panel in *Japan – SPF Dimension Lumber* established that ‘like products’ connote ‘identical products’ and ‘products that have a substantial identical end use’.¹⁵⁷ The Panel went ahead to point out the factors that make up ‘like products’: the end-use of the product in the market; tastes and habits of consumers and the properties of a product.¹⁵⁸ It should however be observed that ‘like products’ could have a different meaning depending on the context.¹⁵⁹ Hence, these characteristics are not in themselves a conclusive way for establishing product likeness.

The products must have similar physical characteristics. Where the physical characteristics are different, the difference ought to be minor such that the difference ought not to rule out the finding that the products are ‘like’.¹⁶⁰ The Panel established that ‘minor differences in physical characteristics were not sufficient reason to allow for different tariff treatment’.¹⁶¹ Like products should have similar tariff classifications.¹⁶² The end-use or intended end-use of the products must be like.¹⁶³ Moreover, consumers’ perceptions about the product should be similar. The perceptions are characterised by trade patterns, use-habits and the price of the product. Such that, if these characteristics are similar then the products are like and if they are different then the products are different.¹⁶⁴

In *Japan - Alcoholic Beverages II*,¹⁶⁵ the Appellate Body (AB) noted that the Border Tax Adjustments Report set the basic approach for interpreting ‘like or similar products’.¹⁶⁶ It observed that the approach should be analysed on a case-by-case

¹⁵⁷ GATT Panel Report ‘*Japan - SPF Dimension Lumber*’ para 5.5 (d).

¹⁵⁸ GATT Panel Report ‘*Japan - SPF Dimension Lumber*’ para 5.6.

¹⁵⁹ See the history of drafting the GATT at United Nations Economic and Social Council ‘Preparatory Committee of the International Conference on Trade and Employment’ Committee II (22 November 1946) available at: <https://docs.wto.org/gattdocs/q/UN/EPCT/CII-65.PDF>. At page 2 it is stated that “like products” “had different meanings in different contexts of the Draft Charter”. “Like products” was therefore used without a precise definition. Based on the League of Nations Report as capture in the Preparatory texts, “like product” referred to “products that were practically identical to another product”.

¹⁶⁰ GATT Panel Report ‘*Japan - SPF Dimension Lumber*’ para 3.44.

¹⁶¹ GATT Panel Report ‘*Japan - SPF Dimension Lumber*’ para 3.44.

¹⁶² GATT Panel Report ‘*Japan - SPF Dimension Lumber*’ paras 3.48 & 3.55.

¹⁶³ GATT Panel Report ‘*Japan - SPF Dimension Lumber*’ para 3.50.

¹⁶⁴ GATT Panel Report ‘*Japan - SPF Dimension Lumber*’ para 3.52.

¹⁶⁵ Appellate Body Report ‘*Japan-Alcohol Beverages II*’ WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, available at [directdoc.aspx \(wto.org\)](https://directdoc.aspx(wto.org))

¹⁶⁶ Appellate Body Report ‘*Japan-Alcohol Beverages II*’ 20.

basis.¹⁶⁷ The AB noted that panels, in addition to taking into account the approach, should also apply the best judgment in assessing on a factual basis whether two products were 'like'. In this regard, there was no single definition of 'like'.¹⁶⁸

Arising from the foregoing cases, it is evident that the likeness of products is determined based on physical characteristics, tariff clarifications, end-uses and consumer perceptions about the products. While it is easier to establish the likeness of physically traded goods based on these characteristics, this is not the case with digitally traded data. There currently are no tariff classifications for digitally traded data. The likeness of digitally traded data can be assessed based on their digital characteristics, end-uses and consumers' perceptions about them. To understand the context in which safeguard measures are imposed on digitally traded data, digitally traded data from an importing Member State must be accorded similar treatment as domestically traded/produced digital data. Similarly, 'like' imported digital data from different countries must be accorded equal treatment.

2.4.2.2 Directly competitive or substitutable products

Under the Agreement on Safeguards, domestic industries producing 'like or directly competitive products' are investigated in assessing the impact of import surges.¹⁶⁹ The Appellate Body in *US – Lamb* observed that safeguard measures can only be imposed where imported products have a prejudicial effect on domestic industries dealing in 'like or directly competitive products'.¹⁷⁰ The products are thus first identified and then assessed as to whether or not they are 'like or directly competitive in relation to imported products'.¹⁷¹ This group of products is specific, in that the domestic producers of the products must be dealing in 'like or directly competitive products'.¹⁷²

In *US — Cotton Yarn*,¹⁷³ Pakistan lodged a complaint at the WTO Dispute Settlement Body (DSB) against transitional safeguard measures imposed by the US on

¹⁶⁷ Appellate Body Report '*Japan-Alcohol Beverages II*' 20.

¹⁶⁸ Appellate Body Report '*Japan-Alcohol Beverages II*' 20-21.

¹⁶⁹ Agreement on Safeguards art 2.1.

¹⁷⁰ Appellate Body Report '*US – Lamb*' paras 86-87.

¹⁷¹ Appellate Body Report '*US – Lamb*' para 84.

¹⁷² Appellate Body Report '*US – Lamb*' para 86.

¹⁷³ WT/DS192/AB/R, 8 October 2001, Report of the Appellate Body available at: [Microsoft Word -](#)

imports of combed cotton yarn from Pakistan.¹⁷⁴ The US presented a report showing that on investigation it was established that the yarn was causing or threatening to cause serious injury to domestic industries dealing in a like product.¹⁷⁵ Consultations between the US and Pakistan having failed, the US proceeded to impose safeguard measures. Pakistan lodged the complaint and the Panel made a determination in their favour. Aggrieved, the US lodged the appeal with the Appellate Body.¹⁷⁶ The Appellate Body observed that ‘competitive’ connotes the ‘capacity of a product to compete both in a current or a future situation’.¹⁷⁷ This is distinct from ‘competition’ and ‘being in actual competition’.¹⁷⁸ A competitive product has the potential to compete. Two products need not compete against each other to be considered ‘competitive’.¹⁷⁹

The Appellate Body in *US — Cotton Yarn* noted that ‘directly’ emphasises ‘the degree of proximity that must obtain in the competitive relationship between the products under comparison’.¹⁸⁰ Like products are more likely than not to be in a competitive relationship in the market. However, where a domestic product is not like in comparison to the imported product, the proximity of competitiveness could be direct or indirect. The more unlike two products are, the wider the indirect competitive relationship.¹⁸¹ ‘Directly’ therefore qualifies the degree of proximity of the competitive relationship, more particularly, when two products are unlike.¹⁸² Thus, safeguard measures do not extend to unlike products ‘which have only a remote or tenuous competitive relationship with the imported product’.¹⁸³

In addition to the foregoing, the Appellate Body interpreted what constitutes ‘directly competitive or substitutable products’ in *Korea — Alcoholic Beverages*.¹⁸⁴ The

[192ABR \(wto.org\)](#).

¹⁷⁴ Appellate Body Report ‘*US — Cotton Yarn*’ para 1.

¹⁷⁵ Appellate Body Report ‘*US — Cotton Yarn*’ para 2.

¹⁷⁶ Appellate Body Report ‘*US — Cotton Yarn*’ paras 3-6.

¹⁷⁷ Appellate Body Report ‘*US — Cotton Yarn*’ para 96.

¹⁷⁸ Appellate Body Report ‘*US — Cotton Yarn*’ para 96.

¹⁷⁹ Appellate Body Report ‘*US — Cotton Yarn*’ para 96.

¹⁸⁰ Appellate Body Report ‘*US — Cotton Yarn*’ para 97.

¹⁸¹ Appellate Body Report ‘*US — Cotton Yarn*’ para 98.

¹⁸² Appellate Body Report ‘*US — Cotton Yarn*’ para 98.

¹⁸³ Appellate Body Report ‘*US — Cotton Yarn*’ para 98.

¹⁸⁴ WT/DS75/AB/R., WT/DS84/AB/R., 18 January 1999, Report of the Appellate Body available at [Microsoft Word - 75abr.doc \(wto.org\)](#). In Appellate Body Report ‘*US — Cotton Yarn*’ para 94, the Appellate Body stated that its interpretation in Appellate Body Report ‘*Korea- Alcoholic Beverages*’

European Communities (EC) and the US lodged a complaint at the DSB against two Korean tax laws that were deemed discriminatory. The EC and the US argued that the measures accorded preferential tax treatment to Soju, a traditional Korean alcoholic beverage, compared to certain imported alcoholic beverages.¹⁸⁵ The issue at the core of the dispute was the meaning and use of 'directly competitive or substitutable products'.¹⁸⁶ On appeal, Korea argued that the Panel had misapplied and misinterpreted 'directly competitive or substitutable products' resulting in a finding against them.¹⁸⁷

The Appellate Body observed that 'directly competitive or substitutable' is used in the context of two products, i.e. one imported and another domestic product, that are in competition with each other or can be substituted in the marketplace.¹⁸⁸ The Appellate Body observed further that:-

....the wording of the term "directly competitive or substitutable" implies that the competitive relationship between products is not to be analysed exclusively by reference to current consumer preferences. In our view, the word "substitutable" indicates that the requisite relationship may exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, capable of being substituted for one another.¹⁸⁹

Hence, products that are 'interchangeable' or that offer 'alternative ways of satisfying particular needs or tastes' are considered directly competitive or substitutable.¹⁹⁰ It was further held that 'directly' connotes the proximity between the domestic and the imported products in the competitive relationship.¹⁹¹ In addition, while all like products are directly competitive or substitutable, not all directly competitive or substitutable products are like.¹⁹²

The Appellate Body in *Korea – Alcoholic Beverages* observed that all directly competitive or substitutable products were not strictly in relation to 'current instances of

was applicable to safeguard measures. That, much as the decision was premised on Article III:2 of GATT, it was still applicable to provisions on safeguard measures.

¹⁸⁵ Appellate Body Report '*Korea – Alcoholic Beverages*' para 2.

¹⁸⁶ Appellate Body Report '*Korea – Alcoholic Beverages*' para 4.

¹⁸⁷ Appellate Body Report '*Korea – Alcoholic Beverages*' para 4.

¹⁸⁸ Appellate Body Report '*Korea – Alcoholic Beverages*' para 114.

¹⁸⁹ Appellate Body Report '*Korea – Alcoholic Beverages*' para 114.

¹⁹⁰ Appellate Body Report '*Korea – Alcoholic Beverages*' para 115.

¹⁹¹ Appellate Body Report '*Korea – Alcoholic Beverages*' para 116.

¹⁹² Appellate Body Report '*Korea – Alcoholic Beverages*' para 118.

substitution’ as consumer behaviours could be influenced.¹⁹³ Instead, latent demand, which could result in price changes, should also be examined in some cases.¹⁹⁴ The AB further noted that it was relevant to consider the ‘maintenance of equality of competitive conditions for imported and domestic products’.¹⁹⁵ On a case-by-case basis, it may be necessary to evaluate consumer responsiveness to the product in different markets.¹⁹⁶ Thus, in assessing directly competitive or substitutable products, the capacity of the products to compete is examined. In so doing, there should be a certain degree of proximity in the marketplace so as to establish a competitive relationship. In addition, the products must be interchangeable. More importantly, both consumer behaviours and latent demand show whether or not products are directly competitive. These elements that apply to trade goods will for purposes of this study be contextualised to digital data. Such that, in assessing whether digital data is directly competitive or substitutable, their capacity to compete and degree of proximity are considered. The more unlike two sets of data are, the wider the indirect competitive relationship. In addition, the direct competitiveness of data is assessed based on latent demand and consumer behaviour. Lastly, the digital data must be interchangeable.

2.4.2.3 Services likeness analysis

GATS necessitates equal treatment of ‘like services’. There is however no single definition of ‘like services’. The context in which it is used under GATS is also vague. The lack of a definition of ‘like services’ is attributed to its intangible form, the existence of different modes of supply, use of like services and like services suppliers amongst other reasons.¹⁹⁷ It is further argued that an interpretation of ‘like services’ is more likely than not to give rise to further questions, hence, bringing about uncertainty in the interpretation.¹⁹⁸

¹⁹³ Appellate Body Report ‘*Korea – Alcoholic Beverages*’ para 120.

¹⁹⁴ Appellate Body Report ‘*Korea – Alcoholic Beverages*’ paras 120 & 121.

¹⁹⁵ Appellate Body Report ‘*Korea – Alcoholic Beverages*’ para 127.

¹⁹⁶ Appellate Body Report ‘*Korea- Alcoholic Beverages*’ para 137.

¹⁹⁷ World Trade Organization Economic Research and Statistics Division ‘Determining “likeness” under the GATS: Squaring the circle?’ Staff Working Paper ERSD-2006-08 (2006), available at https://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf (‘WTO Staff Working Paper’) 2.

¹⁹⁸ WTO Staff Working Paper (n 197) 2.

GATS Article XVII requires that services and service suppliers from a Member be accorded no less favourable treatment than is accorded to like domestic services or service suppliers. Unlike under GATT which is limited to 'like products', likeness under GATS is two-fold; first, the service must be like, and second, the suppliers of the service must be like.¹⁹⁹ GATS defines 'services' as all forms of services with the exclusion of services supplied under governmental authority.²⁰⁰ 'Service supplier' on the other hand is 'any person that supplies a service'.²⁰¹ The person could be a 'natural' or a 'juridical' person - a legal entity.²⁰² Going by these definitions alone, it is evident that ascertaining likeness in the case of services and service supply is in itself challenging because of their very broad nature. The party alleging the existence of a like service has a burden of showing that the like service exists.²⁰³

In *EC — Bananas III*,²⁰⁴ 'nature' and 'characteristics' were used to identify 'like services' on an MFN basis.²⁰⁵ 'End-uses' and 'consumer tastes and habits' have been construed to be the most closely connected factors in determining the likeness of a service.²⁰⁶ End-uses are assessed by whether or not the service or service supplier performs a similar function. Consumer habits and tastes on the other hand examine whether two services are substitutable, such that one service can be chosen over another service.²⁰⁷ This is similarly the case with a service supplier.²⁰⁸ Interpretation of what constitutes like service and like service suppliers across the four modes of services however remains a big challenge.

¹⁹⁹ United Nations Conference on Trade and Development 'Dispute Settlement: World Trade Organization 3.13 GATS' (2003) 14, available at: https://unctad.org/system/files/official-document/edmmisc232add31_en.pdf.

²⁰⁰ GATS art I.3(b).

²⁰¹ GATS art XXVIII(g).

²⁰² GATS art XXVIII(j)-(o).

²⁰³ WTO Staff Working Paper (n 197) 5.

²⁰⁴ European Communities – Regime for the Importation, Sale and Distribution of Bananas (Complaint by the United States), Report of the Panel, WT/DS27/R/USA, 22 May 1997, available at [directdoc.aspx \(wto.org\)](https://www.wto.org/Document/DocId/3679.htm).

²⁰⁵ Panel Report '*EC — Bananas III*' para 7.322.

²⁰⁶ WTO Staff Working Paper (n 197) 21.

²⁰⁷ WTO Staff Working Paper (n 197) 22.

²⁰⁸ As above.

The foregoing challenges in interpreting ‘like services’ and ‘like service supply’ under GATS pose a challenge to the interpretation of ‘like digitally traded services’. The characteristics, the form of digital service, consumer perception and end uses might be relevant in understanding ‘like digital service’. To this extent, it is necessary to establish that the service performs a similar function as another service for it to be considered to be like. The service provider should also provide like services. Additionally, the digital service must be substitutable with another like digital service. These thresholds are very high to meet considering the platform under which these services are delivered and consumed. A case-by-case analysis of like services and like service providers would be necessary in the case of digitally traded services. Moreover, the burden of proving that a like digital service does exist rests on whoever so alleges.

2.4.2.4 Definition of domestic industries

The Agreement on Safeguards defines a ‘domestic industry’ as:

...producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.²⁰⁹

The above definition was discussed at length by the Appellate Body in *US – Lamb*,²¹⁰ where it observed that the definition has two elements, first, producers and second, ‘like or directly competitive products’.²¹¹ Producers bring things into existence. The producers, however, must be dealing in a like or directly competitive product.²¹² Products that fall outside this degree of proximity are excluded from the definition of a domestic industry. Thus, only specific products inform the definition of a domestic industry and ultimately, the imposition of a safeguard measure.²¹³ The Appellate Body noted further that the scope of a domestic industry is determined based on whether or not the product is ‘like or directly competitive’ in comparison to the imported product.²¹⁴ More

²⁰⁹ Agreement on Safeguards art 4.1(c).

²¹⁰ United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001, available at [Microsoft Word - 178ABR.doc \(wto.org\)](https://www.wto.org/English/TradeDisputes/DS177/US_Lamb/US_Lamb_ABR.doc).

²¹¹ Appellate Body Report ‘*US – Lamb*’ para 84.

²¹² Appellate Body Report ‘*US – Lamb*’ para 84.

²¹³ Appellate Body Report ‘*US – Lamb*’ para 86.

²¹⁴ Appellate Body Report ‘*US – Lamb*’ para 87.

importantly, the input and the end-product must be like or directly competitive for it to fall within the definition of a domestic industry under the Agreement on Safeguards.²¹⁵

In *US — Cotton Yarn*, the US based its imposition of a quantitative restriction on Pakistan's yarn on investigations it conducted which showed that Pakistan yarn were causing or threatening to cause serious damage to US domestic industries.²¹⁶ One of the issues for determination, was the definition of a domestic industry.²¹⁷ Pakistan argued that the US definition of domestic industry under its investigation report failed to factor in all domestic industries producing yarn, thus, the investigations were inconclusive.²¹⁸ The US definition had excluded vertically integrated fabric producers dealing in yarn production.²¹⁹ The US argued that its definition was based on whether the domestic industry was dealing in like or directly competitive products. The US stated that 'yarn sold on the merchant market and yarn produced by vertically integrated fabric producers for their own internal consumption are like, but they are not directly competitive with each other.' Hence, the distinction in the definition.²²⁰ In the Report, the Appellate Body stated that:

The definition of the domestic industry must be product-oriented and not producer-oriented, and that the definition must be based on the products produced by the domestic industry which are to be compared with the imported product in terms of their being like or directly competitive.²²¹

The Appellate Body stated further that 'producing' is in relation to production for commercial purposes. It could not be interpreted to mean production for sale in any other part of the market or merchant. In addition, the Appellate Body observed that 'producing' 'cannot be given a different or a qualified meaning on the basis of what a domestic producer chooses to do with its product.'²²² Thus, in determining a domestic industry, 'production' is primarily considered and not the uses of the product.

²¹⁵ Appellate Body Report '*US — Lamb*' para 90.

²¹⁶ Appellate Body Report '*US — Cotton Yarn*' para 3.

²¹⁷ Appellate Body Report '*US — Cotton Yarn*' para 61.

²¹⁸ Appellate Body Report '*US — Cotton Yarn*' para 82.

²¹⁹ Appellate Body Report '*US — Cotton Yarn*' paras 82 & 83.

²²⁰ Appellate Body Report '*US — Cotton Yarn*' para 84.

²²¹ Appellate Body Report '*US — Cotton Yarn*' para 86.

²²² Appellate Body Report '*US — Cotton Yarn*' para 87.

Thus, arising from the foregoing and for purposes of this study, two elements must be demonstrated in determining a domestic industry dealing in a like or directly competitive data, in digital trade. First, data must be created and secondly, the creation must be in relation to a like or directly competitive data. The input and end-data must be like or directly competitive and any such production should be for commercial purposes. Lastly, the definition of ‘domestic industry’ under the Agreement on Safeguards could be applied to digital trade with necessary modifications.

To sum up the above arguments on like and directly competitive products and services, contextual application of safeguard measures rules to digital trade necessitates that surges in digital trade will be measured on an imported digital service or data that is ‘like or directly competitive’ to a digital service or data provided by domestic industries or platforms. Thus, the above discussions will inform this study’s understanding and use of ‘like and directly competitive’ in assessing the application of safeguard measures to digital trade.

2.4.3 Serious injury or threat to serious injury

The Agreement on Safeguard defines ‘serious injury’ as the ‘significant overall impairment in the position of a domestic industry’²²³ and ‘threat of serious injury’ as serious injury that is ‘imminent’.²²⁴ In determining whether the increase in quantities of imports has caused serious injury or threatens to cause serious injury to a domestic industry, certain factors are analysed. In particular, the Agreement on Safeguards puts forth the following factors:-

..the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.²²⁵

The above factors were considered to be non-exhaustive by the Appellate Body in *Argentina – Footwear (EC)*.²²⁶ It was stated that the ‘overall position’ of the domestic industry must be examined in light of the factors to determine whether there has been ‘a

²²³ Agreement on Safeguards art 4.1(a).

²²⁴ Agreement on Safeguards art 4.1(b).

²²⁵ Agreement on Safeguards art 4.2 (a).

²²⁶ *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R, 14 December 1999, available at [Microsoft Word - 121ABR.doc \(wto.org\)](https://www.wto.org/Document/English/TradeDisputes/DS121/AB/R.htm).

significant overall impairment' in the position of a domestic industry.²²⁷ The Appellate Body stated that the weight to be given to each of these factors may vary depending on each case. The factors therefore should be analysed on a case-by-case basis.²²⁸ In addition, each factor need not be declining, on evaluation. One factor may not be declining but there could be a 'significant overall impairment' as a result of a decline of the other factors. This is sufficient to establish a serious injury.²²⁹

In *US — Cotton Yarn*, Pakistan argued that the US had not investigated yarn from Mexico to ascertain whether it was also causing or threatening to cause serious damage to US domestic industries.²³⁰ It was established that yarn imports to the US also originated from Mexico. In its decision, the Panel observed that the US had picked which Member's imports to investigate and left out others. It stated that the attribution of serious injury or threat of serious injury could not be made based on imports from some Members but must be made in respect of all Members.²³¹

While the Appellate Body upheld the Panel's decision, its basis for determination was different.²³² The Appellate Body stated that where injury is attributed to imports of one Member, then no other Member can take the responsibility, as it will be tantamount to 'misattribution' of injury. In this case, Mexico could not be faulted for the injury caused by Pakistan imports.²³³ The Appellate Body notes that there should be proportionality in assessing and attributing injury and in no instance, is a Member to take total responsibility unless it has alone caused the serious injury.²³⁴ In addition, AB noted that a comparative analysis must be made on imports of all Members to ascertain their effects.²³⁵ In conclusion, the AB held that imports from Mexico have also increased substantially and sharply, as was the case with Pakistan imports. Hence, a comparative analysis should have been done by the US to ascertain the effects of Mexico's imports.²³⁶

²²⁷ Appellate Body Report '*Argentina — Footwear (EC)*' para 139.

²²⁸ Appellate Body Report '*Argentina — Footwear (EC)*' para 139.

²²⁹ Appellate Body Report '*Argentina — Footwear (EC)*' para 139.

²³⁰ Appellate Body Report '*US — Cotton Yarn*' para 106.

²³¹ Appellate Body Report '*US — Cotton Yarn*' para 107.

²³² Appellate Body Report '*US — Cotton Yarn*' para 126.

²³³ Appellate Body Report '*US — Cotton Yarn*' para 119.

²³⁴ Appellate Body Report '*US — Cotton Yarn*' para 119.

²³⁵ Appellate Body Report '*US — Cotton Yarn*' paras 121-124.

²³⁶ Appellate Body Report '*US — Cotton Yarn*' paras 125 & 126.

In *US — Wheat Gluten*,²³⁷ the Appellate Body noted that in establishing serious injury, the investigating authority must carry out full investigations and consider all factors.²³⁸ If there is an ‘other factor’ that may be the cause of the serious injury, it must be investigated. All factors must be considered and not only those that are ‘related exclusively to increased imports’.²³⁹

Subsequently, this study seeks to examine the applicability of the factors that justify serious injury as set out under the Agreement on Safeguards, to digital trade. Such factors are considered in totality in assessing whether or not there has been significant overall impairment in the position of a domestic industry or platform or whether there is an eminent serious injury. During investigations, all factors including ‘other factors’ and imports from all Members are investigated to fulfil the requirements for establishing serious injury.

2.4.4 Increased quantities of imports

In addition to the requirements examined previously, an application of safeguard measures is preceded by proof that there are ‘increased quantities of imports’ in absolute terms or relative to domestic production.²⁴⁰ The Appellate Body in *Argentina – Footwear (EC)* agreed with the Panel that the demonstration of an increase in imports should be in relation to increased quantities of imports in a manner that causes or threatens to cause serious injury and not a mere increase in imports.²⁴¹ For an increase in imports to arise, it must be shown that the imports are in increased quantities, either in absolute terms or relative to production in the importing country. Secondly, both the ‘amount’ and the ‘rate’ of imports must have increased.²⁴² Additionally, before a safeguard measure may be imposed, it must be shown that imports increased ‘under such conditions’ as to cause or threaten serious injury.²⁴³ Thus, an investigation should not just show that there was an

²³⁷ United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Appellate Body, WT/DS166/AB/R, 22 December 2000, available at: [WTO | Appellate Body Repertory of Reports and Awards 1995-2013 - Safeguards Agreement](#).

²³⁸ Appellate Body Report ‘*US — Wheat Gluten*’ para 55.

²³⁹ Appellate Body Report ‘*US — Wheat Gluten*’ para 72.

²⁴⁰ Agreement on Safeguards art 2.1.

²⁴¹ Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 129 & 130.

²⁴² Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 129.

²⁴³ The words “under such conditions” under the Agreement on Safeguards has been construed not to impose an additional obligation for applying safeguard measures. It is therefore not an essential

increase in imports, instead, it must be shown that there were ‘such increased quantities’ of imports so as to cause or threaten to cause serious injury to a domestic industry’.

In *US – Steel Safeguards*,²⁴⁴ the Appellate Body noted that ‘such’ appearing before ‘increased quantities’ under the Agreement on Safeguards, ‘clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof.’²⁴⁵ It observed that investigating authorities must assess whether the increase is recent enough, sudden enough, sharp enough and significant enough.²⁴⁶ The Appellate Body also held in *Argentina – Footwear (EC)* that any increase in imports must have been sudden, sharp, recent and significant.²⁴⁷ Expressly, the Appellate Body stated that:

...the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".²⁴⁸

In *Argentina – Footwear (EC)* the Panel observed that cognisance must be taken of the trends during the investigation period, that is, an authority cannot simply rely on an end-point analysis, but must critically analyse the intervening trends, especially where imports decreased during the last year (or more) of the investigation period.²⁴⁹ The Panel in *Argentina – Preserved Peaches* observed that the overall trends during the period of analysis and not only the data from the most recent trends should be considered.²⁵⁰ The increase should also be ‘in such quantities as to cause injury’ and not ‘just any increase’.²⁵¹

With three consecutive annual declines in imports in *Argentina – Footwear (EC)*, the Panel observed that there was no basis to find that imports had increased merely

element in analysing whether or not there has been increased in quantities of imports.

https://www.wto.org/english/res_e/publications_e/ai17_e/safeguards_art2_jur.pdf.

²⁴⁴ United States - Safeguard Measures on Imports of Certain Steel Products, Report of the Appellate Body, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, 10 November 2003, available at [Microsoft Word - 259ABR.doc \(wto.org\)](#).

²⁴⁵ Appellate Body Report ‘*US – Steel Safeguards (EC)*’ para 346.

²⁴⁶ Appellate Body Report ‘*US – Steel Safeguards (EC)*’ para 346.

²⁴⁷ Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 130.

²⁴⁸ Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 131.

²⁴⁹ Panel Report ‘*Argentina – Footwear (EC)*’ para 8.159.

²⁵⁰ Panel Report ‘*Argentina – Preserved Peaches*’ para 7.64.

²⁵¹ Panel Report ‘*Argentina – Footwear (EC)*’ paras 8.161-8.162.

because imports at the end of the 5-year period were higher than at the start thereof.²⁵² Thus, it is not sufficient to just show that imports this year increased more than last year or five years ago.²⁵³ Therefore, neither an increase in imports in the past two years nor a decrease in five years, mathematically, is determinative of an increase in imports.²⁵⁴ Instead, the increase in imports must be both quantitative and qualitative.²⁵⁵ Qualitative increase in imports is assessed based on 'rate and amount' of the increase in imports.²⁵⁶ The rate is determined by the number of transactions while amount is determined by the volume of imports.²⁵⁷

The base year for the determination of whether imports increased must also be selected in an objective manner.²⁵⁸ The Panel in *Argentina — Preserved Peaches* observed that neither Article XIX:1(a) GATT nor Article 2.1 of the Agreement on Safeguards set out the minimum period for investigations to determine an increase in imports.²⁵⁹ The period should however be long enough to allow for determination of the trends of imports and injury. Brink notes that the period of investigation should be at least three years.²⁶⁰ Some countries such as the United States use five years. Significantly, the selected period should be continuous and should not artificially generate a finding of injury.²⁶¹

In *US — Steel Safeguards*, the Appellate Body held that an increase in imports must be established in an unambiguous and reasoned manner and without leaving any doubt that the decision to apply the measure has a direct link with the increase in imports, that is, that the increase in imports, 'alone satisfy the requirements for the application of a safeguard measure.'²⁶² All relevant factors must therefore be evaluated. The investigation

²⁵² Panel Report '*Argentina — Footwear (EC)*' paras 8.154, 8.155 & 8.157.

²⁵³ Appellate Body Report '*Argentina — Footwear (EC)*' para 131.

²⁵⁴ Panel Report '*Argentina — Preserved Peaches*' para 7.52.

²⁵⁵ Panel Report '*Argentina — Preserved Peaches*' para 7.54.

²⁵⁶ Panel Report '*Argentina — Preserved Peaches*' para 7.55.

²⁵⁷ G Brink 'Safeguards Substance: Increased Imports' Trade Remedies Training Material 10.

²⁵⁸ Panel Report '*Argentina — Footwear (EC)*' para 8.164.

²⁵⁹ Panel Report '*Argentina — Preserved Peaches*' paras 7.50 & 7.52.

²⁶⁰ G Brink 'Safeguards Substance: Period of Investigation and Product Scope' Trade Remedies Training Material 2-4.

²⁶¹ As above.

²⁶² Appellate Body Report '*US — Steel Safeguards*' para 472.

must objectively justify consistency between increased imports and serious injury.²⁶³ Thus, there must be a causal link between the increase in quantities of imports and the serious injury caused or threatened to be caused to a domestic industry.

Significantly, any temporary decline in imports during the investigation period must be evaluated. This creates a mixed scenario, of increased and declined imports which impacts an analysis of 'increased quantities of imports'. The Panel in *Argentina – Footwear (EC)* observed that where such trends are witnessed an analysis must be made to ascertain whether the decline is temporary or long-term.²⁶⁴ The Panel in *Argentina — Preserved Peaches* observed that data from the most recent were isolated from the rest of the data, thus, a misleading finding of increased imports was found.²⁶⁵

Thus, the above essential elements of 'increased quantities of imports' shall be adopted in assessing digital trade import surges. As discussed, in comparison to domestic creation or production of data or services, there must be increased quantities of imported data or services. The increase should cause or threaten to cause serious injury. As highlighted by the Appellate Body, any increase in imports must have been sudden, sharp, recent and significant. The imports should also increase quantitatively and qualitatively. Significantly, all relevant factors and trends must be evaluated during the period of investigations.

2.5 Conclusion

In conclusion, this chapter has in two parts examined key terms and concepts applicable to digital trade and safeguard measures. In the first part, digital trade concepts have been explored. In particular, this chapter extensively examined the existing definitions of e-commerce and digital trade. It noted that, while these terms co-relate, the focus of this study is digital trade as it relates to goods and services that are ordered, paid for, and delivered digitally. This part also examined concepts relevant to or used interchangeably with digital trade. It noted that electronic transactions have in some instances been

²⁶³ Panel Report '*Argentina – Footwear (EC)*' paras 8.279-8.280. See also Panel Report '*US – Wheat Gluten*' paras 9.1-9.2; and '*US – Lamb*' para 8.1.

²⁶⁴ Panel Report '*Argentina – Footwear (EC)*' para 8.160.

²⁶⁵ Panel Report '*Argentina — Preserved Peaches*' para 7.78.

defined to connote e-commerce and, in other instances, contain digital trade aspects of trade taking place wholly digitally.

The first part of this study compared digital data and digital content. This study noted their correlation and similar uses. Other terms that have been explored are digital product versus electronic product; digital service versus electronic service; cross-border data flows and electronic transmissions. The study discussed that there is no inconsistency as to what constitutes cross-border data flows, instead, the conditions for the transfer of data across borders differ. The study noted that there is no precise definition of electronic transmission but is under consideration in ongoing discussions on e-commerce at the WTO.

The second part of this chapter explored key concepts relevant to safeguard measures. It noted that there is no specific definition of a safeguard measure, instead, a definition has been developed out of the conditions that allow for the application and the forms of safeguard measures. This part explored the interpretation and use of conditions that must be met prior to the application of a safeguard measure. In particular, like and directly competitive goods and services were examined. Under this, product likeness, directly competitive or substitutable products, service likeness, and the definition of a domestic industry were examined. In addition, this part assessed the definitions of serious injury or threat thereof and increased quantities of imports. As noted, these concepts have either been defined under the Agreement on Safeguards or the GATT and WTO dispute settlement systems in numerous disputes cited above that have interpreted the provisions and given the context for their use. These concepts as pointed out are contextualised to safeguard measures applicable to digital trade in this study

The next chapter of this study shall interrogate digital trade rules under international economic law. Herein, the development of digital trade at the WTO and other international organisations shall be examined. Digital trade rules in regional agreements and groupings from outside Africa are also examined.

CHAPTER THREE:

ANALYSIS OF DIGITAL TRADE UNDER INTERNATIONAL TRADE LAW

3.1 Introduction

Digital trade has transformed international trade in goods and services, such that it has reduced the cost of international trade and affected the nature of goods and services traded digitally.¹ The WTO notes for instance that the cost of international trade between 1996 and 2014 declined by fifteen percent as a result of digital trade.² The WTO further projects a growth rate of between 31 and 34 percent for digital trade by 2030.³ While there is an increase in digital trade across the world, and as discussed in the previous chapter, there is no consensus on what constitutes digital trade in goods and services. There is also no multilateral agreement on digital trade either at the WTO or elsewhere. This, therefore, gives discretion to states and WTO Members to define and formulate digital trade provisions in domestic laws and trade agreements, based on their interests and preferences.

Despite the momentum that digital trade has gained, there has been a stalemate in negotiations on digital trade/e-commerce at the WTO and the Work Programme has made minimal progress. At the Ministerial Conferences that followed,⁴ e-commerce was mentioned, albeit in passing and with a lot of repetition, without progress, and was more

¹ WTO 'The Future of World Trade: How Digital Technologies are Transforming Global Commerce' World Trade Report 2018, available at https://www.wto.org/english/res_e/publications_e/world_trade_report18_e.pdf, 3.

² WTO World Trade Report 2018 (n 1) 5.

³ WTO World Trade Report 2018 (n 1) 5.

⁴ See 2001 Ministerial Conference at World Trade Organization 'Ministerial Declaration' adopted on 14 November 2001, WT/MIN(01)/DEC/1 of 20 November 2001, para 34; 2003 Ministerial Conference at World Trade Organization Work Program on Electronic Commerce 'Dedicated Discussions under the auspices of the General Council on Cross-Cutting Issues related to Electronic Commerce' Draft Report to the 24-25 July Meeting of the General Council, WT/GC/W/505 of 21 July 2003; 2005 Ministerial Conference at World Trade Organization 'DOHA WORK PROGRAMME Ministerial Declaration Adopted on 18 December 2005' WT/MIN(05)/DEC of 22 December 2005, para 1; 2009 Ministerial Conference at World Trade Organization Seventh Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 8, 13, 22 and 27 October and 2, 4 and 6 November 2009 'Summary of the Secretariat of the Issues Raised', WT/GC/W/614 of 27 November 2009, page 3; 2011 Ministerial Conference at World Trade Organization Work Programme on Electronic Commerce 'Decision of 17 December 2011' WT/L/843 of 19 December 2011; 2015 Ministerial Conference at World Trade Organization Item 4 – Work Programme on Electronic Commerce – Review of Progress 'Report of Ambassador Alfredo Suescum – Friend of the Chair, WT/GC/W/721 of 1 August 2016, para 1.1.

inclined towards the extension of the moratorium on customs duties on electronic transmissions.⁵ Owing to the stalemate in negotiations on digital trade at the WTO, a group of WTO Members came together in 2017 to form the Joint Statement Initiative on Electronic Commerce with the objective of re-igniting discussions on digital trade with the hope that it would result in negotiations by consensus at the WTO and, ultimately, develop a multilateral agreement on digital trade. The work of the Work Programme on E-commerce, the moratorium on the application of customs duties on electronic transmissions and mandates of the Joint Statement Initiative on Electronic Commerce inform the discussions in this chapter.

There is no consensus at the multilateral level on whether digital trade is a good or service or both. Zheng examines that digital trade is used to move digital data across borders as opposed to unfinished products.⁶ According to him, 'digital data' is dominant in 'digital trade'.⁷ Going by the way the WTO laws are set up one cannot out-rightly categorise digital trade as either a good or service.⁸ Zheng explains this in several fronts. First, in terms of tangibility, digital products are 'more tangible than traditional services and less tangible than traditional goods'.⁹ Secondly, there is a challenge of the classification of digital products for the reason that an attempt to classify them as a service raises issues of product likeness since some of the digital products have 'physical counterparts'. This is similarly the case with classification as goods.¹⁰ Thus, Zheng notes that there is no 'one-size-fits-all' way to classify digital products.¹¹ There are also practicable challenges in the application of WTO laws on goods and services.¹² All of these stem from the lack of a clear framework for digital trade or e-commerce. In this regard, WTO agreements relevant to e-commerce are analysed in this chapter.

⁵ W Zheng 'The Digital Challenge to International Trade Law' (2020) 52(2) *New York University Journal of International Law and Politics* 539, 576.

⁶ Zheng (n 5) 541.

⁷ Zheng (n 5) 541.

⁸ Zheng (n 5) 545.

⁹ Zheng (n 5) 545.

¹⁰ Zheng (n 5) 545-546. To understand this further, look at the submissions by the United States of America (US) and the European Communities in WTO 'Work Programme on Electronic Commerce' WT/GC/16 (12 February 1999); and WTO 'Preparation for the 1999 Ministerial Conference-WTO Work Programme on Electronic Commerce' WT/GC/W/306 (9 August 1999)

¹¹ Zheng (n 5) 545.

¹² Zheng (n 5) 547.

In addition to the initiatives at the WTO, this chapter explores some of the existing free trade agreements that contain digital trade provisions. As will be witnessed later in this chapter, trade agreements currently contain the most comprehensive rules on digital trade. This chapter further explores e-commerce developments by select global institutions outside the WTO. These discussions on the growth of digital trade at the global level are relevant to Africa because African countries are, first, members to these institutions under review, for instance, 44 African countries are Members of the WTO; second, parties to bilateral agreements at the global scale; and third, affected either directly or indirectly by decisions made on digital trade in global settings either collectively or selectively by states.

Building on the foregoing discussions and the discussions put forth in the second chapter of this study, this chapter evaluates digital trade or e-commerce development under international trade law. This is done in three major sections. The first section examines the growth of digital trade under the WTO. The second section discusses digital trade provisions in regional and digital trade agreements. The third section analyses the growth of digital trade in select global institutions. The chapter thereafter concludes.

3.2 The growth of e-commerce or digital trade at the World Trade Organization

During the Uruguay Round of the WTO, there was little digital trade.¹³ Thus, at the time of completion of negotiations of WTO agreements in 1994, very little consideration was given to digital trade.¹⁴ Digital trade was recognised narrowly in two sectors; financial services and telecommunications.¹⁵ E-commerce is mentioned in the WTO Understanding on Commitments in Financial Services, wherein WTO Members are prohibited from taking measures that prevent data transfer through 'electronic means'.¹⁶ Further, the Annex of Telecommunications speaks to digital trade in terms of WTO Members ensuring that other Members' services are supplied through means of public

¹³ TP Stewart 'Current Thoughts on Trade' <https://currentthoughtsontrade.com/category/electronic-commerce-and-digital-trade/> (accessed 22 August 2021).

¹⁴ As above.

¹⁵ Zheng (n 5) 554.

¹⁶ WTO 'Understanding on Commitments in Financial Services' available at https://www.wto.org/english/tratop_e/serv_e/21-fin_e.htm, para 8.

telecommunications transport networks and services and information contained in databases can be accessed.¹⁷

The journey towards examining digital trade at the WTO officially began at the MC2 in 1998, where WTO Members agreed to constitute the Work Programme on E-commerce to examine trade-related aspects of e-commerce.¹⁸ During the May 1998 WTO MC in Geneva, opportunities for global trade brought about by electronic commerce were officially recognized under the WTO framework.¹⁹ The General Council of the WTO was tasked with exploring trade issues related to electronic commerce and report on their findings to the Ministers at the subsequent Ministerial Conference.²⁰ WTO Members were asked to refrain from imposing customs duties on electronic transactions.²¹ The WTO Work Programme on Electronic Commerce of 1998 mandated the General Council of the WTO to continuously review electronic commerce issues and pay particular emphasis on trade aspects related to it.²²

During the MC4 in 2001 in Doha, the challenges and opportunities brought about by electronic commerce were identified.²³ It was deemed necessary to create and maintain an environment to enhance electronic commerce. WTO Members were again asked not to impose customs duties on electronic commerce transactions. The General Council was also tasked with monitoring and reporting on electronic commerce.²⁴

At the 2003 MC in Cancun, the General Council was called upon to identify institutions that were best suited to handle the Work Programme on Electronic Commerce.²⁵ It was further obligated to oversee the review of trade-related issues of

¹⁷ See WTO Analytical Index 'GATS-Annex on Telecommunications (Jurisprudence)' available at https://www.wto.org/english/res_e/publications_e/ai17_e/gats_anntelecommunications_jur.pdf, para 5(c).

¹⁸ World Trade Organization 'Work Programme on Electronic Commerce' Adopted by the General Council on 25 September 1998, WT/L/274 (20 September 1998), para. 1.3.

¹⁹ World Trade Organization 'Declaration of Global Electronic Commerce' adopted 20 May 1998, WT/MIN(98)/DEC/2 of 25 May 1998.

²⁰ WTO 'WT/MIN(98)/DEC/2' (n 19).

²¹ WTO 'WT/MIN(98)/DEC/2' (n 19).

²² Para 1.2.

²³ World Trade Organization 'Ministerial Declaration' adopted on 14 November 2001, WT/MIN(01)/DEC/1 of 20 November 2001 paras 5 & 34.

²⁴ WTO 'WT/MIN(01)/DEC/1' (n 23) para 34.

²⁵ World Trade Organization Work Program on Electronic Commerce 'Dedicated Discussions under the auspices of the General Council on Cross-Cutting Issues related to Electronic Commerce' Draft

electronic commerce.²⁶ Issues relating to e-commerce classification, development, fiscal implications of e-commerce, customs duties imposition on electronic commerce, applicable law and jurisdiction, competition and general objectives applicable to electronic commerce, were identified.²⁷ There were proposals to replace the term ‘electronic transmissions’ in the customs duties moratorium with the term ‘products transmitted electronically.’²⁸ This proposal was later reaffirmed by the United States (US) at a General Council meeting in December 2005.²⁹

The WTO bodies charged with the mandate of the Work Programme on Electronic Commerce are the Council for Trade in Goods, the Council for Trade in Services, the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Committee for Trade and Development.³⁰ The Work Programme on Electronic Commerce mandated the Council for Trade in Services to ‘examine and report’ on electronic commerce that falls within the framework of the General Agreement on Trade in Services (GATS).³¹ It was in particular required to explore issues related to the Most-Favoured Nation (MFN), National Treatment (NT), market access, its scope, transparency, competition, participation by developing countries and recognition, standards and domestic regulation, customs and classifications.³²

The Council for Trade in Goods was obligated to examine electronic commerce related to the General Agreement on Tariffs and Trade (GATT) and ‘multilateral trade agreements’ provided for under the Agreement Establishing the WTO (WTO

²⁶ Report to the 24-25 July Meeting of the General Council, WT/GC/W/505 of 21 July 2003.

²⁷ WTO ‘WT/GC/W/505’ (n 25) para 2.

²⁸ WTO ‘WT/GC/W/505’ (n 25) para 5.

²⁹ World Trade Organization Sixth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 7 and 21 November 2005 ‘Summary by the Secretariat of the Issues Raised’, WT/GC/W/556 of 30 November 2005, para 1.

³⁰ World Trade Organization Work Programme on Electronic Commerce ‘Dedicated Discussion under the auspices of the General Council on Cross-Cutting Issues related to Electronic Commerce’ Report to the 1-2 December 2005 meeting of the General Council, WT/GC/W/555 of 21 November 2005, para 11.

³¹ World Trade Organization Item 6 – Work Programme on Electronic Commerce – Review of Progress ‘Report by Ambassador Alfredo Suescum – Friend of the Chair’, WT/GC/W/701 of 24 July 2015 Para 1.3.

³² WTO ‘WT/L/274’ (n 18) para 2.1.

WTO ‘WT/L/274’ (n 18) para 2.1.

Agreement).³³ This Council in particular was called upon to explore issues related to market access, standards, rules of origin, classifications, and customs duties.³⁴ The Council for TRIPS was tasked with examining electronic commerce issues related to intellectual property.³⁵ Issues related to access to technology, new technologies, trademarks, copyright and related rights recognition and protection were to be examined.³⁶ The Committee on Trade and Development was tasked with examining electronic commerce issues related to effects caused to small and medium sized enterprises (SMEs), challenges caused to developing countries and possible ways for improving their participation in electronic commerce, the impact of electronic commerce on physical distribution of goods in developing countries, information technology usage to integrate developing countries in the 'multilateral trading system', and implications of finances on electronic commerce in developing countries.³⁷

During the MC6 in 2005 in Hong Kong, the incomplete work of the Work Programme on Electronic Commerce was noted.³⁸ It was agreed to incorporate the e-commerce discussions into trade treatment-related discussions on software delivered electronically.³⁹ WTO Members further agreed to refrain from imposing customs duties on electronic transactions.⁴⁰ At the 2009 MC7 in Geneva during dedicated discussions on electronic commerce, several Members proposed that the moratorium not to impose customs duties on electronic transmissions be separated from the Work Programme on Electronic Commerce.⁴¹

During the 2009 WTO Ministerial Conference, the General Council was ordered to periodically review issues related to electronic commerce under the Work Programme on

³³ WTO 'WT/L/274' (n 18) para 3.1.

³⁴ WTO 'WT/L/274' (n 18) para 3.1.

³⁵ WTO 'WT/L/274' (n 18) para 4.1.

³⁶ WTO 'WT/L/274' (n 18) para 4.1.

³⁷ WTO 'WT/L/274' (n 18) para 5.1.

³⁸ World Trade Organization 'DOHA WORK PROGRAMME Ministerial Declaration Adopted on 18 December 2005' WT/MIN(05)/DEC of 22 December 2005, para 1.

³⁹ WTO 'WT/MIN(05)/DEC' (n 38) para 46.

⁴⁰ WTO 'WT/MIN(05)/DEC' (n 38) para 46.

⁴¹ World Trade Organization Seventh Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 8, 13, 22 and 27 October and 2, 4 and 6 November 2009 'Summary of the Secretariat of the Issues Raised', WT/GC/W/614 of 27 November 2009, page 3.

Electronic Commerce.⁴² It was also ordered that WTO principles of predictability, non-discrimination, transparency and trade treatment to be included in the scope of the Work Programme on Electronic Commerce.⁴³ WTO Members were also called upon to further refrain from imposing customs duties on electronic commerce-related transactions.⁴⁴ These discussions were advanced during the MC8 in 2011 where it was decided to continue with discussions on electronic commerce and to observe the principles of non-discrimination, predictability and transparency.⁴⁵ Developing countries and least-developing countries were given special consideration in so far as enhancing internet connectivity, access to information and technology and public internet sites relevant for the growth of electronic commerce were concerned.⁴⁶

Following a 2011 decision on electronic commerce, the Work Programme on Electronic Commerce was tasked with examining SMEs' access to electronic commerce.⁴⁷ The General Council was further called upon to periodically review electronic commerce-related developments.⁴⁸ Imposition of customs duties on electronic commerce by WTO Members was further discouraged.⁴⁹ At the Nairobi MC in 2015, WTO Members expressed their willingness to further discuss and consult on electronic commerce.⁵⁰ Members were also ready to discuss the effects of electronic commerce on LDCs and developing countries.⁵¹

The WTO General Council adopted a decision in 2019 on customs duties whereby it noted that WTO Members had further agreed to refrain from imposing customs duties on electronic commerce transactions.⁵² The moratorium was applied up until the MC12

⁴² World Trade Organization 'Work Programme on Electronic Commerce: Decision of 2 December 2009' WT/L/782 of 11 December 2009.

⁴³ WTO 'WT/L/782' (n 42) para 3.

⁴⁴ WTO 'WT/L/782' (n 42) para 4.

⁴⁵ World Trade Organization Work Programme on Electronic Commerce 'Decision of 17 December 2011' WT/L/843 of 19 December 2011.

⁴⁶ WTO 'WT/L/843' (n 45) para 1.

⁴⁷ WTO 'WT/L/843' (n 45.)

⁴⁸ WTO 'WT/L/843' (n 45) second last paragraph.

⁴⁹ WTO 'WT/L/843' (n 45) last paragraph.

⁵⁰ World Trade Organization Item 4 – Work Programme on Electronic Commerce – Review of Progress 'Report of Ambassador Alfredo Suescum – Friend of the Chair, WT/GC/W/721 of 1 August 2016, para 1.1.

⁵¹ WTO 'WT/GC/W/721' (n 50) para 1.7.

⁵² World Trade Organization Work Programme on Electronic Commerce 'General Council Decision

that took place in June 2022⁵³ and subsequently extended to MC13 that took place in February to March 2024.⁵⁴ A further extension was made to MC14 or 31 March 2026, should MC14 be delayed.⁵⁵ It was also agreed at MC13 that discussions on e-commerce would be reinvigorated while taking into consideration the financial, economic and development needs of developing and least developing countries.⁵⁶ MC13 also noted the efforts made by Members to further e-commerce discussions in dedicated sessions and a workshop held by the Work Programme on E-commerce.⁵⁷ Subsequently, there was a call for continued collaboration.

Hence, as is the case currently, there is no clear framework for e-commerce/digital trade at the WTO. There have, however, been growing interests in developing comprehensive rules evident by various initiatives by WTO Members such as the joint statement initiative⁵⁸ and the Work Programme on e-commerce facilitated discussions on e-commerce leading to MC14.⁵⁹ The ongoing discussions on e-commerce at the WTO are on eight focus areas: (i) moratorium on the imposition of customs duties on electronic transmissions; (ii) technology transfer related to e-commerce; (iii) development and data issues; (iv) facilitating digital trade and electronic transactions; (v) digital industrialisation; (vi) consumer protection; (vii) digital divide; and (viii) regulatory and legal frameworks on e-commerce.⁶⁰ The initiatives on e-commerce at the WTO are examined further below.

⁵³ adopted on 10 December 2019', WT/L/1079 of 11 December 2019, second last paragraph.
WTO 'Twelfth WTO Ministerial Conference' [WTO | Ministerial conferences - Twelfth WTO Ministerial Conference - Geneva Switzerland](#) (accessed 10 July 2023).

⁵⁴ WTO Work Programme on E-Commerce 'Ministerial Decision adopted 17 June 2022' WT/MIN(22)/32, WT/L/1143, 22 June 2022.

⁵⁵ WTO 'Work Programme on Electronic Commerce: Ministerial Decision adopted 2 March 2024' WT/MIN(24)/38, WT/L/1193, 4 March 2024.

⁵⁶ WTO 'WT/MIN(24)/38, WT/L/1193' (n 55) para 1.

⁵⁷ WTO 'WT/MIN(24)/38, WT/L/1193' (n 55) paras 2 & 3.

⁵⁸ WTO 'Joint Initiative on E-commerce' [WTO | Joint Initiative on E-Commerce](#) (accessed 20 October 2023).

⁵⁹ WTO 'Facilitator of e-commerce work programme seeks members' views on way forward' [WTO | 2023 News items - Facilitator of e-commerce work programme seeks members' views on way forward](#) (accessed 20 October 2023).

⁶⁰ WTO 'News about electronic commerce' [WTO | Electronic commerce news archive](#) (accessed 20 October 2023).

3.2.1 Institutions and initiatives on e-commerce at the WTO

WTO Work Programme on Electronic Commerce

As discussed previously, the Work Programme on E-commerce was established in 1998 during the MC2 to carry out the following functions:

...to examine all trade-related issues relating to global electronic commerce, taking into account the economic, financial, and development needs of developing countries, and to report on the progress of the work programme, with any recommendations for action, to the Third Session.⁶¹

The Work Programme on E-commerce's mandate is realised through tasks assigned to four WTO bodies; the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS and the Committee for Trade and Development.⁶² Important to note is that the WTO General Council has the primary mandate of constituting and continuously reviewing the mandate of the Work Programme on E-commerce.⁶³ The General Council further examines the Work Programme on E-commerce's mandate relating to the application of customs duties to electronic transmissions.⁶⁴ In line with these mandates, the General Council circulated its first summary of dedicated discussions on e-commerce in 2001.⁶⁵ The cross-cutting issues identified under the summary are: classification of the content of certain electronic transmissions,⁶⁶ development-related issues,⁶⁷ fiscal implications of e-commerce,⁶⁸ competition,⁶⁹ and applicable laws to e-commerce.⁷⁰ The Summary further identified discussions on imposition of custom duties on electronic transmissions and the relationship between e-commerce and traditional forms of commerce, as cross-cutting

⁶¹ WTO 'WT/L/274' (n 18) para 1.1.

⁶² WTO 'WT/L/274' (n 18) paras 2-5.

⁶³ WTO 'WT/L/274' (n 18) para 1.2.

⁶⁴ WTO 'WT/L/274' (n 18) para 1.2.

⁶⁵ World Trade Organization 'Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 15 June 2001' WT/GC/W/436 (6 July 2001).

⁶⁶ As above, para 2. It remained unclear whether electronically transmitted products were governed under GATT or GATS. Some of the delegations proposed that digitized products constitute services.

⁶⁷ WTO 'WT/GC/W/436' (n 65) para 2.

⁶⁸ WTO 'WT/GC/W/436' (n 65) para 3.

⁶⁹ WTO 'WT/GC/W/436' (n 65) para 4.

⁷⁰ WTO 'WT/GC/W/436' (n 65) para 5. There was no understanding on whether or not existing WTO rules were applicable to e-commerce.

issues.⁷¹ Following 2001, the next discussions were held in 2016 and several others have been held informally.⁷² These discussions have minimally affected the outcome of the work of the Work Programme on E-commerce. The cross-cutting issues identified by the General Council have never been substantively discussed at the WTO.

The mandate of the Council for Trade in Services is to explore and report on the manner in which e-commerce is treated under GATS.⁷³ It is in particular called upon to report on how GATS rules relating to MFN, NT, transparency, participation of developing countries, competition, regulations within domestic set-ups, market access, customs duties, classification issues and scope would apply to electronic commerce.⁷⁴ Noteworthy, these issues under GATS which significantly impact digital trade remains unresolved at the WTO, over two decades after the Work Programme on E-commerce was formed. The Council for Trade in Goods, on the other hand, is to explore and report on e-commerce aspects under the GATT.⁷⁵ It is to, in particular, report on e-commerce aspects relating to market access, rules of origin, classification issues, standards, customs duties, valuation issues and import licensing procedures.⁷⁶ Similarly, a comprehensive report on these issues is yet to be reported by the Council for Trade in Goods to allow for their review by the Work Programme on E-commerce and, generally, WTO Members.

The Council for TRIPS's contribution to the work of the Work Programme on E-commerce relates to e-commerce aspects of intellectual property such as copyrights and related rights, trademark protection and enforcement, and access to new technology.⁷⁷ Lastly, the Committee for Trade and Development is called upon to explore and examine e-commerce related development implications.⁷⁸ The role of the Committee is significant

⁷¹ As above, Attachment at 5. These issues are also contained under World Trade Organization 'Second Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 6 May 2002' WT/GC/W/475 (20 June 2002).

⁷² WTO 'Work Programme on Electronic Commerce' https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm (accessed 26 August 2022).

⁷³ WTO 'WT/L/274' (n 18) para 2.1.

⁷⁴ WTO 'WT/L/274' (n 18) para 2.1.

⁷⁵ WTO 'WT/L/274' (n 18) para 3.1.

⁷⁶ WTO 'WT/L/274' (n 18) para 3.1.

⁷⁷ WTO 'WT/L/274' (n 18) para 4.1.

⁷⁸ WTO 'WT/L/274' (n 18) para 5.1.

to developing countries as it is required to examine how e-commerce impact their growth and economic development. It also should investigate and suggest ways for enhancing the participation of developing countries in digital trade.⁷⁹ Additionally, the Committee is to use information technology to incorporate developing countries into the multilateral trading system and assess how physical forms of trade in developing countries are impacted by digital trade. More importantly, the Committee should examine how developing countries are financially impacted by e-commerce.⁸⁰ These four institutions have been ineffective in examining and reporting on trade-related aspects of e-commerce. It is submitted that the reports made have only insignificantly influenced the growth of digital trade and related discussions at the WTO.

As discussed earlier, the Work Programme on E-commerce is not a stand-alone item under the WTO. Its functions are centrally carried out by the General Council.⁸¹ The Work Programme on E-commerce also depends on the WTO's four institutions, discussed earlier, to accomplish its mandates. The reliance by the Work Programme on E-commerce on these institutions has been subject to criticism by WTO Members such as India and South Africa who opine that a stalemate in discussions on e-commerce has been witnessed and, particularly, the Work Programme on E-commerce has not lived up to its mandate on account that it is not a 'stand-alone item'.⁸² They believe that if the Work Programme on E-commerce was made a standing item in the four WTO bodies, there would be more structured discussions on e-commerce.⁸³ There have also been discussions at the WTO to make the Work Programme on E-commerce either a 'standing item' or an 'ad-hoc item'.⁸⁴ This issue remains unresolved.

In 2017, MC11 in Buenos Aires agreed to continue the work of the Work Programme on E-commerce.⁸⁵ To fulfil this, periodic reviews were to be held and to be

⁷⁹ WTO 'WT/L/274' (n 18) para 5.1.

⁸⁰ WTO 'WT/L/274' (n 18) para 5.1.

⁸¹ WTO 'WT/L/274' (n 18) para 1.2.

⁸² See World Trade Organization 'Work Programme on Electronic Commerce: Reinvigorating the Work under the 1998 Work Programme on Electronic Commerce' WT/GC/W/812 (4 December 2020) Communication from South Africa and India.

⁸³ WTO 'WT/GC/W/812' (n 82) para 3.1.

⁸⁴ WTO 'WT/GC/W/812' (n 82) para 1.3.

⁸⁵ See WTO 'Work Programme on Electronic Commerce: Ministerial Decision of 13 December 2017' WT/MIN(17)/65; WT/L/1025 (18 December 2017).

reported on at MC12.⁸⁶ The negotiations on trade-related aspects of e-commerce were launched during the 2019 World Economic Forum.⁸⁷ Progress was expected to be made at MC12 held in June 2022,⁸⁸ but no substantive progress was made.⁸⁹ During MC12, an agreement was arrived at to strengthen the Work Programme on E-commerce mandate in tandem with developments in international trade.⁹⁰ Since then, e-commerce appears to have been given increased attention going by the series of meetings and dedicated sessions held in 2022 and 2023 in the lead up to MC13.⁹¹ Indeed these efforts were noted at MC13 and are expected to continue until MC14 during which time, the current mandate of the Work Programme on E-commerce would expire.⁹²

Arising from the foregoing, it is evident that the Work Programme on E-commerce has not lived up-to its mandate since it was established in 1998. Further, the Council for Trade in Services, Council for Trade in Goods, Council for TRIPS and Committee for Trade and Development have proved ineffective in supporting the Work Programme on E-commerce to fulfil its mandate. WTO Members, save for continuously re-affirming the mandates of the Work Programme on E-commerce at every other Ministerial Conference, have failed to support and prioritize discussions on e-commerce. Although forming part of all the Ministerial Conferences' agenda,⁹³ e-commerce has been discussed hastily and with a promise that more comprehensive discussions will be held in a subsequent Ministerial Conference, something that has never materialised. E-commerce therefore remains a promising yet much-ignored issue at the WTO. There is a need for restructuring

⁸⁶ As above.

⁸⁷ WTO OMC 'E-commerce discussions at the WTO' 31 October 2019 http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/ressources/permanent-technical-committee/225-226/itemxvid1_e_commerce_wto_en.pdf?la=en (accessed 24 August 2021). Under Focus Group A on Enabling Digital Trade/E-commerce, electronic transactions framework is discussed.

⁸⁸ WTO 'Twelfth WTO Ministerial Conference' https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm (accessed 22 August 2021).

⁸⁹ WTO 'Work Programme on Electronic Commerce: Ministerial Decision adopted 17 June 2022' WT/MIN(22)/32; WT/L/1143 (22 June 2022).

⁹⁰ WTO 'WT/MIN(22)/32; WT/L/1143' (n 89).

⁹¹ WTO 'Facilitator of e-commerce work programme seeks members' views on way forward' [WTO | 2023 News items - Facilitator of e-commerce work programme seeks members' views on way forward](#) (accessed 20 October 2023).

⁹² WTO 'WT/MIN(24)/38, WT/L/1193' (n 55) paras 2-5.

⁹³ This is because of the moratorium on the non-application of customs duties on electronic transmissions which has been extended in all Ministerial Conferences since 1998. The mandate of the Work Programme on E-commerce has on the same breath been constantly re-affirmed.

the discussions on e-commerce at the WTO and to review the mandates of the Work Programme on E-commerce.

Moratorium on the imposition of customs duties on electronic transmissions

The moratorium on the imposition of customs duties on electronic transmissions was first formally introduced into the WTO by Ministers during the 1998 Second Ministerial Conference.⁹⁴ The agreement was that 'Members will continue their current practice of not imposing customs duties on electronic transmissions'.⁹⁵ This was because no WTO Member was imposing customs duties on electronic transmissions at the time.⁹⁶ The moratorium was to be extended by consensus and after examining the progress made by the Work Programme on E-Commerce.⁹⁷ To date, the Work Programme on E-commerce has made minimal progress in examining and developing a multilateral framework on trade related aspects of e-commerce. Nonetheless, the practice of not imposing customs duties on electronic transmissions has been maintained in the Ministerial Conferences that followed and was maintained during MC12 held from 12 to 16 June 2022 in Geneva.⁹⁸ The moratorium was maintained until MC13 which took place from February to March 2024⁹⁹ when it was further extended until MC14 or 31 March 2026, whichever is earlier.¹⁰⁰

Importantly, while there is a general understanding to not impose customs duties on electronic transmissions, there is no precise definition of what constitutes 'electronic transmissions'. It has however been construed generally to mean 'cross-border trade delivered digitally'.¹⁰¹ This implies, first, that trade must be delivered on the digital platform, and, secondly, the trade must occur across borders. This leaves out physically delivered trade. Some WTO Members have also construed electronic transmissions to

⁹⁴ WTO 'Declaration of Global Electronic Commerce' adopted 20 May 1998, WT/MIN(98)/DEC/2 of 25 May 1998.

⁹⁵ World Trade Organization 'WT/MIN(98)/DEC/2' (n 94) para 2, 2nd to last sentence.

⁹⁶ R Kozul-Wright & R Banga 'Moratorium on Electronic Transmissions: Fiscal Implications and Way Forward' UNCTAD Research Paper No 47 (2020) *United Nations Conference on Trade and Development*.

⁹⁷ As above.

⁹⁸ WTO 'Twelfth Ministerial Conference' https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm (accessed 22 June 2022).

⁹⁹ WTO 'WT/MIN(22)/32; WT/L/1143' (n 89).

¹⁰⁰ WTO 'WT/MIN(24)/38, WT/L/1193' (n 55) para 5.

¹⁰¹ A Andrenelli & JL Gonzalez 'Electronic Transmissions and International Trade – Shedding New Light on the Moratorium Debate' OECD Trade Policy Papers No 233 (13 November 2019) *OECD Publishing* 6.

cover services.¹⁰² In terms of the scope for application of the moratorium, there is no consensus as to whether or not the moratorium is applicable to either the transmission itself or the content of the transmission.¹⁰³ Indonesia has for instance proposed that the moratorium should be applicable to the ‘transmissions’ and not the ‘contents of the transmissions’.¹⁰⁴ It notes in its Statement that ‘it is understood that such moratorium shall not apply to electronically transmitted goods’.¹⁰⁵ There is however no consensus on the scope of the moratorium at the WTO.¹⁰⁶ Therefore, the broad and uncertain understanding of ‘electronic transmissions’ pose a challenge on the scope of application of the moratorium. These issues remain unresolved at the WTO.

The practice of not imposing customs duties on electronic transmissions has been justified on the basis of improving the competitiveness of exports and the welfare of consumers.¹⁰⁷ The Organisation for Economic Co-operation and Development (OECD) notes that the potential customs revenue losses brought about by not imposing customs duties on e-transmissions are relatively low compared to the total revenue of a government.¹⁰⁸ The 2019 finding by the OECD further highlights that the amount of goods that can be digitised is low and thus creates an unstable source of revenue.¹⁰⁹ OECD notes that the burden of customs duties imposed on electronic transmissions falls on domestic consumers.¹¹⁰ Thus, according to the OECD, the benefits of not imposing customs duties on electronic transmissions outweigh the losses/challenges.

¹⁰² This interpretation has been criticized on account that by including services, the scope is broadened and duty-free trading environment is permitted. Hence, digital trade will be liberalised fully. See for instance World Trade Organization Work Programme on Electronic Commerce ‘The E-Commerce Moratorium: Scope and Impact’ WT/GC/W/798 (11 March 2020) Communication from India and South Africa, para 5.1

¹⁰³ As above, 6.

¹⁰⁴ WTO ‘Statement of Indonesia: Facilitator’s Consultation on Electronic Commerce, MC11 Declaration, and other Relevant Plenary Sessions’ WT/MIN(17)/68 (20 December 2017).

¹⁰⁵ As above.

¹⁰⁶ It was agreed during the 12th Ministerial Conference to intensify discussions on the definition, scope and impact of the moratorium on customs duties on electronic transmissions. See World Trade Organization Work Programme on Electronic Commerce ‘Ministerial Decision Adopted on 17 June 2022’ WT/MIN(22)/32; WT/L/1143 (22 June 2022).

¹⁰⁷ Andrenelli & Gonzalez (n 101) 2-5.

¹⁰⁸ Andrenelli & Gonzalez (n 101) 2.

¹⁰⁹ Andrenelli & Gonzalez (n 101) 5.

¹¹⁰ Andrenelli & Gonzalez (n 101) 5.

Through a Communication submitted to the WTO for circulation amongst its Members,¹¹¹ Australia, Canada, Chile, Colombia, Hong Kong China, Iceland, Republic of Korea, New Zealand, Norway, Singapore, Switzerland, Thailand and Uruguay noted that electronic transmissions generally reduce costs through for instance cutting of costs associated with the physical transportation of goods.¹¹² As a result of trade cost reduction, the welfare of consumers and productivity are increased.¹¹³ This is further realised by not imposing tariffs on electronic transmissions. The Communication highlights that the impacts of not imposing customs duties on electronic transmissions are 'positive and large'.¹¹⁴ It further identifies Value Added Tax (VAT) and Goods and Services Tax (GST) as better alternatives for not imposing customs duties.¹¹⁵ Thus, these countries deem it necessary to continue the practice of not imposing customs duties on electronic transmissions.¹¹⁶

As it is, there is a possibility that the WTO moratorium on the imposition of customs duties might be made permanent. This proposal is however not supported by all WTO Members. South Africa and India have for instance opposed the making of the moratorium permanent on the basis that the moratorium results in significant revenue implications.¹¹⁷ They note in particular that the moratorium is a challenge to developing countries for three reasons: first, industrialisation is impacted; second, there is a general loss of tariff revenue; and third, other charges and duties are lost.¹¹⁸ They note that unless developing countries are allowed to impose customs duties on electronic transmissions, then the digital divide between developing, with the exclusion of China, and developed countries will broaden.¹¹⁹ India and South Africa, therefore, observe that the impacts of the moratorium are 'weighty'.¹²⁰ There was also an attempt by France to introduce customs

¹¹¹ See WTO Work Programme on Electronic Commerce 'Broadening and Deepening the Discussions on the Moratorium on Imposing Custom Duties on Electronic Transmissions' WT/GC/W/799/Rev.1 (29 June 2020).

¹¹² WTO 'WT/GC/W/799/Rev.1' (n 111) para 2.

¹¹³ WTO 'WT/GC/W/799/Rev.1' (n 111) para 3.1.

¹¹⁴ WTO 'WT/GC/W/799/Rev.1' (n 111) para 3.2.

¹¹⁵ WTO 'WT/GC/W/799/Rev.1' (n 111) paras 4.2 & 4.3.

¹¹⁶ WTO 'WT/GC/W/799/Rev.1' (n 111) para 6.

¹¹⁷ WTO Work Programme on Electronic Commerce 'The E-Commerce Moratorium: Scope and Impact' WT/GC/W/798 (11 March 2020) Communication from India and South Africa.

¹¹⁸ WTO 'WT/GC/W/798' (n 117) para 2.7.

¹¹⁹ WTO 'WT/GC/W/798' (n 117) paras 2.8 - 2.13.

¹²⁰ WTO 'WT/GC/W/798' (n 117) para 4.1.

duties on electronic transmissions but the attempt was thwarted by the US' pressure on France not to do so.¹²¹

It is important to note that the practice of not imposing customs duties on electronic transmissions has been adopted outside the WTO by WTO Members and non-Members. For instance, the Joint State Initiative on Electronic Commerce in its discussions has agreed to maintain the WTO requirement of not imposing customs duties on electronic transmissions.¹²² JSI further proposes to make this requirement permanent for the purposes of promoting predictability and certainty in digital trade.¹²³ Further, at least fifty-six WTO Members have entered into Regional Trade Agreements (RTAs) that call for no application of customs duties on electronic transmissions.¹²⁴

Thus, while there is a general agreement by WTO Members not to apply customs duties on electronic transmissions, the practice is marred with a lot of ambiguities and unpredictability due to the ever-changing nature and circumstances surrounding the application of the moratorium. There is also an evident divide between WTO Members as to whether or not the moratorium should be made permanent. Overall, there is a need for extensive discussions and understanding of the definitions, scope and relevance for non-application of customs duties on electronic transmissions by WTO Members. Lastly, there is need for all-inclusive deliberations on the moratorium.

Joint Statement Initiative on Electronic Commerce

At MC11 in Buenos Aires, some of the WTO Members¹²⁵ who had issues on e-commerce that they hoped to be addressed constituted the Joint Statement Initiative (JSI) on e-

¹²¹ C Forsgren, S Song & D Horváth 'Digital Services Taxes: Do They Comply with International Tax, Trade, and EU Law?' (May 2020) <https://taxfoundation.org/research/all/federal/france-digital-tax-international-tax-law-trade-law-eu-law/> (accessed 10 May 2024).

¹²² METI Ministry of Economy, Trade and Industry 'WTO Joint Statement Initiative on E-commerce: Statement by Ministers Released' https://www.meti.go.jp/english/press/2022/0613_002.html (accessed 10 June 2022).

¹²³ As above.

¹²⁴ Andrenelli & Gonzalez (n 101) 11.

¹²⁵ The JSI was circulated at the Conference at the request of Delegates of WTO Members from 'Albania; Argentina; Australia; Bahrain; Brazil; Brunei Darussalam; Cambodia; Canada; Chile; Colombia; Costa Rica; European Union; Guatemala; Hong Kong, China; Iceland; Israel; Japan; Kazakhstan; Korea, Republic of; Kuwait; Lao PDR; Liechtenstein; the former Yugoslav Republic of Macedonia; Malaysia; Mexico; Moldova, Republic of; Montenegro; Myanmar; New Zealand; Nigeria; Norway; Panama; Paraguay; Peru; Qatar; Russian Federation; Singapore; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; United

commerce which they encouraged other WTO Members to join.¹²⁶ Through the JSI they hoped to initiate discussions on digital trade at the WTO.¹²⁷ The discussions are focused on six thematic areas; openness and electronic commerce, enabling electronic commerce, trust and digital trade, market access, telecommunications and cross-cutting issues.¹²⁸ The discussions are in the form of plenary sessions and small group meetings based on textual proposals by the participants.¹²⁹

The JSI's co-convenors comprising of Australia, Japan and Singapore, have convened several meetings to deliberate on digital trade issues at the WTO. The first comprehensive report of the progress made by the JSI on e-commerce was published in December 2020.¹³⁰ The second progress report was published in September 2021.¹³¹ In addition, JSI's co-convenors published a statement on the progress made by JSI in December 2021.¹³² The statement noted that substantial progress had been made in discussions on 'online consumer protection, electronic signatures and authentication, unsolicited commercial electronic messages, open government data, electronic contracts, transparency, paperless trading and open internet access.'¹³³ The Statement noted that in 2022 JSI would focus its discussions on cross-border data flows, custom duties on electronic transmissions, frameworks for e-commerce and data localisation.¹³⁴ Further

States; and Uruguay'. As of 25 June 2024, the membership to the JSI on E-commerce had increased to 91 WTO Members, see WTO 'Joint Initiative on E-commerce' [WTO | Joint Initiative on E-Commerce](#) (accessed 27 June 2024). The Gambia joined in October 2023, see WTO 'Joint Statement on E-Commerce: Communication from the Gambia' INF/ECOM/82, 23 October 2023.

¹²⁶ WTO 'Joint Statement on Electronic Commerce' WT/MIN(17)/60 (13 December 2017). Notably, JSI is open to all WTO Members.

¹²⁷ As above.

¹²⁸ WTO 'Joint Initiative on E-commerce' [WTO | Joint Initiative on E-Commerce](#) (accessed 23 October 2023).

¹²⁹ A Mitchell & E Chin 'The WTO Joint Statement Initiative on E-commerce: Navigating the Digital Trade Rules in a Fragmented World' (2023) *Journal of World Trade* 1-14, 3.

¹³⁰ WTO 'WTO Electronic Commerce Negotiations: Consolidated Negotiating Text-December 2020' INF/ECOM/62/Rev.1 (14 December 2020).

¹³¹ WTO 'WTO Electronic Commerce Negotiations: Updated Consolidated Negotiating Text – September 2021-Revision' INF/ECOM/62/Rev.2, 8 September 2021.

¹³² World Trade Organization 'WTO Joint Statement Initiative on E-commerce Statement by Ministers of Australia, Japan and Singapore' (December 2021) available at https://www.wto.org/english/news_e/news21_e/ji_ecom_minister_statement_e.pdf.

¹³³ As above, page 1.

¹³⁴ As above, para 5.

progress of the negotiations was expected to be made during MC12.¹³⁵ This was however not realised.

The third and fourth progress reports of the JSI published in December 2022¹³⁶ and August 2023¹³⁷ respectively show the progress made after MC12. Though not publicly accessible, there is an indication that there was progress in some of the e-commerce aspects and minimal progress in aspects such as cross-border data flows and data localisation, customs duties on electronic transmissions and market access.¹³⁸ There had been discussions on ‘paperless trading, electronic contracts, electronic authentication and electronic signatures, unsolicited commercial electronic messages, online consumer protection, open government data, open internet access, transparency, cybersecurity, and electronic transactions framework’.¹³⁹

The JSI round of negotiations held from 22 to 25 April 2024 led to the completion of technical discussions on e-commerce, though not made public, and the work progressed to the ‘final decision-making phase’.¹⁴⁰ Subsequently JSI Members were asked to consult domestically and carry out political outreach as a step towards concluding the negotiations’ pending issues.¹⁴¹ Later in July 2024, the JSI made public the text of the Agreement on Electronic Commerce, the outcome of its negotiations.¹⁴² It is the first set of digital trade rules under the WTO, pending adoption or further deliberations by all the WTO Members. The Agreement is yet to be integrated into the WTO legal framework.

Important to note however is that the legal status of the JSI on e-commerce has been challenged by South Africa and India at the WTO.¹⁴³ South Africa and India are

¹³⁵ See WTO ‘Electronic Commerce’ https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm (accessed 24 August 2021).

¹³⁶ WTO ‘WTO Electronic Commerce Negotiations: Updated Consolidated Negotiating Text – December 2022-Recision’ INF/ECOM/62/Rev.3, 22 December 2022.

¹³⁷ WTO ‘WTO Electronic Commerce Negotiations: Updated Consolidated Negotiating Text – August 2023-Revision’ INF/ECOM/62/Rev.4, 4 August 2023.

¹³⁸ Mitchel & Chin (n 129) 3 & 8.

¹³⁹ Mitchel & Chin (n 129) 3.

¹⁴⁰ WTO ‘E-commerce negotiators finalize “technical discussions” and outline next steps’ https://www.wto.org/english/news_e/news24_e/ecom_25apr24_e.htm (accessed 15 June 2024).

¹⁴¹ As above.

¹⁴² WTO ‘Joint Statement Initiative on Electronic Commerce’ INF/ECOM/87, 26 July 2024.

¹⁴³ WTO ‘The Legal Status of ‘Joint Statement Initiatives’ and their Negotiated Outcomes’ WT/GC/W/819 (19 February 2021).

particularly challenging the JSI for reasons that ‘some’ WTO Members and not ‘all’ are attempting to negotiate and formalize WTO rules in a manner that is in contravention of the Marrakesh Agreement Establishing the WTO¹⁴⁴ and contradicts the fundamental principles of the WTO.¹⁴⁵ They note particularly that JSI is contrary to multilateralism and the consensus manner of making decisions at the WTO.¹⁴⁶ It is further contrary to the procedure for making amendments at the WTO.¹⁴⁷ According to India and South Africa, the JSI hopes to create an agreement on an MFN basis. This, according to India and South Africa, is contrary to the manner of creating either a multilateral or plurilateral trade agreement under the WTO which can only be added to Annex 4 of the Marrakesh Agreement exclusively by consensus at a Ministerial Conference.¹⁴⁸ This challenge of the legal status of the JSI therefore leaves doubt on whether or not progress on e-commerce negotiations at the Conference would be made. It also raises concerns about the progress that has so far been made by the JSI. JSI has however indicated that its discussions are open to all WTO Members and identifies inclusion as one of its core principles.¹⁴⁹ To realise this, it has launched a capacity building framework that offers support to developing and least-developing countries to participate in its discussions.¹⁵⁰

This notwithstanding, there has been increased momentum towards negotiation of a WTO Agreement on digital trade. This is evident for example in the renewed and increased interest by WTO Members to regulate digital trade following the spread of the corona virus disease in 2020 which saw an increase in digital trade across the globe.¹⁵¹ There is, therefore, hope that an Agreement on digital trade can be negotiated successfully at the WTO in the near future, perhaps at MC14. Formulation of a WTO

¹⁴⁴ Marrakesh Agreement Establishing the World Trade Organization (15 April 1994), 1867 UNTS 154, 33 ILM 1144 (1994).

¹⁴⁵ WTO ‘WT/GC/W/819’ (n 143) paras 2, 3 & 4.

¹⁴⁶ WTO ‘WT/GC/W/819’ (n 143) para 5.

¹⁴⁷ WTO ‘WT/GC/W/819’ (n 143) para 8. It notes that the JSI is confusing the procedure for amending rules under Article X of the Marrakesh Agreement and specific provisions under the General Agreement on Tariffs and Trade (GATT) and GATS.

¹⁴⁸ WTO ‘WT/GC/W/819’ (n 143) paras 6 & 7.

¹⁴⁹ WTO ‘WTO Joint Statement Initiative on E-commerce: Statement by Ministers of Australia, Japan and Singapore’ (June 2022) available at https://www.wto.org/english/news_e/news22_e/jsec_13jun22_e.pdf.

¹⁵⁰ As above, para 2.

¹⁵¹ I Ogo ‘An Agenda for the AfCFTA Protocol on E-commerce’ (25 June 2020) <https://www.tralac.org/news/article/14692> (accessed 24 August 2021).

Agreement on digital trade could be leveraged by Members to create clear and precise provisions on international trade, as an improvement and by drawing lessons from the challenges experienced in existing agreements on trade and services.¹⁵² This proposal has however received mixed reactions from WTO Members, such that some opine that it could strengthen the WTO while another group feels that it might fracture the WTO further.¹⁵³

3.2.2 WTO Agreements and digital trade

Digital trade under GATT

At the time of negotiations of GATT provisions, e-commerce was yet to develop and was therefore not taken into account during the negotiations. Following the development of e-commerce, there have been discussions that GATT provisions apply to e-commerce. The nexus between GATT provisions and e-commerce is that e-commerce contributes to the growth of international trade in goods. This is because electronic platforms act as a medium for ordering and paying for goods that are ultimately physically delivered.¹⁵⁴ Thus, e-commerce that results in the physical delivery of a good falls within the GATT provision, notwithstanding that the orders and payments are made online. Those goods that are delivered digitally or through digital trade are outside the scope of GATT. In addition, GATT is relevant to e-commerce such that it calls on Members to accord similar treatment to goods, regardless of how they are traded.¹⁵⁵

¹⁵² AD Mitchell & N Mishra 'Data at the Docks: Modernizing International Trade Law for the Digital Economy' (2018) 20(4) *Vanderbilt Journal of Entertainment and Technology Law* 1073-1134, 1127-1128.

¹⁵³ Zheng (n 4) 563-564. Zheng proposes that for progress to be made, negotiations on digital trade should focus on the basic rules as opposed to controversial issues, page 568. Fleuter is also hell-bent on initiating complex issues in the negotiations on e-commerce for the reason that it had taken so much time and a slow pace to successfully negotiate the current WTO agreements, for this, see S Fleuter 'The Role of Digital Products Under the WTO: A New Framework for GATT and GATS Classification' (2016) 17 *Chicago Journal of International Law* 153.

¹⁵⁴ A Panagariya 'E-commerce, WTO and Developing Countries' Policy Issues in International Trade and Commodities Study Series 2 (United Nations Conference on Trade and Development 2000), 3.

¹⁵⁵ A Gamboa-Alder 'E-commerce discussions at the WTO' WCO Permanent Technical Committee 225th/226th Session Brussels, 31 October 2019, available at [Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\) \(international.gc.ca\)](https://www.wcoomd.org/information/media/press/2019/20191031-ETC-225th-226th-session-brussels.aspx).

During the General Council meetings in May and July 2003, electronic commerce-related issues such as ‘classification of the content of certain electronic transmissions’ were discussed.¹⁵⁶ It was observed that only services were transmitted electronically and were therefore outside the scope of GATT.¹⁵⁷ The GATT Harmonized System could not therefore deal with electronic services as it only concerns itself with products, their physical characteristics being their identifying feature.¹⁵⁸ Were electronic products to be factored in, they would still fail in the element of physical characteristics. There was also no clearly set definition of ‘electronic products’.¹⁵⁹ To this end, it was noted that electronic products were ‘ideas of images, sounds or instructions that could be digitalised, stored and transmitted by electronic means’. Propositions were made on limiting the definition of electronic products to products that had a ‘physical equivalent’.¹⁶⁰ It was further noted that the physical equivalent was characterised by the ‘tangible form’ rather than the ‘contents’ of the products.¹⁶¹ Arguments were made on whether the GATS would be applicable to the ‘distribution transaction’ of the electronic transaction and GATT to the physical delivery of products across borders or whether GATS would apply to the entire transaction as there was no physical delivery of the product.¹⁶² It was concluded that electronic deliveries could not be covered under GATT. It was not resolved on how to classify electronic products.¹⁶³ The major unresolved question that arose in this instance is whether electronic products are covered under the GATS or GATT or whether they are covered under the TRIPS Agreement.

Thus, GATT may be applicable to certain aspects of e-commerce to the extent that they have the physical characteristics of a traded good. However, as discussed in the previous chapter, this study focuses on trade that takes place wholly online, i.e. digital

¹⁵⁶ World Trade Organization Fifth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 16 May and 11 July 2003 ‘Summary by the Secretariat of the Issues Raised’, WT/GC/W/509 of 31 July 2003.

¹⁵⁷ WT/GC/W/509 (n 156) 2, first paragraph.

¹⁵⁸ WT/GC/W/509 (n 156) 2, first paragraph.

¹⁵⁹ WT/GC/W/509 (n 156) 2, first paragraph.

¹⁶⁰ WT/GC/W/509 (n 156) 2, second paragraph.

¹⁶¹ WT/GC/W/509 (n 156) 2, second paragraph.

¹⁶² WT/GC/W/509 (n 156) 2, second paragraph.

¹⁶³ WT/GC/W/509 (n 156) 3-4.

trade. This form of trade falls outside the scope of GATT as order, delivery and payment are all online.

Digital Trade under GATS

GATS is relevant to the discussions on digital trade as it contains provisions on services delivered digitally.¹⁶⁴ Mode 1 supply of services under GATS is characterised by the provision of services from one territory into another territory taking place on the digital platform.¹⁶⁵ This mode of service is the most relevant to digital trade.¹⁶⁶ This position was affirmed by the WTO Panel in *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*.¹⁶⁷ According to the Panel:-

Article I:2(a) of the GATS defines "mode 1", otherwise referred to as "cross-border", as the supply of a service "from the territory of one Member into the territory of any other Member". The definition does not contain any indication as to the means that can be used to supply services cross-border. This indicates, in our view, that the GATS does not limit the various technologically possible means of delivery under mode 1.¹⁶⁸

Additionally, GATS contains provisions for telecommunications services. The GATS Annex on Telecommunications contains provisions on the use of public telecommunications transport networks and services by Members.¹⁶⁹ 'Transmission and reception of signals by any electromagnetic means' constitute telecommunications under the Annex. While the Annex is not directly applicable to digital trade, telecommunications enable digital trade as they act as mediums through which digital data and services are exchanged across borders.

The relevance of GATS to digital trade has also been highlighted in terms of its provisions on Members' ability to unilaterally exempt themselves from MFN obligations at the time of drafting schedules of commitments. In addition, market access and national

¹⁶⁴ Organisation for Economic Co-operation and Development (OECD) 'Digital Trade and Market Openness' Working Party of the Trade Committee Report, TAD/TC/WP(2018)3/FINAL (9 August 2018) 13.

¹⁶⁵ GATS art 1.2(a).

¹⁶⁶ Y Ismail 'E-commerce in the World Trade Organization: History and latest developments in the negotiations under the Joint Statement' (2020) International Institute for Sustainable Development and CUTS International, Geneva 1-29, 6.

¹⁶⁷ Panel Report '*US — Gambling*' para 6.281.

¹⁶⁸ As above.

¹⁶⁹ GATS Annex on Telecommunications para 1.

treatment obligations are governed by the schedules of commitments in a ‘positive list approach’ that allows for their application regardless of the means of delivery, including technology-enabled deliveries.¹⁷⁰ To this extent, GATS is considered to be technologically neutral,¹⁷¹ such that it does not distinguish between the various modes of provision of a service.

The above notwithstanding, GATS provisions are construed to be insufficient in addressing current digital trade development.¹⁷² For instance, non-discrimination principles do not apply mutatis mutandis to digital trade since they are premised on the scope of commitments entered in the schedules by Members.¹⁷³ This is because the service sectoral classification list is old and does not take into account developments in the digital economy.¹⁷⁴ This is particularly relevant for digital services that cannot be classified as like to services contained the schedules. Arguably, the services in the digital platforms could be classified differently considering that they had not developed at the time of commencement of trade under GATS.¹⁷⁵ Mitchell and Mishra further argue that the flow of data across borders cannot be effectively addressed under GATS on the basis that they are restricted by regulations and not customs duties, for instance, privacy and data protection concerns.¹⁷⁶

Digital Trade under the WTO Trade Facilitation Agreement

The Trade Facilitation Agreement (TFA) of the WTO was adopted in December 2013 and entered into force on 22 February 2017.¹⁷⁷ The TFA currently applies to 130 WTO Members that have accepted it, out of which 43 are African countries.¹⁷⁸ The TFA provides a framework for ‘expediting the movement, release and clearance of goods,

¹⁷⁰ Ismail (n 166) 5-6.

¹⁷¹ As above.

¹⁷² Mitchell & Mishra (n 152) 1088.

¹⁷³ Mitchell & Mishra (n 152) 1088-1089.

¹⁷⁴ Mitchell & Mishra (n 152) 1089-1090.

¹⁷⁵ Mitchell & Mishra (n 152) 1090-1091.

¹⁷⁶ Mitchell & Mishra (n 152) 1091.

¹⁷⁷ WTO ‘Agreement on Trade Facilitation’ [WTO | legal texts - Agreement on Trade Facilitation](#) (accessed 25 October 2023).

¹⁷⁸ WTO ‘Members accepting the Protocol of Amendment to insert the WTO Trade Facilitation Agreement into Annex 1A of the WTO Agreement’ [WTO | Trade topics - Trade facilitation - Background](#) (accessed 25 October 2023).

including goods in transit.¹⁷⁹ The Agreement facilitates trade in goods that are physically delivered. It contains provisions such as leveraging electronic formalities in pre-arrival processing;¹⁸⁰ electronic payment of fees, duties, taxes and other charges;¹⁸¹ acceptance of electronic copies of documents;¹⁸² and electronic provision of information.¹⁸³

Thus, the Agreement is relevant in the analysis of electronic commerce as it impacts goods ordered and paid for online but physically delivered, such that it aims to expedite the process of delivery. Digital trade cannot be analysed in the context of this Agreement considering that digital trade is delivered online.

Digital Trade under the Information Technology Agreement and Expansion Agreement

The Information Technology Agreement (ITA) was concluded at the Singapore Ministerial Conference in December 1996 by 29 participants.¹⁸⁴ As of March 2024, 84 WTO Members were participating in the ITA, out of which only Egypt, Mauritius, Morocco and Seychelles are African Members.¹⁸⁵ The ITA was concluded with the intent of eliminating all import duties and other charges on information and communication technology (ICT) products. In 2015 at the Nairobi Ministerial Conference, the ITA was expanded to cover 201 more products all aimed at facilitating the use of ICT technologies, under the ITA Expansion Agreement.¹⁸⁶ The Committee of Participants on the Expansion of Trade in Information Technology Products was created to oversee the implementation of the ITA and Expansion Agreement.¹⁸⁷ The Committee is praised for contributing to the reduction and elimination of barriers and improving market access for ICT products.¹⁸⁸

¹⁷⁹ WTO Trade Facilitation Agreement, entered into force 22 February 2017 Preamble.

¹⁸⁰ WTO Trade Facilitation Agreement art 7.1.

¹⁸¹ WTO Trade Facilitation Agreement art 7.2.

¹⁸² WTO Trade Facilitation Agreement art 10.2.

¹⁸³ WTO Trade Facilitation Agreement art 12.6.

¹⁸⁴ WTO 'Information Technology Agreement' [WTO | Information Technology Agreement](#) (accessed 25 October 2023).

¹⁸⁵ WTO 'Information Technology Agreement' [WTO | Information Technology Agreement](#) (accessed 25 October 2023) ; see also WTO 'Committee of Participants on the Expansion of Trade in Information Technology Products: Status of Implementation' G/IT/1/Rev.60, 15 March 2024.

¹⁸⁶ As above.

¹⁸⁷ WTO 'Committee of Participants on the Expansion of Trade in Information Technology Products' [WTO | Committee of Participants on the Expansion of Trade in Information Technology Products](#) (accessed 25 October 2023).

¹⁸⁸ As above.

Significantly, the ITA calls for the elimination of tariffs on certain ICT products in MFN commitments.¹⁸⁹ Thus, while the ITA is not binding on all WTO Members, tariff cuts under the ITA are extended to all WTO Members on an MFN basis. The ITA is therefore relevant to this study as ICT products form an infrastructure for digital trade.¹⁹⁰

Digital trade under the TRIPS Agreement

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) regulates intellectual property rights in all aspects of trade.¹⁹¹ TRIPS by its nature is all inclusive as it covers all IP aspects related to trade, regardless of where trade takes place, be it physically or digitally. In this regard, therefore, TRIPS applies to e-commerce. In particular, TRIPS protects technologies that facilitate e-commerce. The technologies include computers, computer software, networks, routers and user interfaces.¹⁹² Digital platforms also come about as innovations that should be protected by TRIPS.

Aside from technologies and platforms, digital trade involves trade of copyrighted contents, such as e-books, and other data or services that contain intellectual property.¹⁹³ Intellectual goods are, therefore, transferred digitally.¹⁹⁴

The WTO Agreement on Technical Barriers to Trade

The Agreement on Technical Barriers to Trade (TBT) was concluded to ensure that trade was neither hindered nor discriminated against by technical regulations, standards, and conformity assessment procedures.¹⁹⁵ By nature, the TBT Agreement extends to regulations, standards and conformity procedures applied ICT products and e-commerce, generally. For instance, 'standards governing broadband networks or regulations on encryption'.¹⁹⁶

¹⁸⁹ ITA, Annex

¹⁹⁰ Ismail (n 166) 6.

¹⁹¹ WTO 'TRIPS — Trade-Related Aspects of Intellectual Property Rights' [WTO | Intellectual property \(TRIPS\) - gateway](#) (accessed 26 October 2023).

¹⁹² Ismail (n 166) 6.

¹⁹³ Ismail (n 166) 6.

¹⁹⁴ WTO 'Members debate intellectual property and e-commerce, innovation and access to medicines' [WTO | 2017 News items - Members debate intellectual property and e-commerce, innovation and access to medicines](#) (accessed 26 October 2023).

¹⁹⁵ WTO 'Technical Barriers to Trade' https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (accessed 26 October 2023).

¹⁹⁶ Ismail (n 166) 6.

In a report by the Council for Trade in Goods of 1998 on e-commerce to the General Council, standards relating to e-commerce were highlighted.¹⁹⁷ It was noted by one delegation that it was important to promote international standards in e-commerce and at the same time ensure that the standards do not become barriers to e-commerce.¹⁹⁸ It was observed that standards played a role in global e-commerce. Other delegations urged that standards be developed to promote e-commerce and not avert its development.¹⁹⁹ It was also proposed for standards to be developed based on how electronic transmissions was characterised.²⁰⁰ It was noted that elements of goods under e-commerce were covered under the TBT Agreement.²⁰¹

3.3 Digital Trade Rules in Regional and Digital Trade Agreements

Owing to the lack of a multilateral agreement on digital trade, WTO Members have over the years entered into Regional Trade Agreements (RTAs) that contain provisions on e-commerce and Digital Economy Agreements (DEAs) that wholly regulate digital trade amongst themselves.²⁰² According to Ismail, 187 of 352 RTAs in force in 2022 contained electronic commerce provisions.²⁰³ This number increased to 214 of 432 RTAs in force in 2023.²⁰⁴ E-commerce provisions in RTAs take the form of the promotion of e-commerce and cooperation amongst the parties.²⁰⁵ RTAs have also adopted the moratorium on the non-application of customs duties on electronic transmissions.²⁰⁶ Other provisions are on

¹⁹⁷ WTO 'Work Programme on Electronic Commerce: Information Provided to the General Council' G/C/W/158, 26 July 1999, para 8.
¹⁹⁸ WTO 'G/C/W/158' (n 197) para 8.1.
¹⁹⁹ WTO 'G/C/W/158' (n 197) para 8.2.
²⁰⁰ WTO 'G/C/W/158' (n 197) para 8.3.
²⁰¹ WTO 'G/C/W/158' (n 197) para 8.3.
²⁰² M Wu 'Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System' (2017) *International Centre for Trade and Sustainable Development*.
²⁰³ Y Ismail 'Cooperation, Capacity Building, and Implementation Considerations of Developing Countries in the E-Commerce Joint Statement Initiative: Status and the way forward' International Institute for Sustainable Development and CUTS International, Geneva (2022) 1.
²⁰⁴ M Burri, MV Callo-Müller, and K Kugler 'The Evolution of Digital Trade Law: Insights from TAPED' (2024) 23 *World Trade Review* 190–207, 195.
²⁰⁵ JA Monteiro & R Teh 'Provisions on Electronic Commerce in Regional Trade Agreements' (2017) World Trade Organization Working Paper ERSD-2017-11, 2.
²⁰⁶ WTO 'RTA Provisions: Glossary' available at http://rtais.wto.org/USERGUIDE/Glossary_MT_Eng.pdf, para 4.12.

electronic signatures, dispute settlement, data and consumer protection and paperless trading.²⁰⁷

While e-commerce provisions as contained in RTAs are broad and diverse, they offer model provisions for negotiations and possible incorporation by consensus into a multilateral agreement on digital trade, subject to necessary adjustments to suit the digital trade circumstances. Examples and of relevance to this study are provisions on the scope of digital trade/e-commerce, customs duties on electronic transmissions, non-discrimination, cross-border data flows, personal data protection, online consumer protection, dispute settlement, amongst others. As will be shown in the subsequent chapter of this study, these provisions were incorporated into the AfCFTA Digital Trade Protocol, with minimal modifications. These provisions have been incorporated and elaborated in digital economy agreements, discussed in detail below. At the global level, the text of the Agreement on Electronic Commerce negotiated under the Joint Statement Initiative on E-commerce of the WTO incorporates these and other provisions.²⁰⁸

Therefore, in addition to RTAs with digital trade provisions, the subsequent sections of this chapter examine digital economy agreements concluded by some WTO Members. This section proceeds accordingly.

3.3.1 Digital Economy Partnership Agreement

In 2020, New Zealand, Chile and Singapore entered into a Digital Economy Partnership Agreement (DEPA).²⁰⁹ DEPA is the first agreement focusing only on digital trade to be signed by WTO Members and is open for other WTO Members to join.²¹⁰ DEPA is premised on the knowledge that digital trade is instrumental in promoting inclusive economic growth.²¹¹ Notably, DEPA is binding on the parties subject to WTO rules.²¹² It

²⁰⁷ Monteiro and Teh (n 205) 4

²⁰⁸ WTO 'Joint Statement Initiative on Electronic Commerce' INF/ECOM/87, 26 July 2024.

²⁰⁹ Digital Economy Partnership Agreement, signed 11 June 2020, available at <https://www.mfat.govt.nz/assets/Trade-agreements/DEPA/DEPA-Signing-Text-11-June-2020-GMT-v3.pdf>.

²¹⁰ World Economic Forum 'Digital economy agreements are a new frontier for trade – here's why' (24 August 2022) <https://www.weforum.org/agenda/2022/08/digital-economy-agreements-trade/> (accessed 27 August 2022).

²¹¹ DEPA preamble.

²¹² DEPA art 1.2 (1).

also recognises the overall role that individual states have in regulating some of the aspects of digital trade, for instance, cross-border electronic transfer of information.²¹³ It further regulates the protection of personal data in digital trade²¹⁴ and promotion of secure digital trade.²¹⁵ Overall, DEPA offers a framework for regulation of digital trade at a multinational level.

In addition to the foregoing and of relevance to this study are provisions on customs duties where parties have adopted the WTO moratorium on customs duties;²¹⁶ and non-discriminatory treatment of digital products where parties have committed not to:-

.....accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.²¹⁷

As will be discussed in the fifth chapter of this study, there is no clarity on how trade rules on MFN and NT apply to digital trade. The above provision on non-discriminatory treatment of digital products could be used as a guiding point, in addition to other similar provisions, in the discussions of similar digital trade rules at multilateral and continental levels.

3.3.2 UK bilateral digital trade agreements

The United Kingdom (UK) and Singapore signed the UK-Singapore Digital Economy Agreement (DEA) in 2022²¹⁸ and the agreement is currently in force.²¹⁹ DEA highlights the increasing impact of digital trade on world trade and, particularly, trade between its

²¹³ DEPA art 4.3.

²¹⁴ DEPA art 4.2(1).

²¹⁵ DEPA art 5.1(1)

²¹⁶ DEPA art 3.2.

²¹⁷ DEPA art 3.3.

²¹⁸ Digital Economy Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Singapore, Singapore 1 of 2022, available at https://assets.publishing.service.gov.uk/media/6229f350e90e0747aa8eb6ad/CS_Singapore_1.20_02_UK_Singapore_Digital_Economy_Agreement.pdf.

²¹⁹ See Department for International Trade 'UK-Singapore Digital Economy Agreement: final agreement explainer' (14 June 2022) <https://www.gov.uk/government/publications/uk-singapore-digital-economy-agreement-explainer/uk-singapore-digital-economy-agreement-final-agreement-explainer> (accessed 27 August 2022).

parties. Importantly, DEA allows for the free flow of digital content between the UK and Singapore.²²⁰ In terms of customs, DEA allows for the maintenance of a single window system for the collection of digital customs.²²¹ There is however no clarity on whether or not digital customs is limited to digital trade since there is a possibility that the single systems window also applies in the collection of customs duties arising for physically traded goods and services, albeit digitally. DEA is however generally instrumental in supporting digital trade between Singapore and the UK.

Further to the above, the UK and Ukraine in 2023 reached an agreement under the UK-Ukraine Digital Trade Agreement (DTA) but the agreement is not yet in force.²²² The DTA was arrived at primarily to help Ukraine rebuild its economy by leveraging digital trade opportunities, following the Russia-Ukraine war.²²³ Like many other bilateral agreements, the DTA adopts the WTO moratorium on customs duties.²²⁴ There is also an agreement to allow for cross-border flow of information amongst the parties without any restrictions or prohibitions.²²⁵ All other provisions, though not relevant to this study, are pertinent in facilitating digital trade amongst the parties.

Arising from the foregoing, the provisions under DEA and DTA can be incorporated with necessary modifications into the WTO discussions for a multilateral agreement on digital trade. It will also be necessary for the WTO discussions to include provisions relevant to safeguard measures applicable to digital trade since none of the UK bilateral agreements on digital trade incorporates similar provisions. The same recommendations apply to Africa.

²²⁰ As above, Clause 1 on 'Duty-Free Digital Content'.

²²¹ As above, Clause 4 on 'Digital Customs'.

²²² Digital Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Ukraine, Ukraine 2 (2023), available at https://assets.publishing.service.gov.uk/media/646356fc94f6df000cf5eaf4/CS_Ukraine_2.2023_UK_Ukraine_Digital_Trade_Agreement.pdf.

²²³ Government of UK 'Promotional material UK-Ukraine DTA: agreement explainer' Published 20 March 2023, <https://www.gov.uk/government/publications/uk-ukraine-digital-trade-agreement-agreement-explainer/uk-ukraine-dta-agreement-explainer> (accessed March 2024).

²²⁴ UK-Ukraine DTA art 132-B.

²²⁵ UK-Ukraine DTA art 132-K.

3.3.3 Comprehensive and Progressive Agreement for Transpacific Partnership

The Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP) is a Free Trade Agreement (FTA) signed by eleven countries; Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam on 8 March 2018 and entered into force on 30 December 2018.²²⁶ The CPTPP is open to others to join. In February 2021, the UK requested accession to CPTPP.²²⁷ Negotiations towards this concluded on 31 March 2023 and the Protocol of Accession signed on 16 July 2023.²²⁸ CPTPP is, however, yet to enter into force in the UK as it is undergoing legislative processes.²²⁹ The CPTPP incorporates the provisions of the Trans-Pacific Partnership (TPP) Agreement, signed on 4 February 2016 but not yet in force,²³⁰ and suspends the application of certain provisions.²³¹

The TPP dedicates Chapter 14 to e-commerce.²³² In 18 sub-articles, the TPP provides measures on e-commerce among the Parties.²³³ Measures affecting digitally delivered services are, however, governed separately under the TPP.²³⁴ The TPP adopts the WTO moratorium on customs duties on electronic transmissions.²³⁵ In addition, it regulates the non-discriminatory treatment of digital products, electronic authentication and signatures, domestic e-transactions framework, online consumer protection, personal information protection, cross-border transfer of information by electronic means,

²²⁶ Australian Government Department of Foreign Affairs and Trade 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)' [Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\) | Australian Government Department of Foreign Affairs and Trade \(dfat.gov.au\)](https://dfat.gov.au/our-work/tpa-cptpp/) (accessed 26 October 2023).

²²⁷ As above.

²²⁸ Government of UK 'The UK and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)' (20 May 2024) <https://www.gov.uk/government/collections/the-uk-and-the-comprehensive-and-progressive-agreement-for-trans-pacific-partnershipcptpp> (accessed 1 June 2024).

²²⁹ As above.

²³⁰ Comprehensive and Progressive Agreement for Transpacific Partnership, available at: [tpp-11-treaty-text.pdf \(dfat.gov.au\)](https://dfat.gov.au/our-work/tpa-cptpp/) art 1.1.

²³¹ As above, art 2 & Annex.

²³² TPP chapter 14, available at: [14-electronic-commerce.pdf \(dfat.gov.au\)](https://dfat.gov.au/our-work/tpa-cptpp/).

²³³ TPP art 14.2.2.

²³⁴ TPP art 14.2.3.

²³⁵ TPP art 14.3.

and dispute settlement, among other provisions on e-commerce.²³⁶ TPP also outlines the principles on access and use of the internet for e-commerce.²³⁷

Arising from the above and specific provisions of Chapter 14 of the TPP, it is evident that CPTPP is broad in scope, such that it has provisions on most issues affecting e-commerce. While some of the provisions seek to harmonise domestic policies, some of the provisions govern e-commerce among the Parties and at the same time gives Parties discretion to develop domestic policies that are necessary to achieve a legitimate public policy objective. For instance, TPP on one hand calls on the Parties to allow for the free flow of information, on the other hand, it allows for the enactment of a law or adoption of a measure that is inconsistent with the free flow of data requirement to achieve a legitimate public policy objective.²³⁸ This brings about issues of enforcement of this provision, which could be problematic and defeat the purpose of an FTA.

The above notwithstanding, lessons could be drawn from both the CPTPP and TPP in developing e-commerce agreements or policies. The provisions could be adapted also from existing e-commerce instruments as the TPP has done by adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce of 1996 in its call for Parties to develop domestic e-transactions frameworks.²³⁹

3.3.4 United States-Mexico-Canada Agreement

The United States-Mexico-Canada Agreement (USMCA) is an FTA signed between the US, Mexico and Canada on 10 December 2019 and entered into force on 1 July 2020 and is a substitution of the North American Free Trade Agreement (NAFTA).²⁴⁰ The core intent of USMCA is to boost trade between the parties and support high-paying jobs and grow their economies.²⁴¹

²³⁶ TPP chapter 14.

²³⁷ TPP art 14.10.

²³⁸ TPP art 14.11.

²³⁹ TPP art 14.5.

²⁴⁰ Office of the United States Trade Representative 'United States-Mexico-Canada Agreement' [United States-Mexico-Canada Agreement | United States Trade Representative \(ustr.gov\)](#) (accessed 26 October 2023).

²⁴¹ As above.

Digital trade under the USMCA is set out in 18 sub-articles and an annex of Article 19.²⁴² The USMCA provision on digital trade covers all aspects of trade by electronic means.²⁴³ The USMCA is broad in scope and covers aspects such as a requirement not to impose customs duties on digital products transmitted electronically, non-discriminatory treatment of digital products, a requirement to maintain a domestic framework in line with the UNCITRAL Model Law on Electronic Commerce 1996 principles, electronic authentication and signatures, online consumer protection, personal information protection, paperless trading, cross-border electronic transfer of information and cybersecurity, among other provisions.²⁴⁴ Like the CPTPP, the USMCA outlines the principles on access and use of the internet for digital trade.²⁴⁵

A keen look at the USMCA provisions on digital trade shows a lot of similarities with the CPTPP provisions, both in terms of the scope and the wording of the provisions. The USMCA has for instance maintained the same approach as the CPTPP in the regulation of cross-border transfer of information. It has on one hand mandated Parties to allow for the free flow of data by electronic means among themselves, and on the other hand, given Parties discretion to adopt or maintain a measure that is inconsistent with the free flow of data requirement on the basis of achieving a legitimate public policy achieve.²⁴⁶ Distinct, however, from the CPTPP, the USMCA necessitates that the measure should not be arbitrary or discriminatory and ought not to be applied in a manner that restricts the transfer of information but should only be applied to the extent of meeting the objective.²⁴⁷

Arising from the foregoing, several lessons on digital trade could be drawn from the USMCA owing to its broad scope. It has provisions on most issues affecting digital trade. Ongoing efforts at the global and African levels could be guided by it provided the context and circumstances of digital trade development are taken into consideration.

²⁴² USMCA art 19, available at [19-Digital-Trade.pdf \(ustr.gov\)](#).

²⁴³ USMCA art 19.2.2.

²⁴⁴ USMCA art 19.

²⁴⁵ USMCA art 19.10.

²⁴⁶ USMCA art 19.11.

²⁴⁷ USMCA art 19.11.2.

3.3.5 Regional Comprehensive Economic Partnership

The Regional Comprehensive Economic Partnership (RCEP) is an FTA between fifteen Asia-Pacific nations signed on 15 November 2020 and entered into force on 1 January 2022.²⁴⁸ The fifteen Members comprise of ten Members of the Association of Southeast Asian Nations (ASEAN) i.e. Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam; and five ASEAN FTA Partners i.e. Australia, China, Japan, New Zealand and Republic of Korea.²⁴⁹ India was part of the negotiations but is yet to join RCEP.²⁵⁰ RCEP was created primarily to boost trade and investment and to minimise development gaps among the Members.²⁵¹

RCEP covers several trade aspects including e-commerce. Chapter 12 of RCEP is dedicated to e-commerce.²⁵² It aims to promote consumer confidence and boost the development and use of e-commerce among the Parties.²⁵³ RCEP covers measures that affect e-commerce.²⁵⁴ It also calls for cooperation among the Parties in enabling e-commerce.²⁵⁵ In terms of coverage, RCEP covers aspects such as paperless trading, electronic authentication and signatures, online consumer protection, online personal information protection, unsolicited commercial electronic messaging, domestic regulation, transparency in e-commerce measures, cybersecurity, dialogue on e-commerce and settlement of disputes.²⁵⁶

Like the CPTPP and the USMCA, RCEP has adopted the WTO practice of not applying customs duties on electronic transmissions.²⁵⁷ RCEP notes in particular that the WTO MC11 Ministerial Decision on e-commerce provides the basis for the application of the moratorium. This is to be reviewed in line with future WTO Ministerial decisions.²⁵⁸ In

²⁴⁸ RCEP, available at: [RCEP – The Regional Comprehensive Economic Partnership \(rcepsec.org\)](https://rcepsec.org/) (accessed 27 October 2023).

²⁴⁹ As above.

²⁵⁰ RCEP 'About' [About – RCEP \(rcepsec.org\)](https://rcepsec.org/) (accessed 27 October 2023).

²⁵¹ As above.

²⁵² RCEP chapter 12, available at: [Microsoft Word - \(No Header\) Consolidated RCEP Agreement \(31Aug'20\) - CLEAN \(WC\) \(27Oct'20\) rev.docx \(rcepsec.org\)](https://rcepsec.org/).

²⁵³ RCEP art 12.2.

²⁵⁴ RCEP art 12.3.

²⁵⁵ RCEP art 12.4.

²⁵⁶ RCEP chapter 12.

²⁵⁷ RCEP art 12.11.

²⁵⁸ RCEP art 12.11 (2-4).

terms of cross-border data flows, RCEP allows for the free flow of data among the Parties and equally gives Parties discretion to formulate domestic policies that restrict the flow of data on the basis of achieving a legitimate public policy objective and for security interests.²⁵⁹ Such restriction of data flow, however, ought not to be arbitrary, non-discriminatory and should not in a disguised manner restrict trade.²⁶⁰

RCEP gives the impression that most of the FTAs negotiated in the recent past contain most provisions covered under the CPTPP and USMCA subject to a few modifications. Going forward there is a possibility that most FTAs will adopt similar provisions on digital trade. In addition, these FTAs show the great length of legislation of digital trade in trade agreements. However, there are still gaps in the regulation of wholly digital aspects of trade.

3.3.6 United States-Japan Digital Trade Agreement

The US and Japan concluded an Agreement Concerning Digital Trade which applies to measures that affect trade by electronic means.²⁶¹ The Agreement was signed on 7 October 2019 and entered into force on 1 January 2020.²⁶² Considering its scope and coverage, this Agreement is without doubt one of the most comprehensive agreements dedicated only to digital trade. It was enacted in recognition of the digital development in the US and Japan, which are both well-established.²⁶³

The Agreement incorporates *mutatis mutandis* the general exceptions provisions under Article XIV paragraphs (a) to (c) of GATS and Article XX of GATT.²⁶⁴ In addition, the Agreement is enforced subject to security exceptions that both Parties enjoy in terms of the ability not to disclose information in the interest of security and to take measures

²⁵⁹ RCEP art 12.15.

²⁶⁰ As above,

²⁶¹ Agreement between the United States of America and Japan Concerning Digital Trade, available at: [Agreement between the United States and Japan concerning Digital Trade.pdf \(ustr.gov\)](#).
²⁶² US Department of State 'Japan (20-101.1) – Digital Trade Agreement' [Japan \(20-101.1\) - Digital Trade Agreement - United States Department of State](#) (accessed 27 October 2023).

²⁶³ Office of the United States Trade Representative 'FACT SHEET on US- Japan Digital Trade Agreement' [FACT SHEET on U.S.-Japan Digital Trade Agreement | United States Trade Representative \(ustr.gov\)](#) (accessed 28 October 2023).

²⁶⁴ United States-Japan Digital Trade Agreement art 3.

necessary to restore peace or security.²⁶⁵ In addition, parties enjoy prudential exceptions and monetary and exchange rate policy exceptions.²⁶⁶

The Parties under the Agreement have agreed not to impose customs duties on electronic transmissions.²⁶⁷ They have also agreed not to discriminate against each other's digital products.²⁶⁸ In terms of cross-border data flows, there is an agreement for the free flow of data between the parties.²⁶⁹ This does not, however, preclude a party from adopting or maintaining a measure necessary to achieve legitimate public policy objectives subject to it being non-discriminatory and only necessary to meet the intended objective.²⁷⁰

Other provisions in the Agreement are on domestic regulation, electronic authentication and signatures, location of computing facilities and financial services, online consumer protection, personal information protection, unsolicited commercial electronic messaging, source codes, cybersecurity, open government data and ICT goods that use cryptography.²⁷¹

In summary, while the above PTAs show the efforts made in regulating digital trade, relevant cross-cutting provisions are on the moratorium on customs duties, non - discrimination of digital products and cross-border data flows. None of the agreements, however, contain provisions specific to this study i.e. provisions on safeguard measures applicable to digital trade. In addition, and as discussed previously, there are gaps in the regulation of wholly digital aspects of trade. A broader analysis of these instruments show that they apply to digital trade, as construed in this thesis, to a limited extent.

3.4 E-commerce and digital trade development in other global institutions

In addition to the foregoing developments on digital trade at the WTO and in trade agreements, several other global institutions also have legal frameworks and other initiatives in place that cover electronic commerce. As discussed in the previous chapter

²⁶⁵ United States-Japan Digital Trade Agreement art 4.
²⁶⁶ United States-Japan Digital Trade Agreement art 5.
²⁶⁷ United States-Japan Digital Trade Agreement art 7.
²⁶⁸ United States-Japan Digital Trade Agreement art 8.
²⁶⁹ United States-Japan Digital Trade Agreement art 11.
²⁷⁰ United States-Japan Digital Trade Agreement art 11.
²⁷¹ United States-Japan Digital Trade Agreement.

of this study, electronic commerce takes place electronically and is either delivered digitally or physically. As discussed, those delivered digitally are relevant to this study but since a distinction cannot outrightly be made between e-commerce delivered digitally or physically, this study examines e-commerce generally. Whether or not digitally delivered, e-commerce is facilitated by different factors and involves many actors. Just to highlight a few, e-commerce involves the examination of the platforms, computers or software, internet connectivity, developers, consumers and owners and various governments/jurisdictions among others. As a result, several initiatives are in place that impact diverse aspects of e-commerce, for instance, regulations of telecommunications and consumer protection.

While the above developments are pertinent in this study, this chapter will proceed to focus only on the development and initiatives in three global institutions that have in one way, or another influenced global e-commerce development. In particular, this section explores e-commerce developments at UNCITRAL, UNCTAD and the OECD.

3.4.1 Initiatives by the United Nations Commission on International Trade Law

UNCITRAL is a UN Commission in charge of worldwide commercial law reform.²⁷² It modernises and harmonises international business rules.²⁷³ UNCITRAL is one of the oldest institutions with an e-commerce framework. The development of e-commerce at UNCITRAL is older than the development at the WTO. E-commerce-related work at UNCITRAL began in the 1980s with a key focus on cross-border electronic payments and electronic data interchange.²⁷⁴ UNCITRAL took into account the preliminary developments of e-commerce at the time and in 1996 formulated a Model Law on Electronic Commerce.²⁷⁵ In 2001, UNCITRAL enacted a Model Law on Electronic Signatures to bring certainty to the use of electronic signatures²⁷⁶ and in 2005, the United

²⁷² UNCITRAL 'About UNCITRAL' [About UNCITRAL | United Nations Commission On International Trade Law](#) (accessed 27 October 2023).

²⁷³ As above.

²⁷⁴ UNCITRAL 'UNCITRAL legal instruments for e-commerce and paperless trade' [PowerPoint Presentation \(unescap.org\)](#) (accessed 27 October 2023).

²⁷⁵ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 *bis* as adopted in 1998.

²⁷⁶ UNCITRAL Model Law on Electronic Signatures, adopted 5 July 2001, available at: [UNCITRAL Model Law on Electronic Signatures \(2001\) | United Nations Commission On International Trade Law](#)

Nations Convention on the Use of Electronic Communications in International Contracts.²⁷⁷ In addition, the UNCITRAL Model Law on Electronic Transferable Records was enacted in 2017 to provide a framework for the use of e-forms of bills of lading, promissory notes and others.²⁷⁸ UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services was also enacted in 2022 to provide a framework for data flows and trust services.²⁷⁹

The UNCITRAL Model Law on Electronic Commerce 1996 contains provisions of electronic commerce legal recognition of data messages and communication of data messages.²⁸⁰ It also contains provisions on e-commerce on carriage of goods.²⁸¹ It was therefore enacted to primarily enable the use of modern communications and storage of information means for commercial purposes. Texts of the Model Law on Electronic Commerce 1996 are the global benchmark in developing laws on e-commerce.²⁸² For instance and as highlighted previously, CPTPP, USMCA and RCEP have expressly mandated the Parties to rely on the principles outlined under UNCITRAL Model Law on Electronic Commerce of 1996 in developing domestic frameworks on e-commerce or digital trade. The Model Law has been adopted by 80 states²⁸³ and impacted the drafting of several domestic and regional e-commerce policies.

In line with the changing landscape of e-commerce and advancement in digital technologies, UNCITRAL is in the process of developing a revised instrument on e-commerce.²⁸⁴ Discussions under UNCITRAL Working Group IV on e-commerce were ongoing in 2024 and several reports on the progress made have been presented in

²⁷⁷ United Nations Convention on the Use of Electronic Communications in International Contracts, adopted 23 November 2005, entered into force 1 March 2013.

²⁷⁸ UNCITRAL Model Law on Electronic Transferable Records, adopted 13 July 2017.

²⁷⁹ UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services, adopted 7 July 2022.

²⁸⁰ UNCITRAL Model Law on Electronic Commerce 1996 part one.

²⁸¹ UNCITRAL Model Law on Electronic Commerce 1996 part two.

²⁸² UNCITRAL 'UNCITRAL legal instruments for e-commerce and paperless trade' [PowerPoint Presentation \(unescap.org\)](#) (accessed 27 October 2023).

²⁸³ UNICTRAL 'UNCITRAL texts on e-commerce: an overview' [Session-1b-Castellani-UNCITRAL-texts_Eng.pdf \(adb.org\)](#) (accessed 27 October 2023).

²⁸⁴ United Nations 'Working Group IV: Electronic Commerce' [Working Group IV: Electronic Commerce | United Nations Commission On International Trade Law](#) (accessed 7 May 2024).

several UNCITRAL sessions.²⁸⁵ A look at one of the reports shows that the discussions cover data contracts and artificial intelligence and automation in contracting.²⁸⁶

3.4.2 Initiatives by the United Nations Conference on Trade and Development

The United Nations Conference on Trade and Development (UNCTAD) is yet another UN body that has contributed to e-commerce through progress tracking and the provision of platforms to discuss e-commerce and related issues. UNCTAD supports global issues relating to trade and development.²⁸⁷ It also supports the realisation of Sustainable Development Goals (SDGs).

UNCTAD is the focal point in the UN system on e-commerce and the digital economy.²⁸⁸ In particular, UNCTAD contributes to e-commerce through research and analysis, technical cooperation, women's empowerment, and consensus-building and coordination.²⁸⁹ In realisation of these mandates, UNCTAD conducts e-trade readiness assessments, supports e-commerce strategies and law reform and measures e-commerce and the digital economy. The findings are made public in various forms including reports, statistics and other publications.²⁹⁰ UNCTAD also conducts training and provides platforms, such as the e-commerce week, to discuss issues relating to e-commerce and the digital economy.²⁹¹

3.4.3 Initiatives by the Organisation for Economic Co-operation and Development

The OECD is an intergovernmental organisation founded in 1961 to fuel world trade and economic progress. It brings together 38 member countries from North and South

²⁸⁵ As above.

²⁸⁶ UNCITRAL Report of Working Group IV (Electronic Commerce) on the work of its sixty-fifth session (New York, 10–14 April 2023), available at: [V2302874.pdf \(un.org\)](#).

²⁸⁷ UNCTAD 'About UNCTAD' [About UNCTAD | UNCTAD](#) (accessed 27 October 2023).

²⁸⁸ UNCTAD 'E-commerce and the digital economy' [E-commerce and the digital economy | UNCTAD](#) (accessed 27 October 2023)>

²⁸⁹ UNCTAD (n 288).

²⁹⁰ UNCTAD (n 288).

²⁹¹ UNCTAD (n 288).

America, Europe and Asia.²⁹² OECD's slogan is 'better policies for better lives'.²⁹³ The scope of work is therefore diverse and covers e-commerce and the digital economy.²⁹⁴

'Digital' is one of the topics dealt with by the OECD. Under this, it focuses on work related to artificial intelligence, blockchain, broadband and telecom, consumer policy and product safety, digital economy, digital government, digital security and privacy.²⁹⁵ The outputs are dispatched to the public in the forms of statistics, digital economy outlook, papers and toolkits.²⁹⁶ The OECD's mandate impacts global e-commerce. For instance, and as highlighted in the previous chapter of this study, one of the most cited definitions of e-commerce was developed by the OECD in 2009 and modified in 2011.²⁹⁷ The OECD also supports the work of the WTO discussions on e-commerce, for instance, it has contributed to the e-commerce moratorium discussions by showing how the benefits of the moratorium outweigh the costs.²⁹⁸

3.5 Conclusion

In conclusion, this chapter has examined the growth of digital trade at the WTO in terms of how it came about and the ongoing developments. As pointed out, since e-commerce was formally introduced into the WTO in 1998, very minimal progress has been made in outlining the governing framework, setting out the definition of essential terminologies and in the discussions and other efforts on e-commerce. Specific discussions that have been put forth in this chapter relate to the growth at the WTO, herein, the mandates of the Work Programme on E-commerce and Joint Statement Initiative on E-commerce are notable. This section has pointed out that since the establishment of the Work Programme on E-commerce in 1998, it has not lived up to its mandate as it has unsuccessfully overseen

²⁹² OECD 'List of OECD Member countries - Ratification of the Convention on the OECD' [List of OECD Member countries - Ratification of the Convention on the OECD](#) (accessed 27 October 2023). The countries include; Australia, Austria, Belgium, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

²⁹³ OECD 'Who we are' [About the OECD - OECD](#) (accessed 27 October 2023).

²⁹⁴ As above.

²⁹⁵ OECD 'Digital' [Digital - OECD](#) (accessed 27 October 2023).

²⁹⁶ As above.

²⁹⁷ Refer to Chapter Two of this Study.

²⁹⁸ WTO 'Understanding the implications of the WTO ecommerce Moratorium' [179_646.pdf \(wto.org\)](#) (accessed 27 October 2023).

discussions on digital trade and related aspects at the WTO. Its mandate has been reaffirmed by Ministers during several Ministerial Conferences, but the contribution it is making to digital trade at the WTO is yet to be seen.

This study has examined the role of the JSI in re-igniting discussions on digital trade at the WTO. While the status of the JSI has been challenged on account that not all WTO Members are participating, the JSI has insisted that it has opened its discussions to all WTO Members to participate and highlights ‘inclusion’ as its core principle. Further, the JSI’s findings can only be adopted at the WTO by consensus of the Members. It is therefore instrumental that the JSI must adopt a technique different from what has been witnessed at the WTO since 1998 to give life to the discussions on digital trade at the WTO. Hopefully, the discussions will culminate in a multilateral agreement on digital trade.

This chapter has also assessed the moratorium on the application of customs duties on electronic transmissions. It has been identified that there currently is no consensus on what constitutes ‘electronic transmissions’ and similarly, the scope of the moratorium remains unclear, such that there is inconsistency as to whether the moratorium should apply to the ‘transmissions’ or the ‘contents of the transmissions’. Nevertheless, to date the moratorium has been continuously extended in all Ministerial Conferences after the Second Ministerial Conference. This study has highlighted the concerns of developing countries on the economic impacts that the moratorium has on their economies. Statistics by the OECD have pointed out that the moratorium results in huge tariff revenue losses by developing countries and amounts to giving free access to developed countries to the digital economies of developing countries.

In addition, this chapter has explored the applicability of GATT, GATS, TRIPS, TBT Agreement, Trade Facilitation Agreement and Information Technology Agreement and Technology Expansion Agreement to e-commerce. It has been discussed that the principle of ‘technological neutrality’ allows for the application of these instruments that were concluded before e-commerce advanced, to e-commerce as it continues to evolve. For instance, it has been discussed that GATT applies to e-commerce which results in the physical delivery of a product. TRIPS and TBT apply to all forms of trade regardless

of the medium of trade. GATS also contains elements of e-commerce under mode 1 of service supply.

The chapter proceeded to examine digital trade in RTAs and digital trade agreements. It pointed out that while most states have incorporated e-commerce provisions in RTAs, there has been a new trend in the recent past where WTO Members are now signing digital economy agreements. Examples are the Digital Economy Partnership Agreement signed between New Zealand, Chile and Singapore; the Digital Economy Agreement signed between the UK and Singapore and UK-Ukraine Digital Trade Agreement. The discussions on CPTPP, USMCA, RCEP and the US-Japan Digital Trade Agreement have justified the great length at which digital trade has been regulated in free trade agreements. It has been discussed that countries are resorting to these agreements due to the lack of a multilateral framework for digital trade.

Before concluding, this chapter has pointed out and briefly discussed e-commerce development in other global institutions such as UNCITRAL, UNCTAD and OECD. It has been discussed that these institutions in one way or another contribute to e-commerce either through the formulation of model laws, as done by UNCITRAL; monitoring and support of e-commerce initiatives globally, as is the case for UNCTAD; and support of e-commerce initiatives at the WTO and amongst its members, as is the case for the OECD.

Notably, this chapter has examined digital trade and related developments at the international trade level. They inform the discussions in the next chapter which aims to examine the growth and status of digital trade at the African regional level.

CHAPTER FOUR

THE STATUS OF DIGITAL TRADE UNDER AFRICAN REGIONAL LAW

4.1 Introduction

Digitalisation has transformed the way goods and services are traded due to its ability to increase the speed, scope, and scale of trade.¹ In Africa, digital trade continues to grow, although at a relatively slow pace compared to the rest of the world.² Although there has been a general increase in internet penetration, there is a wide gap in terms of digital trade readiness by African countries. The digital market is for instance dominated by e-commerce platforms that are non-African.³ The very broad digital divide places Africa in a precarious position. This therefore calls for the formulation of policies to particularly protect African domestic industries. One such policy which informs discussions in this study, is on safeguard measures to protect African domestic industries from surges in digital trade imports.

The previous chapter of this study has examined the status of digital trade under international trade law. This chapter is dedicated to discussions on the status of digital trade at the African level. Importantly, the rules that apply to digital trade at the international trade level similarly apply to African countries, more particularly, African countries that are members of the World Trade Organization (WTO). This chapter would not, therefore, reiterate the rules that have already been examined in the previous chapter. It will focus on other developments on digital trade solely within an African context and those that have been developed by African countries within the context of a multilateral trading system. Thus, this chapter builds on the discussions in the previous chapter by contextualising the status of digital trade under African regional law.

¹ OECD 'Key issues in Digital Trade: OECD Global Forum on Trade 2023 "Making Digital Trade Work for All" (OECD 2023), available at <https://www.oecd.org/trade/OECD-key-issues-in-digital-trade.pdf>.

² A Lemma, M Mendez-Parra & L Naliaka 'The AfCFTA: unlocking the potential of the digital economy in Africa' ODI Report published July 2022, 36.

³ UNCTAD 'E-Commerce and Digital Economy Programme: Year in Review 2020' <https://unctad.org/webflyer/e-commerce-and-digital-economy-programme-year-review-2020> (accessed 26 June 2021).

As shall be established in the discussions that follow, there has been little or slow development of digital trade on the African continent. This is attributed largely to the limited progress made in the international trade sphere and technological issues that affect most African countries.⁴ Zheng observes that, despite the impact that digital trade has had on international trade, the law has not kept up with it.⁵ He notes for example that the WTO has not kept up with the developments on digital trade, the stalemate in negotiations on e-commerce and limited progress at the WTO Work Programme on E-commerce being conspicuous.⁶ Zheng notes in particular that the WTO is still in the 'pre-digital set-up'.⁷ This limited progress at the WTO has seen correlative limited progress at the African level, both as a region and domestically by African states. This chapter therefore examines the growth of digital trade in Africa.

Thus, this chapter examines the growth of digital trade under African regional law in the following structure: the next section will give a general overview of the growth of digital trade at the continental level. The subsequent five sections will examine the contributions to digital trade by the African Union (AU), African Continental Free Trade Area (AfCFTA), African regional economic communities, trade agreements and African states at the domestic level. This chapter will thereafter examine the contributions made by African WTO Members to the discussions on e-commerce at the WTO. The last section will summarise the discussions herein and briefly introduce the next chapter.

4.2 The growth of digital trade at the African-Continental level

Unlike other continents, Africa is in a peculiar position owing to the challenges it faces in terms of poor internet connectivity, inadequate policy and institutional frameworks, and lack of financial inclusion.⁸ Baker notes that countries within sub-Saharan Africa are grappling with the challenges of poor infrastructure and internet connectivity.⁹ Because of

⁴ PR Baker *E-commerce and Digital Trade: A Policy Guide for Least Developed Countries, Small States and Sub-Saharan Africa* (Commonwealth Secretariat 2017) 2.

⁵ W Zheng 'The Digital Challenge to International Trade Law' (2020) 52(2) *New York University Journal of International Law and Politics* 539, 541.

⁶ Zheng (n 5), 542.

⁷ Zheng (n 5), 542.

⁸ C Igue, A Alinsato & T Agadjouede 'E-commerce in Africa: Issues and Challenges' in M Smeets (eds) *Adapting to the Digital trade era: challenges and opportunities* (World Trade Organization 2021), 116.

⁹ Baker (n 4) 2-3.

this, Africa has been lagging behind in digital transformation. In 2017, African WTO countries held a panel discussion themed ‘Digital Industrial Policy and Development’ to express their views on digital trade aspects relating to industrial policies, the scope of the digital divide and keeping up with developments in the digital economy.¹⁰ In their Communication to the WTO, the African Group noted that digital transformation is disrupting the world and is causing a divide between developed and developing economies.¹¹ Their major concern was that Africa was lagging behind due to a lack of internet connectivity by a majority of Africans.¹² They raised concerns about market capitalizations whereby there are specific firms that are dominating the digital trade space.¹³ Pertinent to this research, the African Group noted that for digital integration to exist in Africa, there was the need for a ‘national digital industrial policy’, i.e., by building the capabilities of African countries for example by developing domestic industries.¹⁴ According to the African Trade Policy Centre of the United Nations Economic Commission for Africa (UNECA), to strengthen digital trade in Africa, there is a need for investment in the digital economy and to increase the capacities of local industries.¹⁵

As of November 2020, Africa’s digitally delivered services made up about 1% of the world’s digital trade.¹⁶ This increased as a consequence of the coronavirus disease. While internet connectivity remains a big challenge in many African countries, Africa has made developments in digital trade on other fronts as espoused further below. The subsequent subsections examine the progress made at the continental level by African institutions.

¹⁰ WTO ‘Work Programme on Electronic Commerce: Report of Panel Discussion on “Digital Industrial Policy and Development” JOB/GC/133 (21 July 2017), para 1.1.

¹¹ WTO ‘JOB/GC/133’ (n 10) para 1.3.

¹² As above.

¹³ World Trade Organization ‘JOB/GC/133’ (n 10) para 1.4.

¹⁴ See World Trade Organization ‘JOB/GC/133’ (n 10) paras 1.6 & 1.7.

¹⁵ United Nations Economic Commission for Africa ‘Digital Trade in Africa: Implications for Inclusion and Human Rights’ 2019 Report available at <https://repository.uneca.org/ds2/stream/?#/documents/7795db02-249b-5276-b2d5-d7caae1c31ac/page/1>, xvii.

¹⁶ C Stork ‘Situational Analysis of Digital Trade and Digital Economy in Africa’ Report presented at the African Union E-commerce Conference held on 23-25 November 2020 available at <https://researchictolutions.com/home/wp-content/uploads/2020/11/AU-23Nov2020-Digital-Trade.pdf>, 29; GIZ ‘Promoting e-commerce in Africa’ January 2021 <https://www.giz.de/en/worldwide/93140.html> (accessed 15 June 2021).

4.2.1 Digital Trade under the African Union

The Africa Union (AU) brings together all of the fifty-five African countries and was constituted to provide a framework for increased co-operation and regional integration as the key driver of Africa's economic development.¹⁷ Under the Constitutive Act of the African Union¹⁸ and Protocol to its amendments,¹⁹ the AU objectifies the creation of necessary conditions to facilitate Africa's contribution toward global trade and global negotiations. Its further objectives include the integration of economies in Africa and the development and promotion of policies on trade.²⁰ Several legal instruments and initiatives have been established under the African Union to boost digital trade in the continent. The legal instruments and initiatives are explored further below.

Digital Trade and Africa's Agenda 2063

Inspired by the need to 'refocus' and 'reprioritise' economic and social development, inclusion, regional and continental integration, peace, security and democratic governance in Africa, the African leaders in January 2015 at the African Union Summit adopted the African Union Agenda 2063.²¹ The Agenda 2063 intends to achieve 'the Africa we want' within a 50-year period, from 2013-2063. It therefore summarises Africa's aspirations and key activities to be undertaken in realisation of the aspirations.²² The Agenda 2063 is a 'peoples' driven initiative' that is realised at the national, regional and continental levels by African states, regional economic communities (RECs) and the African Union respectively.²³

¹⁷ African Union 'About the African Union' <https://au.int/en/overview> (accessed 15 June 2021).

¹⁸ See Constitutive Act of the African Union, available at https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf; See generally the Organization of African Unity (OAU) Charter available at https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf.

¹⁹ Protocol on the Amendments to the Constitutive Act of the African Union available at https://au.int/sites/default/files/treaties/35423-treaty-0025_-_protocol_on_the_amendments_to_the_constitutive_act_of_the_african_union_e.pdf.

²⁰ As above, art 3; See also the Constitutive Act (n 19) art 3.

²¹ African Union 'Agenda 2063: The Africa We Want' (2015) available at https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf

²² African Union 'Agenda 2063: The Africa We Want' <https://au.int/en/agenda2063/overview> (accessed 1 September 2022).

²³ Africa Union 'Background Note 1 of Agenda 2063: The Africa We Want' available at https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf.

Agenda 2063 recognises technology as a key driver for economic growth and development. It is also instrumental in realising aspiration 1 on inclusive growth and sustainable development for a prosperous Africa.²⁴ Agenda 2063 objectifies the transformation of continental markets through deeper integration. To realise this, it hopes to facilitate the establishment of market and trade infrastructure through, for instance, information communication technology.²⁵ It anticipates further that by 2063 there will be full economic integration in Africa.²⁶ One way for achieving this is by leveraging the digital economy. Agenda 2063 recognises electronic interconnectivity as a key element of integration.²⁷ It further recognises the growth and opportunities brought about by the growing digital economy. It calls on stakeholders to support the development of the digital economy as a means for improving Africa's infrastructural development.²⁸ Thus, digital trade is pertinent in achieving the Africa we want by 2063.²⁹ As shall be pointed out later in this section, Agenda 2063 has inspired several e-commerce initiatives currently in place at continental and regional levels.

The African Union Convention on Cybersecurity and Personal Data Protection

In 2014, the African Union adopted the African Union Convention on Cybersecurity and Personal Data Protection ('Malabo Convention').³⁰ The Malabo Convention received the necessary ratifications in April 2023 when Mauritania ratified as the fifteenth Member.³¹ The Convention subsequently entered into force on 8 June 2023.³² The Convention as of

²⁴ African Union 'Framework Document of the Agenda 2063: The Africa We Want' available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf, 13.

²⁵ Agenda 2063 Framework Document (n 24) 33-34.

²⁶ Agenda 2063 Framework Document (n 24) 36.

²⁷ Agenda 2063 Framework Document (n 24) 98-99.

²⁸ As above, 113 & 149-150.

²⁹ B Vickers *A Handbook on Regional Integration in Africa: Towards Agenda 2063* (The Commonwealth 2017) 34.

³⁰ See African Union Convention on Cybersecurity and Personal Data Protection, Adopted 27 June 2014, available at https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf. The Convention applies to the "collection, processing, transmission, use and storage of data by individuals, private and public corporations, local communities and states". See A9.

³¹ African Union 'List of Countries which have Signed, Ratified/Accessed to the African Union Convention on Cyber Security and Personal Data Protection' (19 September 2023), available at https://au.int/sites/default/files/treaties/29560-sl-AFRICAN_UNION_CONVENTION_ON_CYBER_SECURITY_AND_PERSONAL_DATA_PROTECTION_0.pdf

³² As above.

September 2023 had fifteen ratifications³³ while twelve countries have signed but were yet to ratify.³⁴

Interesting to note, the Malabo Convention took effect nine years after its adoption. Even still, forty African states are yet to ratify the Convention. The hesitation by African states to ratify the Convention speaks to the subtle nature of cyberspace regulation in the continent. Orji faults the lack of effective regional coordination for the reluctance of African states to ratify the Convention.³⁵ He recommends the establishment of a regional monitoring mechanism to oversee the ratification and implementation of the Convention.³⁶ The Convention is instrumental in the regulation of Africa's cyberspace, electronic transactions and the protection of personal data.³⁷

The Convention recognises the challenges to the development of e-commerce in Africa which relate to and are of relevance to this study, the lack of legislation on e-services and telecommunication, probative elements brought about by digital systems and lack of customs legislations for e-commerce.³⁸ The Convention has dedicated Chapter 1 to electronic transactions.³⁹ It puts forth the rules relevant for trading online, in terms of advertisements, electronic contracts and the security of e-transactions.⁴⁰ The responsibility of enforcing the Convention rests on the States.⁴¹ The Convention for instance calls on State Parties to establish an authority in their territories to enforce the

³³ The Malabo Convention as of September 2023 had been ratified by - Angola, Cape Verde, Côte d'Ivoire, Congo, Ghana, Guinea, Mozambique, Mauritania, Mauritius, Namibia, Niger, Rwanda, Senegal, Togo and Zambia.

³⁴ The Malabo Convention as of September 2023 had been signed but not ratified by – Benin, Cameroon, Chad, Comoros, Djibouti, Gambia, Guinea-Bissau, South Africa, Sierra Leone, Sao Tome & Principe, Sudan and Tunisia.

³⁵ UJ Orji 'The African Union Convention on Cybersecurity: A Regional Response Towards Cyber Stability?' (2018) 12(2) *Masaryk University Journal of Law and Technology* 91-125, 93. It could also be attributed to criticisms of the Convention witnessed prior to its adoption, by civil society organizations, the private sector and advocates of privacy. The adoption of the Convention was also postponed from the initial date of 22 January 2014 on account that the Convention would limit the rights to speech and privacy; see CCDCOE 'African Union Adopts Convention on Cyber Security' <https://ccdcoe.org/incyber-articles/african-union-adopts-convention-on-cyber-security/> (accessed 1 September 2022).

³⁶ As above, 93.

³⁷ AU Convention on Cybersecurity and Personal Data Protection preamble.

³⁸ AU Convention on Cybersecurity and Personal Data Protection preamble.

³⁹ This Chapter begins at art 2.

⁴⁰ AU Convention on Cybersecurity and Personal Data Protection secs 2-7.

⁴¹ AU Convention on Cybersecurity and Personal Data Protection secs 24(2) & 25(3).

Convention by protecting personal data.⁴² Important to this study, the Convention aims to facilitate a secure space for conducting trade in goods and services electronically in Africa. This is relevant to this study in analysing the volumes of digital trade in Africa and how it is impacted by cybersecurity.

Personal Data Protection Guidelines for Africa, 2018

In 2018, the African Union in collaboration with the Internet Society developed the Personal Data Protection Guidelines for Africa to facilitate the implementation of the Malabo Convention.⁴³ The Guidelines emphasise building trust online, privacy and use of personal data responsibly. It recognises the diversity in cultures, variations in access to technology and diverse legal regimes in Africa. It notes that these challenges impede the creation of harmonised policies on data protection.⁴⁴

The Guidelines call on different stakeholders, including governments and policymakers, data protection authorities, data controllers and their partners, civil society organisations and citizens, to collectively create trust in the online ecosystem and see to it that personal data is protected.⁴⁵ In addition, the Guidelines call for a multi-stakeholder approach in online data protection.⁴⁶ It recommends a responsible and sustainable use of personal data.⁴⁷ It calls on governments to establish consistent data protection laws in Africa and to respect privacy both online and offline.⁴⁸ More importantly, the Guidelines emphasise data protection principles outlined under the Malabo Convention and from other sources, for instance, collection limitation, data quality, purpose specification, use limitation, security safeguards, openness, individual participation and openness.⁴⁹

⁴² AU Convention on Cybersecurity and Personal Data Protection art 11.

⁴³ Internet Society 'Personal Data Protection Guidelines for Africa: A Joint Initiative of the Internet Society and the African Union Commission' (9 May 2018), available at: https://www.internetsociety.org/wp-content/uploads/2018/05/AUCPrivacyGuidelines_2018508_Final_EN.pdf.

⁴⁴ Personal Data Protection Guidelines for Africa (n 43) 7.

⁴⁵ Personal Data Protection Guidelines for Africa (n 43) 18-20.

⁴⁶ Personal Data Protection Guidelines for Africa (n 43) 1-25.

⁴⁷ Personal Data Protection Guidelines for Africa (n 43) 18.

⁴⁸ Personal Data Protection Guidelines for Africa (n 43) 19-20.

⁴⁹ Personal Data Protection Guidelines for Africa (n 43) 9-10.

The Declaration on Internet Governance and Development of Africa's Digital Economy of 2018

During the 30th Ordinary Session of the African Union assembly in Ethiopia from 28 to 29 January 2018, the AU Heads of State and Government made a declaration on internet governance and development of the digital economy in Africa.⁵⁰ Therein, it was noted that less than 20% of Africans were online, a majority of whom were in urban areas.⁵¹ The Declaration reaffirmed the need for inclusivity, transparency and accessibility to all of Internet governance.⁵² The Declaration recognised a multi-stakeholder approach in addressing internet issues.⁵³ The Heads of State and Government also committed to developing legal and regulatory environments to facilitate the growth of Africa's digital economy.⁵⁴

The Declaration is relevant to this study as it contains African governments' commitment to develop the Internet and Africa's digital economy. The Internet is an enabler of digital trade and, as is currently the situation, Africa's digital trade environment is not well established due to challenges relating to Internet infrastructure and absence of most Africans on the Internet. As highlighted previously in this chapter, digital trade does not take place in isolation. A good regulatory environment and the goodwill of governments to safeguard the Internet are therefore essential for digital trade.

African Union Digital Transformation Strategy (2020-2030)

The AU in 2020 developed the African Union Digital Transformation Strategy (2020-2030).⁵⁵ It was inspired by the huge youthful population in Africa that have the ability to leverage opportunities in the digital space.⁵⁶ It is also inspired by the need for Africans to innovate and, more importantly, to achieve the AU Agenda 2063.⁵⁷ The Strategy is

⁵⁰ African Union 'Declaration on Internet Governance and Development of Africa's Digital Economy' Assembly/AU/Decl.3(XXX).

⁵¹ Declaration on Internet Governance and Development of Africa's Digital Economy' (n 50) para 1.

⁵² Declaration on Internet Governance and Development of Africa's Digital Economy' (n 50) para 1.

⁵³ Declaration on Internet Governance and Development of Africa's Digital Economy' (n 50) para 5.

⁵⁴ Declaration on Internet Governance and Development of Africa's Digital Economy' (n 50) para 14.

⁵⁵ African Union 'The Digital Transformation Strategy for Africa (2020-2030), available at <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>.

⁵⁶ As above, part 1 at 1.

⁵⁷ AU Agenda 2063 (2015) available at https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf.

expected to strengthen existing digital trade frameworks and initiatives at the AU.⁵⁸ It objectifies breaking of the digital divide in the continent by creating a secure digital marketplace, empowering Africans digitally, closure of the digital infrastructural gap and harmonization of laws and policies.⁵⁹ It is however the mandate of African states to see to it that policies and regulations that promote digital transformation are adopted in their territories.⁶⁰

African Union Data Policy Framework, 2022

The AU on 28 July 2022 published its Data Policy Framework which was developed in recognition of the increased impact of data and to provide a framework to support data-driven innovation and value creation.⁶¹ The Framework is instrumental in realising the AU Agenda 2063's goal of growing Africa's digital economy. It is also derived from the AU Digital Transformation Strategy, discussed earlier.⁶² The Framework recognises that data is at the centre of digital transformation.⁶³ It also emphasises collaboration at the continental, RECs and national levels in realisation of its purpose. Significantly, the Framework is expected to integrate Africa's data ecosystem that aid intra-Africa digital trade.⁶⁴

The principles guiding the Framework include 'trust, accessibility, interoperability, security, quality and integrity, representivity and non-discrimination'.⁶⁵ In addition, the Framework provides recommendations to guide states in developing domestic policies.⁶⁶ Some of the recommendations include allowing for data flows on the continent while ensuring that there is human rights protection, promoting agile regulation, developing domestic data protection laws, creating independent data protection authorities, setting

⁵⁸ The Digital Transformation Strategy (n 55) 1.

⁵⁹ The Digital Transformation Strategy (n 55) 3.

⁶⁰ The Digital Transformation Strategy (n 55) 7.

⁶¹ African Union 'AU Data Policy Framework' published 28 July 2022, available at: <https://au.int/sites/default/files/documents/42078-doc-AU-DATA-POLICY-FRAMEWORK-ENG1.pdf>.

⁶² AU Data Policy Framework (n 61) 3.

⁶³ AU Data Policy Framework (n 61) 1.

⁶⁴ AU Data Policy Framework (n 61) 18.

⁶⁵ AU Data Policy Framework (n 61) VIII.

⁶⁶ AU Data Policy Framework (n 61) VIII.

open data setting standards, promoting the portability of data, improving infrastructure and establishing an integrated national data system.⁶⁷

In addition to the foregoing, the Framework recognises the global nature of data and the resulting impact it has on cross-border data transfer. This necessitates collaboration and global governance.⁶⁸ Subsequently, The Framework urges African states to allow for data access for development, innovation and competition.⁶⁹ ‘Data’ under the Framework includes ‘personal, non-personal, industrial and public data’.⁷⁰ This is unique as most of the existing data policies or laws in Africa focus only on personal data.

In terms of e-commerce, the Framework recommends collective actions in regulating e-commerce as it intersects with multiple other issues and is impacted by diverse challenges faced by African governments.⁷¹ In particular, the Framework notes that:

Strategies to enhance e-commerce cannot be formulated in isolation since e-commerce intersects with a multiplicity of other issues, including Digital ID, data governance, customs duties, cross-border data flows, cybersecurity, payments system interoperability, consumer protection, competition, taxation, and standards, to name a few. Furthermore, improving e-commerce adoption requires addressing factors such as internet penetration, postal reliability, use of payments services (bank accounts or mobile money), and security of internet servers.⁷²

The Framework observes that movement of data across borders enables digital trade.⁷³ Data hoarding inhibits the benefits of digital trade.⁷⁴ In terms of regulation, trade agreements are inadequate in addressing cross-border data flows as they are non-binding, non-universal.⁷⁵ It notes, however, that the African Continental Free Trade Area creates harmonised rules and efforts on digital trade and e-commerce that are currently

⁶⁷ AU Data Policy Framework (n 61) VII & IX.

⁶⁸ AU Data Policy Framework (n 61) 1-2.

⁶⁹ AU Data Policy Framework (n 61) 2.

⁷⁰ AU Data Policy Framework (n 61) 5.

⁷¹ AU Data Policy Framework (n 61) 43.

⁷² AU Data Policy Framework (n 61) 43.

⁷³ AU Data Policy Framework (n 61) 41.

⁷⁴ AU Data Policy Framework (n 61) 41.

⁷⁵ AU Data Policy Framework (n 61) 43.

overlapping.⁷⁶ Thus, the Frameworks speaks to harmonised rules and coordination in the regulation of data flows as an enabler of digital trade in the continent.

Policy and Regulation Initiative for Digital Africa

The AU in collaboration with other organizations has developed frameworks to strengthen digital trade in the continent. In collaboration with the European Union (EU) and International Telecommunication Union (ITU), the AU has formulated the Policy and Regulation Initiative for Digital Africa (PRIDA) to build the capacities of African states to unlock the future benefits of digital services.⁷⁷ PRIDA objectifies the creation of a legal and institutional framework to allow for the use of Information and Communication Technology (ICT) to boost economic and social development on the African continent.⁷⁸ This is realised in three tracks; track 1, which is spearheaded by the ITU relates to harmonized and efficient spectrum utilization across Africa. The second and third tracks that are spearheaded by the AU, relate to harmonized ICT policy, legal and regulatory frameworks and enhanced stakeholder involvement in the governance of internet globally.⁷⁹ PRIDA also gives priority to capacity building.⁸⁰ Aside from supporting the realisation of the Initiative, the EU provides financial support.

Centre for Excellence for Digital Identity, Digital Trade and Digital Economy

The UNECA in collaboration with the AU has developed the Centre for Excellence for Digital Identity, Digital Trade and Digital Economy (DITE) whose mandate is to support the access of technologies by African states.⁸¹ DITE offers technical advice and support on the development and implementation of standards for digital identity systems and supports the harmonization of civil registration and digital identity systems.⁸² DITE does

⁷⁶ AU Data Policy Framework (n 61) 43.

⁷⁷ See PRIDA 'About Us' <https://oneprida.africa/about-us/> (accessed 1 September 2021).

⁷⁸ See for instance European Commission 'Policy and Regulation Initiative for Digital Africa (PRIDA), available at https://africa-eu-partnership.org/sites/default/files/prida_factsheet.pdf.

⁷⁹ ITU 'Policy and Regulation Initiative for Digital Africa (PRIDA)' <https://www.itu.int/en/ITU-D/Pages/About.aspx> (accessed 1 September 2022).

⁸⁰ As above.

⁸¹ See UNECA 'Concept note on the ECA on Digital Identity, Trade and Economy Initiative and Center of Excellence' available at <https://www.uneca.org/sites/default/files/uploaded-documents/DITE-Africa/concept-note.pdf>.

⁸² UNECA 'What is the way forward with implementing/or strengthening DITE in Africa?' <https://uneca.org/dite-africa/what-way-forward-implementingor-strengthening-dite-africa> (accessed 1 September 2022).

this in recognition of the challenge of lack of legal or formal identity by many African citizens.⁸³ As a result, these citizens have been marginalised and excluded in development processes.

DITE hopes to enhance civil registration of African citizens by 2030.⁸⁴ Additionally, DITE hopes to assist African countries in developing digital identity systems as a way of exploiting the digital economy and improving identity registration processes. It will do this by sharing experiences and best practices from countries that have made progress on digitalisation.⁸⁵ DITE notes that digital identity is pertinent in building trust in the digital economy which ultimately boosts e-commerce.⁸⁶ More importantly, digital identity is critical in realizing the AfCFTA mandate of creating a common digital market. To achieve this, the collaboration of all African states is necessary.⁸⁷

SOKOKUU

On 7 July 2020, the AU together with the African Electronic Trade Group launched 'Sokokuu', an African digital marketplace to facilitate e-commerce between businesses in Africa.⁸⁸ 'Sokokuu' is a Kiswahili word that connotes 'common market'. Its main objective is to bring African markets to a common platform through the sharing of trade information and markets.⁸⁹ Sokokuu would enhance African e-commerce as it will facilitate the movement of products across the continent. It also boosts competitiveness of small and medium sized enterprises.⁹⁰ The initiative promotes intra-African trade.

⁸³ UNECA 'Concept note on the ECA on Digital Identity, Trade and Economy Initiative and Center of Excellence' <https://www.uneca.org/sites/default/files/uploaded-documents/DITE-Africa/concept-note.pdf> (accessed 1 September 2022).

⁸⁴ As above, 2.

⁸⁵ UNECA (n 81).

⁸⁶ UNECA (n 83) 2-4.

⁸⁷ UNECA (n 83) 4-5.

⁸⁸ See African Union 'The African Union and African Electronic Trade Group launch "SOKOKUU", the African E-Commerce Platform, and the Global Competition for Youth Start Ups for the Second Intra-African Trade Fair Pavilion' <https://au.int/en/pressreleases/20200707/african-union-and-african-electronic-trade-group-launch-sokokuu> (accessed 1 September 2021).

⁸⁹ As above.

⁹⁰ S Mugayi 'An Assessment of the African Union Commission's Economic Activities' in SL Jaidi (eds) *Rapport annuel sur l'économie de l'Afrique* (Policy Center for the New South 2020) 260.

Digital Earth Africa programme

The African Union Commission (AUC) has developed a digital strategy to support the programmes relating to digital trade, identity and economy by the AfCFTA.⁹¹ Particularly, the Digital Earth Africa programme has been developed to facilitate the analysis of digital data in the continent.⁹² Its key mandate is to translate earth observations into insights. This aids in the development of Africa's digital infrastructure.⁹³ The Digital Earth Africa's mission is to 'process openly accessible and freely available data to produce decision-ready products.'⁹⁴

The Digital Earth Africa has a Sandbox that facilitates the analysis of earth observation data.⁹⁵ Through the Sandbox digital trade data can be analysed, without jeopardising the integrity and safety of the main repository of the data. Sandboxes have evolved from analysis of national data to cross-border data.⁹⁶ The Sandboxes act as a medium for facilitating the free flow of data, on the one hand, and protection of data legal frameworks, on the other hand. This way, it aids in the integration of the African digital market.⁹⁷ These discussions are relevant to this study since digital trade is dependent on an analysis of digital data that crosses international borders. Thus, if sandboxes are effectively adopted in the continent, they would facilitate the analysis of cross-border digital trade data.

The Pan-African Payment and Settlement System

The Pan-African Payment and Settlement System (PAPSS) was launched on 13 January 2022 in Ghana following its development by the Afreximbank in partnership with the African Union in 2019.⁹⁸ PAPSS is a centralised financial market infrastructure across

⁹¹ UNECA 'COM2021: African countries need to leverage AfCFTA to drive digital trade' 18 March 2021 <https://www.uneca.org/stories/com2021-african-countries-need-to-leverage-afcfta-to-drive-digital-trade> (accessed 15 June 2021).

⁹² Digital Earth Africa 'About Us' <https://www.digitalearth africa.org/about-us> (accessed 15 June 2021)

⁹³ As above.

⁹⁴ DE Africa, available at <https://www.digitalearth africa.org/>.

⁹⁵ Digital Earth Africa 'Platform' <https://www.digitalearth africa.org/platform-resources/platform#de-africa-map> (accessed 15 June 2021).

⁹⁶ See for instance The Datasphere Initiative 'Africa Forum on Sandboxes for Data' <https://www.thedatasphere.org/programs/platform-for-dialogue/africa-dialogue/> (accessed 10 August 2023).

⁹⁷ As above.

⁹⁸ Pan-African Payments and Settlement System 'About PAPSS' [The Pan-African Payments and](#)

Africa. In collaboration with commercial banks and other licensed financial institutions, PAPSS allows for payment and settlements across Africa. PAPSS facilitates the implementation of the Agreement Establishing the AfCFTA as it allows for the free flow of money and mitigates financial risks.⁹⁹

Based on its operational model, payments under PAPSS are transferred instantly or near-instantly.¹⁰⁰ Payment is remitted by the sending institution on behalf of the sender in local currency; then a payment instruction is sent to PAPSS which then remits the money to the receiving institutions which will then transmit the payment in local currency to the receiver.¹⁰¹ PAPSS, therefore, acts as an intermediary between the two banks.

One of the key elements of digital trade is that payments are made online. Oftentimes, there is no universally accepted mode of payment as it is dependent on the agreement between the parties transacting. PAPSS is a one-of-a-kind centralised payment system that if fully implemented would boost digital trade by building trust and minimising the risks that may result from paying for data and services online. To this extent, therefore, PAPSS is relevant to this study.

4.2.2 Digital Trade under the African Continental Free Trade Area

The AfCFTA brings together fifty-five African countries, of which forty-seven countries had by September 2023 ratified the AfCFTA Agreement,¹⁰² making it the world's largest FTA.¹⁰³ It is objectified that the AfCFTA will boost Africa's digital trade as it has come at a time when there is increased digital transformation. It was also created to facilitate the fulfilment of the AU's Agenda 2063, which contains an agenda on boosting digital trade in Africa.¹⁰⁴ UNECA opines that the digitalization of African trade is one way of achieving

[Settlement System \(PAPSS\) - PAPSS](#) (accessed 28 October 2023).

⁹⁹ As above.

¹⁰⁰ Pan-African Payments and Settlement System 'Connecting Payments. Accelerating Africa's Trade' <https://papss.com/> (accessed 28 October 2023).

¹⁰¹ As above.

¹⁰² African Union 'List of Countries which have Signed, Ratified/Acceded to the Agreement Establishing the African Continental Free Trade Area' (27 April 2022), available at https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT_ESTABLISHING_THE_AFRICAN_CONTINENTAL_FREE_TRADE_AREA_0.pdf.

¹⁰³ AfCFTA 'About the AfCFTA' <https://au-afcfta.org/about/> (accessed 1 September 2022).

¹⁰⁴ See for instance African Union Development Agency 'A Continental Free Trade Area For Africa - Driven By Emerging Technologies' <https://www.nepad.org/blog/continental-free-trade-area-africa-driven-emerging-technologies> (accessed 1 September 2021).

the goals of the AfCFTA.¹⁰⁵ According to UNECA, this can be achieved by digitalising virtual services.¹⁰⁶ It however notes that there is a need to improve and harmonise existing legal frameworks.¹⁰⁷

The subsequent subsections explore the development of digital trade under the AfCFTA.

Agreement establishing the African Continental Free Trade Area

During the AU Summit in Addis Ababa on 30 January 2012, the AU Assembly decided to begin negotiations for the establishment of the AfCFTA.¹⁰⁸ Thereafter, the African Heads of States on 15 June 2015, during the 25th Ordinary Session of the Assembly of Heads of State and Government of the AU in Johannesburg, South Africa, agreed to commence negotiations for the establishment of an African Continental Free Trade Area to integrate African markets.¹⁰⁹ In February 2016, negotiations began under the AfCFTA Negotiating Forum which culminated in the 10th Extraordinary Summit of the African Union on AfCFTA in Kigali on 21 March 2018 where three Agreements were signed: the Kigali Declaration by 47 African States, AfCFTA Agreement by 44 African States and the Protocol on Free Movement of Persons by 30 African States.¹¹⁰ Subsequently, the AfCFTA Agreement entered into force on 30 May 2019 after it received twenty-four instruments of ratification.¹¹¹ The AfCFTA became operational on 1 January 2021 and trade tested under

¹⁰⁵ UNECA 'How the digitalization of African trade will help realise the AfCFTA' 8 December 2020 <https://www.uneca.org/stories/how-digitalization-african-trade-will-help-realise-afcfta> (accessed 15 June 2021).

¹⁰⁶ UNECA (n 105).

¹⁰⁷ UNECA (n 105).

¹⁰⁸ African Union 'Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area: Doc. EX.CL/700(XX)' (30 January 2012) Assembly/AU/Dec.394(XVIII), available at https://au.int/sites/default/files/documents/32454-doc-decision_-_english.pdf, paras 3-5.

¹⁰⁹ African Union 'Decision on the Launch of Continental Free Trade Area Negotiations' (15 June 2015) Assembly/AU/Dec.569(XXV) para 3.

¹¹⁰ See African Union 'Indication of Legal Instruments to be signed at the 10th Extraordinary Session of the Assembly on the Launch of the AfCFTA' available at <https://au.int/sites/default/files/pressreleases/34033-pr-indication20of20signing20authority20-20updated20final20final20docx.pdf>.

¹¹¹ AfCFTA 'About the AfCFTA' <https://au-afcfta.org/about/> (accessed 1 September 2022). According to art 23(1) of the AfCFTA Agreement, the AfCFTA Agreement and Protocols on Trade in Goods and Services and Rules and Procedure on the Settlement of Disputes were to come into force thirty days after the 22nd instrument of ratification was deposited.

the AfCFTA Guided Trade Initiative, whose pilot phase covered seven AfCFTA Members.¹¹² However, no trade has yet taken place under the AfCFTA.¹¹³

Notably, not a single provision in the AfCFTA Agreement speaks to digital trade or e-commerce in any form.¹¹⁴ This is despite its drafting at a time when digital trade had gained momentum in continental and international trade. There is also no reference to e-commerce under either the AfCFTA Protocol on Trade in Goods or the Protocol on Trade in Services.¹¹⁵ However, the AfCFTA Agreement allows for the negotiation of additional instruments necessary to further AfCFTA objectives.¹¹⁶ The disregard for the import of e-commerce in AfCFTA negotiations is also seen in the Kigali Declaration for the Launch of the AfCFTA where in its Preamble it only recognises that there was a need for further negotiations on trade in goods and services.¹¹⁷ There is no specific reference to the need for future discussions on e-commerce. This shows that conventional forms of trade in goods and services were given preference under the AfCFTA and discussions on e-commerce only came as an afterthought.

The above notwithstanding, several aspects of e-commerce have been referenced in the Compiled Annexes on the Establishment of AfCFTA.¹¹⁸ In terms of customs cooperation, State Parties are called upon to support each other in ‘modernising customs procedures including e-customs and electronic data interchange applications’.¹¹⁹ In terms of trade facilitation, State Parties are called upon to leverage ICT in their delivery of goods by allowing for digital delivery of imports and exports documentation and by developing

¹¹² AfCFTA ‘The AfCFTA Guided Trade Initiative’ <https://au-afcfta.org/2022/09/the-afcfta-guided-trade-initiative/> (accessed 1 October 2022). The Guided Trade Initiative brings together seven AfCFTA Members who have signalled their readiness to trade under the AfCFTA rules i.e. Cameroon, Egypt, Ghana, Kenya, Mauritius, Rwanda and Tanzania.

¹¹³ Tralac ‘Status of AfCFTA Ratification’ <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 1 October 2023).

¹¹⁴ AfCFTA Agreement, signed 16 May 2018, entered into force 30 May 2019, available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

¹¹⁵ AfCFTA Agreement, Beginning pages 17 and 31 respectively, available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

¹¹⁶ AfCFTA Agreement art 8(3).

¹¹⁷ African Union ‘Kigali Declaration for the Launch of the African Continental Free Trade Area’ (21 March 2018) Ext/Assembly/AU/Decl.1 (X).

¹¹⁸ AfCFTA Secretariat ‘Compiled Annexes on the Establishment of the AfCFTA’ 28 December 2020, available at <https://afcfta.au.int/en/documents/2020-12-28/compiled-annexes-establishment-afcfta>.

¹¹⁹ See Annex 3: Customs Co-operation and Mutual Administrative Assistance art 11 (1) (d).

digital systems for exchange of data on trade.¹²⁰ E-commerce has also been introduced to AfCFTA negotiations. This is discussed further below.

Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade

The AU Assembly during its thirty-third ordinary session in Addis Ababa, Ethiopia, from 9 to 10 February 2020 decided to focus AfCFTA phase III negotiations on an AfCFTA Protocol on E-commerce.¹²¹ The negotiations were to commence immediately phase II negotiations were completed.¹²² Phase II negotiations began in February 2019 and were initially expected to be concluded in December 2020¹²³ but the conclusion date was moved to 31 December 2021 on account of the challenges brought about by Covid-19.¹²⁴ This did not, however, materialise as Phase II negotiations only concluded in October 2022 and, immediately, phase III negotiations were launched.¹²⁵ Phase III negotiations gained momentum in 2023 and between 9 and 12 October 2023, the fourth meeting of the Committee on Digital Trade took place in Kigali.¹²⁶ During the meeting, Draft 2.0 of the Protocol on Digital Trade was unveiled to the members present but was not made public.¹²⁷

As a culmination of the negotiations, the AfCFTA Secretariat circulated the first informal draft of the Protocol to the AfCFTA on Digital Trade at the Ninth Extraordinary Session of the Special Technical Committee on Justice and Legal Affairs held in Durban,

¹²⁰ Annex 4: Trade Facilitation art 17.

¹²¹ African Union 'Decision on the African Continental Free Trade Area (AfCFTA)' Assembly/AU/Dec.751(XXXIII) (10 February 2020) available at https://au.int/sites/default/files/decisions/38180-assembly_au_dec_749-795_xxxiii_e.pdf, paragraph 23.

¹²² As above.

¹²³ African Union 'Assembly/AU/Dec.751(XXXIII)' (n 122) para 22.

¹²⁴ African Union 'Johannesburg Declaration on the Start of Trading under the Agreement Establishing the African Continental Free Trade Area' (5 December 2020) Ext/Assembly/AU/Decl.1(XIII) para 15.

¹²⁵ ECA 'Validation and Closure of Phase II of the AfCFTA-anchored Pharmaceutical Initiative & Discussion of the Action Plan for Phase III of the Initiative Meeting to Be Held In Nairobi, Kenya' (14 October 2022) <https://www.uneca.org/stories/validation-and-closure-of-phase-ii-of-the-afcfta-anchored-pharmaceutical-initiative-%26> (accessed 28 October 2023).

¹²⁶ AfCFTA 'AfCFTA Updates: 4th Meeting of the Committee on Digital Trade' <https://au-afcfta.org/2023/10/4th-meeting-of-the-committee-on-digital-trade/> (accessed 10 November 2023).

¹²⁷ As above.

South Africa, from 7 to 10 February 2024.¹²⁸ According to the AfCFTA Secretariat, the Draft was shared for legal scrubbing. There was a possibility that some of the provisions could change slightly before the final draft was adopted. This, however, did not happen since the Protocol was soon thereafter adopted on 18 February 2024 at the 37th AU Heads of States Summit.¹²⁹

The Digital Trade Protocol is distinct from the other AfCFTA Protocols that have been adapted from similar WTO rules. A look at the AfCFTA Protocols on Trade in Goods, Trade in Services and Rules and Procedures on the Settlement of Disputes suggests that the rules were adapted from existing rules and, more particularly, respective existing WTO rules.¹³⁰ There was no WTO Agreement on digital trade for AfCFTA Members to build on.

Important to note is that the AfCFTA is governed by the principle of preservation of the *acquis*.¹³¹ Under this principle, the AfCFTA is expected to build on existing rules in developing its rules.¹³² Contextually, the AfCFTA under this principle should build on existing rules on digital trade; this could be rules established under the WTO, African RECs or other well-established similar agreements. The AfCFTA also had an opportunity to formulate and structure the provisions of the Protocol on Digital Trade in a manner that is most suitable to it and more particularly, that takes into account the digital trade developments in the continent. The AfCFTA opted to draw guidance from existing digital trade rules, though not well-established, instead of considering African digital trade developments.

¹²⁸ Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, 9 February 2024 Draft shared for legal scrubbing at the Ninth Extraordinary Session of the Special Technical Committee on Justice and Legal Affairs held in Durban, South Africa from 7th to 10 February 2024.

¹²⁹ Tralac 'Overview of the AfCFTA Protocol on Digital Trade' available at: <https://www.tralac.org/documents/events/tralac/5392-2024-annual-conference-note-overview-of-the-afcfta-protocol-on-digital-trade/file.html>.

¹³⁰ The AfCFTA drew lessons from the WTO's General Agreement on Tariffs and Trade, General Agreement on Trade in Services and the Dispute Settlement Understanding.

¹³¹ AfCFTA Agreement art 5.

¹³² Tralac 'AfCFTA Parallelism and the Acquis' <https://www.tralac.org/blog/article/15085-afcfta-parallelism-and-the-acquis.html> (accessed 1 September 2022).

The Digital Trade Protocol was adapted from existing digital economy agreements, discussed in the previous chapter of this study, albeit with no or very limited modifications. Several provisions of the Digital Trade Protocol show similarity with provisions in agreements such as the DEPA between New Zealand, Chile and Singapore; UK-Singapore Digital Economy Agreement and other existing digital economy/trade agreements. For instance, the terms used to describe the right to regulate under Article 4 of the Protocol appear word for word under the Preamble of DEPA. Article 6 of the Protocol on customs duties is *mutatis mutandis* Article 3.2 of DEPA. In addition, the Protocol's provisions at Article 20 on cross-border data transfers and Article 21 on protection of personal data are similar to DEPA's like provisions under Articles 4.2 and 4.3. These are some of the provisions with similarities in the two legal instruments. Further, a detailed look at these instruments show that save for very limited contextual application and with the exclusion of provisions with continental application such as those on objectives (Article 2), areas for cooperation (Article 43), and the relationship between the Protocol and other AfCFTA Protocols (Article 44), all the other provisions under the Protocol borrow from the DEPA. It is, therefore, justifiable to state that the Protocol has a lot of similarity with DEPA. A similar finding would be arrived at in the analysis of other existing digital economy agreements.

The AfCFTA Digital Trade Protocol aims to establish harmonised rules, common standards, and principles on digital trade for the continent's sustainable and inclusive socio-economic development and digital transformation.¹³³ It applies to all digital trade measures adopted or maintained by State Parties.¹³⁴ Digital trade has been defined as trade in goods and services that can be delivered either digitally or physically and involves both natural and juridical persons.¹³⁵ The Protocol has also defined transmitted electronically as digital products transferred through authorised digital networks and interchange systems that include computer networks and mobiles.¹³⁶ As is the case under the WTO, the Protocol calls upon State Parties not to impose customs duties on digital

¹³³ AfCFTA Digital Trade Protocol art 2.

¹³⁴ AfCFTA Digital Trade Protocol art 3.1.

¹³⁵ AfCFTA Digital Trade Protocol art 1.

¹³⁶ As Above.

products transmitted electronically.¹³⁷ This provision is, however, conditional on the scope and origin criteria that will be set out under the Rules of Origin that are to be discussed and adopted.

In addition, the Protocol calls on a State Party to accord no less favourable treatment of digital products originating from or first made available in another territory than that accorded to like digital products first made available in its territory or any other State Party.¹³⁸ The non-discrimination requirements extend to an author, performer, producer, distributor, or owner of the digital product.¹³⁹ This provision does not, however, preclude the conclusion of preferential trade agreements.¹⁴⁰ Further, the Protocol recognises the need for cross-border data transfers by electronic means.¹⁴¹ The Protocol creates a Committee on Digital Trade, constituted by State Parties' representatives, which is responsible for implementing the Protocol. The operations of the Committee are guided by the Council of Ministers.¹⁴²

Important to note, however, is the requirement to develop annexes on rules of origin, cross-border digital payments, cross-border data transfers, criteria for determining the legitimate public reasons for disclosure of source code, digital identities, financial technology, emerging and advanced technology and online safety and security.¹⁴³ The list is long. This means that the implementation of the Protocol can only be fully realised once the annexes have been developed.

The Protocol shows that it has incorporated most of the provisions that are contained in most existing digital trade legal instruments. It would have, however, benefitted more through contextual application and specificity, for instance, clearer definitions of digital trade and electronic transmissions would have aided in the mitigation of the ongoing challenges at the global and continental levels in understanding these terms and their application to digital trade. In terms of the digital trade definition, it would

¹³⁷ AfCFTA Digital Trade Protocol art 6.
¹³⁸ AfCFTA Digital Trade Protocol art 7.1.
¹³⁹ AfCFTA Digital Trade Protocol art 7.2.
¹⁴⁰ AfCFTA Digital Trade Protocol art 7.3.
¹⁴¹ AfCFTA Digital Trade Protocol arts 20 & 46.
¹⁴² AfCFTA Digital Trade Protocol art 37.
¹⁴³ AfCFTA Digital Trade Protocol art 46.

be useful to understand what ‘trade in goods and services’ means for digital trade. No distinction has also been made between e-commerce and digital trade, notwithstanding that the terms are interrelated. The Protocol also seems to have borrowed heavily from existing digital economy agreements with very few modifications. In addition, the Protocol is not elaborate. Needless to state, it would be overambitious to expect that the Protocol would have addressed the application of safeguard measures to digital trade.

4.3 Digital trade under African regional economic communities

By way of introduction, this section examines the progress made by RECs in Africa.¹⁴⁴ The African Union recognises eight RECs in Africa.¹⁴⁵ The RECs consist of the Arab Maghreb Union (AMU), established in 1989 under the Marrakech Treaty;¹⁴⁶ the Common Market for Eastern and Southern Africa (COMESA), established in 1993 by the COMESA Treaty;¹⁴⁷ the Community of Sahel-Saharan States (CEN-SAD), established in 1998 by the CEN-SAD Treaty;¹⁴⁸ the East African Community (EAC), established in 1999 by the EAC Treaty;¹⁴⁹ the Economic Community of Central African States (ECCAS), established in 1983 by the ECCAS Treaty;¹⁵⁰ the Economic Community of West African States

¹⁴⁴ RECs are regional groupings constituted by African states to facilitate integration of their economies. See Organization of African Unity (OAU) ‘Lagos Plan of Action for the Economic Development of Africa’ 1980-2000, available at <https://www.merit.unu.edu/wp-content/uploads/2015/01/Lagos-Plan-of-Action.pdf>.

¹⁴⁵ African Union ‘Regional Economic Communities’ <https://au.int/en/organs/recs> (accessed 24 August 2021).

¹⁴⁶ See Treaty Instituting Arab Maghreb Union (with declaration). Concluded at Marrakesh on 17 February 1989; See also African Union ‘Union du Maghreb Arabe (UMA)’ <https://au.int/en/recs/uma> (accessed 24 August 2020) AMU is constituted by Algeria, Libya, Mauritania, Morocco and Tunisia.

¹⁴⁷ COMESA Treaty enacted 11 May 1993; entered into force 12 August 1994 available at https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf; See African Union ‘Regional Economic Communities’ <https://au.int/en/organs/recs> (accessed 24 August 2021). COMESA is constituted by 21 African countries consisting of Burundi, Comoros, DR Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Eswatini, Uganda, Zambia, Zimbabwe, Somalia and Sudan.

¹⁴⁸ Treaty Establishing CEN-SAD, adopted in 2013. See African Union ‘Regional Economic Communities’ <https://au.int/en/organs/recs> (accessed 24 August 2021). CEN-SAD is constituted by 29 African countries comprising of Benin, Burkina Faso, Cabo Verde, Central African Republic, Chad, Comoros, Côte d’Ivoire, Djibouti, Egypt, Eritrea, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, São Tomé and Príncipe, Senegal, Sierra Leone, Somalia, Sudan, Togo and Tunisia. CEN-SAD is neither an FTA nor Customs Union.

¹⁴⁹ EAC Treaty, signed 30 November 1999, entered into force 7 July 2000 (Amended 14 December 2006 & 20 August 2007); see African Union ‘Regional Economic Communities’ <https://au.int/en/organs/recs> (accessed 24 August 2021). EAC is made up of 6 countries consisting of Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan.

¹⁵⁰ Treaty establishing ECCAS, signed 18 October 1983, entered into force 18 December 1984. See

(ECOWAS), established in 1975 by the ECOWAS Treaty;¹⁵¹ the Intergovernmental Authority on Development (IGAD), established in 1996 by the IGAD Treaty;¹⁵² and the Southern African Development Community (SADC), established in 1992 by the SADC Treaty.¹⁵³

Whereas all of the eight RECs have had opportunities to develop their legal and institutional frameworks on digital trade, not all have developed digital trade strategies. IGAD, CEN-SAD, ECCAS and AMU have particularly not developed strategies on digital trade. This leaves EAC, COMESA, ECOWAS and SADC as the only RECs that have digital trade/e-commerce strategies at present.¹⁵⁴

According to statistics released by UNCTAD in 2017, ECOWAS had the highest percentage of total trade in services which stood at 43% while the lowest was COMESA at 14%.¹⁵⁵ In 2017, Africa's worldwide digitally delivered exports stood at 0.9% while its total trade in services stood at 23%.¹⁵⁶ In 2019, UNCTAD's analysis of the e-readiness by RECs showed that the AMU and EAC were topping the list while ECCAS was the least performing.¹⁵⁷ The statistics are indicative of diverse and inconsistent performance and preparedness by RECs in the progress made on digital trade.

African Union 'Regional Economic Communities' <https://au.int/en/organs/recs> (accessed 24 August 2021). ECCAS is constituted by 10 African countries comprising of Angola Burundi Cameroon, Central African Republic, Chad, Congo, DR Congo, Equatorial Guinea, Gabon and São Tomé and Príncipe.

¹⁵¹ ECOWAS Treaty, entered into force 28 May 1975 (Revised 24 July 1993). See African Union 'Regional Economic Communities' <https://au.int/en/organs/recs> (accessed 24 August 2021). ECOWAS is constituted by 15 African countries comprising of Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

¹⁵² IGAD Treaty, adopted 21 March 1996. See African Union 'Regional Economic Communities' <https://au.int/en/organs/recs> (accessed 24 August 2021). IGAD is constituted by 8 African countries comprising of Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda.

¹⁵³ SADC Treaty, signed 28 February 1998. See African Union 'Regional Economic Communities' <https://au.int/en/organs/recs> (accessed 24 August 2021). SADC brings together 16 African countries comprising of Angola, Botswana, the Union of Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia, and Zimbabwe.

¹⁵⁴ M Smeets *Adapting to the Digital trade era: challenges and opportunities* (World Trade Organization 2021) 90.

¹⁵⁵ Stork (n 16) 17. The percentages of total trade in services in other RECs were as follows: AMU-25%, CEN SAD-22%, EAC -18%, ECCAS-21%, IGAD-17% and SADC-22%.

¹⁵⁶ Stork (n 16) 17.

¹⁵⁷ UNCTAD 'Key Statistics and Trends in Regional Trade in Africa' (United Nations 2019), available at https://unctad.org/system/files/official-document/ditctab2019d3_en.pdf, 38. The scores were as

4.3.1 The East African Community (EAC)

In 2015, the EAC adopted the EAC Model ICT Policy Framework.¹⁵⁸ The Policy Framework sought to provide a framework for mutual projects to boost the ICT sector in the region.¹⁵⁹ The Policy Framework noted the inadequacies in the regulation of areas such as data protection, cybersecurity, e-transactions and convergence.¹⁶⁰ There was also limited infrastructure interoperability and cross-border interconnectivity. The Policy Framework was therefore intended to boost ICT connectivity in EAC. ICT is an enabler of digital trade, hence the relevance of the Policy Framework to this study.

The EAC Model Policy on Electronic Transactions was adopted in 2017 to provide a framework for e-transactions.¹⁶¹ E-commerce was observed to provide new business opportunities but there was no policy framework towards its development in the EAC.¹⁶² At the time, all EAC partners had domestic policies on e-transactions.¹⁶³ The Model Policy therefore provided a framework for harmonisation of e-transactions laws by EAC partners. It also provided a framework for the growth of e-transactions, remove barriers, promote safety and confidence in e-transactions and encourage investment and participation in e-transactions.¹⁶⁴

In recognition of socio-economic development contributed to the region by the digital economy, the EAC Council adopted an E-commerce Strategy on 12 July 2022.¹⁶⁵ The E-Commerce Strategy was developed out of the inspiration to build digital trade trust, improve legal and institutional framework, enhance growth capacities and enhance digital

follows; AMU-40.2, EAC-35.8, ECOWAS-34.9, SADC-34.1, CEN-SAD-33.4, COMESA-27.1, IGAD-26.7 & ECCAS-25.1.

¹⁵⁸ East African Communications Organisation 'EAC Model ICT Policy Framework' (20 March 2015), available at https://eaco.int/admin/docs/reports/Draft_Model_ICT_Policy_KGJ_March_2015.pdf.

¹⁵⁹ Model ICT Policy Framework (n 158) 4.

¹⁶⁰ Model ICT Policy Framework (n 158) 5.

¹⁶¹ East African Communications Organisation 'EAC Model Policy on Electronic Transactions' (2017, EACO), available at <https://eaco.int/admin/docs/publications/EAC%20MODEL%20POLICY%20ON%20ELECTRONIC%20TRANSACTIONS.pdf>.

¹⁶² EAC Model Policy on Electronic Transactions (n 161) 2.

¹⁶³ EAC Model Policy on Electronic Transactions (n 161) 3.

¹⁶⁴ EAC Model Policy on Electronic Transactions (n 161) 4-5.

¹⁶⁵ EAC E-Commerce Strategy adopted by EAC Council 12th July 2022, available at https://www.eac.int/index.php?option=com_documentmanager&task=download.document&file=bWFpbl9kb2N1bWVudHNfcGRmX1JhWEpxQmljSmJMeEdmWnRtbkhMVkRNRUFDEUtQ29tbWVyY2UgU3RyYXRIZ3kgQWRvcHRIZCAxMnRoIEp1bHkgMjAyMiAoMDAzKQ==&counter=1173.

trade collaboration within the EAC.¹⁶⁶ It also aims to enhance collaboration in cross-border e-commerce. The pre-existing respective country e-commerce regulations did not address cross-border e-commerce in the region, thus, the EAC E-Commerce Strategy sought to harmonise the legislations and give room for improved, if not equal, development in the respective states.¹⁶⁷

The Strategy acknowledges that e-commerce development in the region was in the early stages and the progress in each of the member states was diverse, Kenya and Rwanda being the lead while Burundi and South Sudan lagged behind.¹⁶⁸ Nonetheless, the Strategy builds on existing national policies and other frameworks on e-commerce, particularly in Burundi, Kenya, Rwanda, Tanzania and Uganda.¹⁶⁹ The Democratic Republic of Congo (DRC) and Somalia that became EAC Members in July 2022¹⁷⁰ and March 2024¹⁷¹ respectively are expected to align their domestic e-commerce policies to the Strategy and contribute to the growth of e-commerce within EAC.

The Strategy highlights the heterogeneous nature of existing e-commerce policies that cover diverse aspects such as customs duties, paperless trading, e-signatures, dispute resolution, consumer protection, data privacy and non-discrimination of digital products.¹⁷² In this regard, the Strategy has six strategic goals; first, enable open, transparent and harmonised legal and regulatory environment in the EAC; second, harmonised customs regulations measures and digital trade facilitation measures; third, universal access to the e-commerce market; fourth, human capacity and skills to use e-commerce; fifth, infrastructure to support e-commerce; and sixth, ability to place orders, make payments and deliver online notwithstanding the selected telecommunication network and mode of payment.¹⁷³

¹⁶⁶ EAC E-Commerce Strategy (n 165) 3.

¹⁶⁷ EAC E-Commerce Strategy (n 165) 7.

¹⁶⁸ EAC E-Commerce Strategy (n 165) 5.

¹⁶⁹ EAC E-Commerce Strategy (n 165) 4.

¹⁷⁰ East African Community 'Democratic Republic of the Congo' <https://www.eac.int/eac-partner-states/drcongo> (accessed 10 June 2024).

¹⁷¹ East African Community 'Somalia finally joins EAC as the bloc's 8th Partner State' <https://www.eac.int/press-releases/3049-somalia-finally-joins-eac-as-the-bloc-s-8th-partner-state> (accessed 10 June 2024).

¹⁷² EAC E-Commerce Strategy (n 165) 10.

¹⁷³ EAC E-Commerce Strategy (n 165) 19-21.

In addition to the foregoing, the Strategy is guided by six pillars; pillar 1 seeks to establish an enabling legal and regulatory environment; pillar 2 aims to improve digital trade facilitation and logistics; pillar 3 aims to improve market access conditions; pillar 4 enhances human resource development; pillar 5 aims to establish an enabling e-commerce auxiliary environment covering IT and telecommunications, payment services, postal, logistics and transport services; and pillar 6 is on institutional development.¹⁷⁴ In terms of digital trade facilitation, the Strategy calls for harmonisation and strengthening e-commerce and related standards.¹⁷⁵

There are also proposals to implement one area network to allow for mobile network coverage within the EAC.¹⁷⁶ The network was developed in 2014 and to date Kenya, Rwanda, South Sudan and Uganda have joined.¹⁷⁷ The aim is to extend the network to all EAC partners. There is also a call to invest in infrastructure such as cloud and data centres and collaboration between data centres in reducing costs of hosting online marketplaces.¹⁷⁸

Thus, the strategy aims to enact, implement and improve the digital trade and e-commerce environment in the EAC through harmonisation of existing laws and standards and improvement of infrastructure.

The above policies on e-commerce show the EAC's commitment to harmonising domestic laws and growing the digital trade environment within the region. It also shows the increased interest by EAC to regulate and grow digital trade amongst its members. The E-commerce Strategy is quite ambitious and if fully implemented, digital trade will grow significantly in the EAC.

4.3.2 Common Market for Eastern and Southern Africa (COMESA)

COMESA's commitment to promote digital trade was seen through its commitment to focus on digital trade in 2018/2019 under the theme 'COMESA: Towards Digital Economic

¹⁷⁴ EAC E-Commerce Strategy (n 165) 21.

¹⁷⁵ EAC E-Commerce Strategy (n 165) 29-30.

¹⁷⁶ EAC E-Commerce Strategy (n 165) 45.

¹⁷⁷ EAC E-Commerce Strategy (n 165) 45.

¹⁷⁸ EAC E-Commerce Strategy (n 165) 45.

Integration'.¹⁷⁹ In 2018 COMESA adopted the Digital Free Trade Area (DFTA) whose major focus is on e-trade, e-legislations and e-logistics.¹⁸⁰ The DFTA did not, however, come into force in 2018 due to opposition by some of the COMESA Members on the basis of lack of harmonised products and prices.¹⁸¹ There was, therefore, a call for harmonisation of digital information before the DFTA could be operationalised.¹⁸² As of April 2022 the DFTA was yet to take effect.¹⁸³ Nonetheless, the COMESA Secretariat showed interest in the realisation of the DFTA objectives through a series of trainings on various stakeholders.¹⁸⁴ As of 2024, however, there is no indication whether or not the DFTA has taken effect. Noteworthy, the DFTA objectifies the promotion of intra-COMESA and cross-border flow of e-commerce through the creation of online platforms to facilitate e-commerce, use of ICT and formulation of legislations.¹⁸⁵

COMESA has put in place several initiatives that promote e-commerce amongst its Members. To ease payments amongst its Members, COMESA has established and operationalized the Regional Payment and Settlement System (REPSS).¹⁸⁶ As of November 2023, central banks from nine out of twenty-one COMESA Members were live on the System.¹⁸⁷ The System is expected to reduce operational and transaction costs and, ultimately, boost intra-COMESA trade.¹⁸⁸ Further, inspired by the AU Sokokuu, the COMESA Federation of Women in Business in partnership with the African Electronic

¹⁷⁹ Y Ismail 'Mobilising E-Commerce for Development in Africa through AfCFTA' CUTS International, Geneva (2020) 35.

¹⁸⁰ COMESA 'Building Capacity for Digitally Enabled Trading System' <https://www.comesa.int/building-capacity-for-digitally-enabled-trading-system/> (accessed 1 September 2022).

¹⁸¹ Bilaterals.org 'COMESA seeks solutions to digital free trade area' <https://www.bilaterals.org/?comesa-seeks-solutions-to-digital> (accessed 1 September 2022).

¹⁸² As above.

¹⁸³ COMESA 'Building Capacity for Digitally Enabled Trading System' <https://www.comesa.int/building-capacity-for-digitally-enabled-trading-system/> (accessed 1 September 2022).

¹⁸⁴ As above.

¹⁸⁵ COMESA (n 183).

¹⁸⁶ Ismail (n 179) 36.

¹⁸⁷ COMESA 'Progress Report on the Implementation of the Regional Payment and Settlement System (REPSS), 44th Intergovernmental Committee Meeting 21 - 22 November 2023, Lusaka, Zambia, available at https://www.comesa.int/wp-content/uploads/2023/11/3k.-CCH-Progress-Report-on-REPSS-Implementation_EN.pdf, 1. The countries represented are Democratic Republic of Congo, Egypt, Eswatini, Kenya, Malawi, Mauritius, Rwanda, Uganda and Zambia

¹⁸⁸ COMESA 'COMESA Calls on Member States to Utilise Online Payment Platform, REPSS' (accessed 1 October 2022).

Trade Group on 22 September 2021 launched Sokokuu to facilitate cross-border e-trade under COMESA.¹⁸⁹ Sokokuu under COMESA, like in the African Union, provides a platform for sharing of trade information and markets.¹⁹⁰ This initiative is expected to boost trade between women in business in COMESA.

4.3.3 The Southern African Development Community (SADC)

In 2001, SADC signed the Declaration on ICT to aid the region in attaining economic and social development.¹⁹¹ Under the Declaration, SADC Members were to develop policies that aid in bridging the digital divide in the region.¹⁹² Members committed to make bridging the digital divide a priority by, in particular, ensuring that disparities between women and men, rich and poor, and urban and rural areas were not exacerbated by ICT.¹⁹³ Members also agreed to collaborate in eliminating barriers to e-commerce within SADC.¹⁹⁴

In May 2010, SADC created the e-SADC Strategic Framework to facilitate ICT development in the region.¹⁹⁵ Its key aims were harmonisation, capacity building and implementation of electronic strategies within the region. It also aims to encourage the development of national ICT policies.¹⁹⁶ The Strategic Framework further intends to strengthen economic integration and bridge the digital trade divide in the region.¹⁹⁷ It focuses on the use of ICT to strengthen economic integration in the region.¹⁹⁸ Of relevance to this study is the intention to develop the application of e-commerce in the region.¹⁹⁹ This was to be achieved under the objective of deploying e-services through

¹⁸⁹ COMESA 'Sokokuu online trading platform launched' <https://www.comesa.int/sokokuu-etradepplatform-launched/> (accessed 1 September 2022).

¹⁹⁰ SOKOKUU available at <https://sokokuu.africa/> (accessed 1 September 2022).

¹⁹¹ SADC 'Declaration on ICT' signed 14 August 2001, available at https://www.sadc.int/sites/default/files/2021-08/Declaration_on_Information_and_Communication_Technology2001.pdf.

¹⁹² SADC 'Declaration on ICT' (n 191) Declaration 1.

¹⁹³ SADC 'Declaration on ICT' (n 191) 2-3.

¹⁹⁴ SADC 'Declaration on ICT' (n 191) 3.

¹⁹⁵ e-SADC Strategic Framework, adopted 13 May 2010, available at <https://repository.uneca.org/ds2/stream/?#/documents/789cf54b-73c2-59a6-9536-f894b38ee6ff/page/3>

¹⁹⁶ e-SADC Strategic Framework (n 195) VII.

¹⁹⁷ See ECA 'E-commerce in the SADC Sub-Region Strategic Framework' available at https://www.skylineuniversity.ac.ae/pdf/ecommerce/SADC_e-commerce_Strategy_FINAL_Oct18-FINAL.pdf.

¹⁹⁸ See for instance SADC 'Information and Communication' <https://www.sadc.int/issues/information-communication/> (accessed 1 September 2021).

¹⁹⁹ e-SADC Strategic Framework (n 195) 4.

e-commerce.²⁰⁰ A SADC e-commerce readiness assessment was to be conducted to facilitate e-commerce deployment.²⁰¹ Assessments were done by SADC in collaboration with UNECA in Angola, Botswana, the Democratic Republic of Congo, Lesotho, Mauritius, and South Africa and the findings were validated at an April 2012 meeting that saw the validation of the draft SADC e-Commerce Readiness Assessment Report, Strategy and Plan of Action (SADC E-commerce Strategy).²⁰²

In November 2012, SADC Ministers approved the SADC eCommerce Strategy with the aim of fostering trade through e-commerce in SADC.²⁰³ The pillars of the Strategy are to enable e-commerce, strengthen e-commerce infrastructure in the region and nationally, e-commerce capacity building and to develop an institution to oversee implementation in the region.²⁰⁴ The Strategy was adopted with the understanding that e-commerce was not a new form of trade but rather a medium for trade in goods and services.²⁰⁵ To realise the Strategy, there was a commitment to develop an ICT Observatory Database. In 2022, SADC commenced the process of developing a SADC ICT Observatory Database and Web Portal System.²⁰⁶ The System was then developed in 2023 to 'automate the collection and dissemination of ICT indicators' and collection of online data.²⁰⁷

In the years that followed, SADC has focused on e-commerce strategies at the country level, collaborations with COMESA and EAC under the Tripartite Free Trade Area (TFTA), though the TFTA Agreement is yet to take effect,²⁰⁸ and initiatives under the

²⁰⁰ SADC 'Media Statement on the Validation workshop for the E-commerce Readiness study in the SADC Sub-region Convened at the Maritim Hotel, Balaclava, Mauritius' https://www.sadc.int/sites/default/files/2021-07/20120417_-_Validation_Workshop_for_e-Commerce_Readiness.pdf (accessed 1 September 2022).

²⁰¹ SADC (n 200).

²⁰² SADC (n 200).

²⁰³ UNECA 'SADC eCommerce strategy approved by ICT Ministers' available at <https://repository.uneca.org/bitstream/handle/10855/32193/b10809557.pdf?sequence=1&isAllowed=y>.

²⁰⁴ UNECA (n 203).

²⁰⁵ UNECA (n 203).

²⁰⁶ SADC 'Consultancy for development of the SADC ICT Observatory Database and Web Portal System' <https://www.sadc.int/procurement-opportunities/consultancy-development-sadc-ict-observatory-database-and-web-portal> (accessed 1 September 2022).

²⁰⁷ SADC '43rd Summit Brochure 2023' available at <https://www.sadc.int/sites/default/files/2023-08/43rd%20Summit%20Brochure.pdf>, 54.

²⁰⁸ Southern African Development Community 'The Kingdom of Lesotho signs the COMESA-EAC-SADC Tripartite Free Trade Area Agreement' (1 November 2023) <https://www.sadc.int/latest->

AfCFTA. There haven't therefore been many e-commerce initiatives at the regional level. SADC Members have, however, made progress at the national level.

4.3.4 The Economic Community of West African States (ECOWAS)

In June 2007, the Conference of Heads of State adopted the ECOWAS 2020 Vision whose main objective was to move ECOWAS from being state-centric to people-centric by raising the standard of living.²⁰⁹ At the time of the adoption of Vision 2020, digitalisation of the economies was not a priority. Instead, the focus was towards integrating markets and trade and bettering the livelihood of the ECOWAS people.²¹⁰ Vision 2020 became a building block for e-commerce reforms that followed, discussed further below.

To enhance the transfer of data across borders within ECOWAS, the Supplementary Act on Personal Data Protection within ECOWAS was adopted in 2010.²¹¹ The Supplementary Act harmonises domestic legal frameworks on personal data protection.²¹² The Supplementary Act allows for cross-border transfer of data to a non-ECOWAS member provided that any such receiving state has a comprehensive framework that regulate the rights relating to the processing of the transferred data.²¹³ As discussed previously, digital trade is enabled by the free flow of data across borders.

The ECOWAS Vision 2020 was reviewed and replaced in 2020 by ECOWAS Vision 2050.²¹⁴ Pillar four of the ECOWAS Vision 2050 speaks to transformation, inclusion and sustainable development.²¹⁵ Under this pillar, digitalisation of the economy transforms economies.²¹⁶ Moreover, digitalisation is a cross-cutting issue under Vision 2050 which is marked by efforts made to improve connectivity and increased mobile

news/kingdom-lesotho-signs-comesa-eac-sadc-tripartite-free-trade-area-agreement (accessed 10 June 2024).

²⁰⁹ Economic Community of West African States (ECOWAS) 'Vision 2020' <https://ecoslate.github.io/about-ecowas/vision-2020/index.htm> (accessed 1 September 2022).

²¹⁰ ECOWAS Vision 2020, available at <https://www.araa.org/sites/default/files/2023-07/ECOWAS%20VISION%202020.pdf>.

²¹¹ Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS, adopted at the 37th Session of the Authority of Heads of State and Government on 16 February 2010, available at <https://ictpolicyafrica.org/en/document/z69cbq7b51?page=1>.

²¹² As above.

²¹³ As above, 36.

²¹⁴ ECOWAS VISION 2050: ECOWAS of the Peoples: Peace and Prosperity for All, 2022, available at <https://ecowas.int/wp-content/uploads/2022/09/Vision-2050-EN.pdf>,

²¹⁵ ECOWAS Vision 2050, 12.

²¹⁶ ECOWAS Vision 2050, 12.

phone usage in the region. It is believed that digitalisation would address development challenges in the region.²¹⁷ There is commitment to leverage digitalisation in areas such as e-commerce.²¹⁸ There is also commitment to promote ICT and the digital economy.²¹⁹

On 7 July 2023, ECOWAS endorsed an e-commerce strategy developed with the support of UNCTAD to boost e-commerce in the region.²²⁰ The ECOWAS E-commerce Strategy of 2023 to 2027 builds on the African Union Agenda 2063 and the ECOWAS Vision 2050.²²¹ It was developed in light of the growing e-commerce in the region and to address existing challenges such as digital divide.²²² It aims to build a secure, sustainable and inclusive e-commerce ecosystem in the region. It also supports the development of cross-border e-commerce, building trust on e-commerce platforms, improving access to the e-commerce markets and fostering inclusion.²²³ The E-commerce Strategy goals are to strengthen institutions to support the development of cross-border e-commerce, secure trust on e-commerce supply chains, improve access to e-commerce market information and foster inclusion for the development of e-commerce.²²⁴

4.4 Digital trade under African trade agreements

While there has been little development on digital trade at the WTO, progress has been made through Free Trade Agreements (FTAs).²²⁵ Concerns have however been raised on the likelihood of inconsistencies in the application of rules by FTAs.²²⁶ Digital trade

²¹⁷ ECOWAS Vision 2050, 47.

²¹⁸ ECOWAS Vision 2050, 47.

²¹⁹ ECOWAS Vision 2050, 55.

²²⁰ UNCTAD 'New strategy set to boost e-commerce in West Africa' (11 July 2023) <https://unctad.org/news/new-strategy-set-boost-e-commerce-west-africa> (accessed 10 November 2023).

²²¹ ECOWAS 'Experts validate ECOWAS E-commerce Strategy (2023 – 2027) and Implementation Plan' (24 March 2023) <https://ecowas.int/experts-validate-ecowas-e-commerce-strategy-2023-2027-and-implementation-plan/> (accessed 10 November 2023).

²²² Look for Africa 'ECOWAS Adopts Strategy to Boost E-Commerce in West Africa' (13 July 2023) [Ecowas Adopts Strategy to Boost E-Commerce in West Africa - Look For Africa](https://lookforafrica.com/2023/07/13/ecowas-adopts-strategy-to-boost-e-commerce-in-west-africa/) (accessed 10 November 2023).

²²³ ECOWAS 'Harnessing E-commerce for Sustainable Development in ECOWAS' (13 September 2023) <https://ecowas.int/harnessing-e-commerce-for-sustainable-development-in-ecowas/> (accessed 10 November 2023).

²²⁴ ECOWAS Trade Information Systems 'Trade Policy' <https://ecotis.ecowas.int/policy-development/ecowas-e-commerce-strategy-and-implementation-plan-2023-2027/> (accessed 10 November 2023).

²²⁵ Zheng (n 5) 553.

²²⁶ Zheng (n 5) 553.

provisions in the AfCFTA and in African RECs have been discussed in the preceding section. Other trade agreements in the continent that relate to digital trade are analysed next.

To begin with, in 2000, the Cotonou Agreement was concluded between the EU and the Organisation of African, Caribbean and Pacific States (OACPS) for a period of 20 years and was set to expire in February 2020 but was extended to 30 November 2021.²²⁷ It was further extended until a new agreement could be concluded or until 31 October 2023.²²⁸ The Agreement called for parties' cooperation in developing technological and economic infrastructure to facilitate trade²²⁹ and policies.²³⁰ Negotiations on a post-Cotonou agreement commenced in April 2021²³¹ and concluded in July 2023.²³² Subsequently, the Samoa Agreement was signed to replace the Cotonou Agreement to govern relations amongst the Members for the next twenty years. The Parties under the Samoa Agreement commit to collaborate in the development of the digital economy.²³³ They also commit to support and promote regulatory frameworks that allow for e-commerce.²³⁴ Besides this, there is no provision under the agreement specifically on digital trade or e-commerce.

²²⁷ The Cotonou Agreement, signed on 23 June 2000, available at https://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf. African countries that are parties to the Agreement are; Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Comoros, Democratic Republic of Congo, Congo, Côte D'Ivoire, Djibouti, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland (Eswatini), Tanzania, Chad, Uganda, Zambia and Zimbabwe.

²²⁸ European Parliament 'After Cotonou: Towards a new agreement with the African, Caribbean and Pacific states' [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751466/EPRS_BRI\(2023\)751466_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751466/EPRS_BRI(2023)751466_EN.pdf), 2.

²²⁹ As above, art 23(g).

²³⁰ As above, arts 29 & 43.

²³¹ European Council 'Cotonou Agreement' <https://www.consilium.europa.eu/en/policies/cotonou-agreement/> (accessed 3 September 2021).

²³² European Council 'Timeline: steps towards a new EU-ACP partnership after 2020' <https://www.consilium.europa.eu/en/policies/cotonou-agreement/timeline-new-cotonou-agreement/> (accessed 10 February 2024).

²³³ Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other 'Samoa Agreement' available at <https://data.consilium.europa.eu/doc/document/ST-8372-2023-REV-1/en/pdf> art 48(1).

²³⁴ Samoa Agreement art 48(4).

In 2007, the European Union-Eastern and Southern Africa Economic Partnership Agreement (EU-ESA EPA) was concluded between the EU and Comoros, Madagascar, Mauritius, the Seychelles, Zambia and Zimbabwe.²³⁵ As of 2019, all parties with the exclusion of Zambia had signed the EPA which has provisionally been applied since 2012.²³⁶ Of relevance to this study is that the EPA does not regulate digital trade or e-commerce among the parties.²³⁷ This could be because there was little evolution of in e-commerce in 2007, when the EPA was concluded.

Negotiations for the European Union-East African Community Economic Partnership Agreement (EU-EAC EPA) were finalised by the EU and Kenya, Uganda, Tanzania, Rwanda and Burundi in October 2014 to regulate development cooperation and trade in goods between the parties.²³⁸ The Agreement did not, however, take effect since only Kenya and Rwanda signed the EPA in 2016. Hence, the EPA was not ratified by all EAC Members.²³⁹ South Sudan, the Democratic Republic of Congo and Somalia that joined the EAC in 2016, 2022 and 2024 respectively, did not participate in the negotiations but can join the EU-EAC EPA once it enters into force.²⁴⁰ The EU-EAC EPA contains provisions for the development of ICT infrastructure.²⁴¹ It also calls on the Parties to enhance the contribution of ICT on e-commerce and e-services by 2033.²⁴² No other provision in the Agreement speaks to the promotion of digital trade between the parties.

²³⁵ European Commission 'Eastern and Southern Africa (ESA)' https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/eastern-and-southern-africa-esa_en (accessed 10 February 2024).

²³⁶ As above.

²³⁷ See Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2012:111:FULL>.

²³⁸ Economic Partnership Agreement between the East African Community partner states, of the one part, and the European Union and its member states of the other part, available at https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.pdf.

²³⁹ European Commission 'East African Community (EAC)' https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/east-african-community-eac_en (accessed 10 February 2024).

²⁴⁰ European Parliament 'International Agreements in Progress: Economic Partnership Agreement with the East African Community' [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2022\)729445](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)729445) (accessed 1 October 2022).

²⁴¹ As above, art 78.

²⁴² As above, art 81; see also the development benchmarks, targets and indicators at 340-353.

In June 2016, the EU - Southern African Development Community Economic Partnership Agreement (EU-SADC-EPA) was signed and has been provisionally applied since October 2016.²⁴³ The only SADC parties to the EPA are Botswana, Lesotho, Mozambique, Namibia, South Africa and Eswatini. While the EPA regulates various aspects of trade among the parties, it does not have provisions on digital trade. This is also the case with EPAs concluded between the EU and Central Africa²⁴⁴ and West Africa.²⁴⁵

Additionally, in 2020, Kenya and the United Kingdom (UK) signed the UK-Kenya Economic Partnership Agreement to foster trade between the two countries and, by extension, the EAC.²⁴⁶ The Agreement objectifies enhancing ICT's contribution to facilitate e-commerce and e-services.²⁴⁷ It therefore calls upon the parties to cooperate in the development of the ICT sector through the formulation of policies, capacity building, ICT connectivity and partnerships.²⁴⁸

The UK and Ghana signed an Interim Trade Partnership Agreement on 2 March 2021.²⁴⁹ Parties have agreed to cooperate in the conclusion of an FTA on e-commerce between them.²⁵⁰ There is however no provision for strengthening digital trade between the parties, despite the conclusion of negotiations at a time when digital trade in the international trade field is on the rise.

²⁴³ European Commission 'EPA SADC - Southern African Development Community' <https://trade.ec.europa.eu/access-to-markets/en/content/epa-sadc-southern-african-development-community> (accessed 10 February 2024).

²⁴⁴ European Commission 'EPA - Central Africa' <https://trade.ec.europa.eu/access-to-markets/en/content/epa-central-africa> (accessed 10 February 2024).

²⁴⁵ European Commission 'EPA - West Africa' https://trade.ec.europa.eu/access-to-markets/en/content/epa-west-africa#toc_8 (accessed 10 February 2024).

²⁴⁶ Economic Partnership Agreement between the Republic of Kenya, a Member of the EAC, of the one part, and the United Kingdom, of Great Britain and Northern Ireland, of the other part, available at <http://www.parliament.go.ke/sites/default/files/2021-01/ECONOMIC%20PARTNERSHIP%20AGREEMENT%20BTN%20UK%20%26%20KENYA%281%29.pdf> The Agreement took effect on 24 March 2021 following a ratification by the two countries.

²⁴⁷ As above, art 81 (2)

²⁴⁸ As above, art 81(1) & (3).

²⁴⁹ Interim Trade Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Ghana, of the other part, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978684/CS_Ghana_1.2021_UK_Ghana_Interim_Trade_Partnership_Agreement.pdf.

²⁵⁰ As above, art 79.

Kenya's proposed FTA with the US objectifies securing of commitments by the two states to allow for continuing regulation of digital trade based on their development agendas.²⁵¹ It is also hoped that through the FTA, the US will give Kenya the necessary support to boost its digital trade platforms.²⁵² It is without doubt that the two countries are on unequal negotiating positions, Kenya being the weaker party. Thus, there is concern on how a consensus can be reached without either favouring or disadvantaging a party.²⁵³ This is because of the variance in the existing legal and institutional frameworks in the two countries, particularly on data sovereignty and generally for localisation of digital trade data.²⁵⁴

Importantly, the US-Kenya proposed FTA negotiations had been shelved by the Joe Biden administration and were expected to resume in October 2022.²⁵⁵ The negotiations did not, however, resume. Instead, the US and Kenya in July 2022 launched negotiations under the Strategic Trade and Investment Partnership (STIP).²⁵⁶ STIP negotiations began in February 2023 and were ongoing in June 2024, the 6th round of negotiations having been hosted in Mombasa, Kenya from 3 to 7 June 2024.²⁵⁷ The aim of the STIP negotiations is to reach an agreement on diverse trade and investment issues, including, digital trade.²⁵⁸ During the launch of the STIP negotiations, there was an

²⁵¹ See Ministry of Industrialization, Trade and Enterprise Development 'Proposed-Kenya – United States of America Free Trade Area Agreement: Negotiation Principles, Objectives and Scope' available at <https://agoa.info/images/documents/15775/kenya-usaftanegotiatingprinciplesobjectivesandscope220620.pdf>.

²⁵² As above.

²⁵³ Centre for Intellectual Property and Information Technology Law 'The Impact of the Proposed US-KE FTA on Kenya's Data and Digital Trade Policy' <https://cipit.strathmore.edu/the-impact-of-the-proposed-us-ke-fta-on-kenyas-data-and-digital-trade-policy/> (accessed 2 September 2021).

²⁵⁴ As above.

²⁵⁵ AGOA.info 'Kenya seeks a temporary pact with the US ahead of full FTA' <https://agoa.info/news/article/16080-kenya-seeks-a-temporary-pact-with-the-us-ahead-of-full-fta.html> (accessed 1 September 2022).

²⁵⁶ Office of the United States Trade Representative 'United States and Kenya Joint Statement after the Fifth Round of U.S.-Kenya Strategic Trade and Investment Partnership Negotiations' (17 May 2024) [United States and Kenya Joint Statement after the Fifth Round of U.S.-Kenya Strategic Trade and Investment Partnership Negotiations | United States Trade Representative \(ustr.gov\)](https://ustr.gov/about/bureaus/offices/oia/articles-and-statements/press-releases/speeches/2024/0517-us-kenya-joint-statement-after-the-fifth-round-of-u-s-kenya-strategic-trade-and-investment-partnership-negotiations) (accessed 15 June 2024).

²⁵⁷ Office of the United States Trade Representative 'United States and Kenya to Hold Sixth Negotiating Round Under the Strategic Trade and Investment Partnership' (24 May 2024) [United States and Kenya to Hold Sixth Negotiating Round Under the Strategic Trade and Investment Partnership | United States Trade Representative \(ustr.gov\)](https://ustr.gov/about/bureaus/offices/oia/articles-and-statements/press-releases/speeches/2024/0524-us-kenya-to-hold-sixth-negotiating-round-under-the-strategic-trade-and-investment-partnership) (accessed 15 June 2024).

²⁵⁸ Office of the United States Trade Representative 'United States and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership' (July 14, 2022) [United States and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership |](https://ustr.gov/about/bureaus/offices/oia/articles-and-statements/press-releases/speeches/2022/0714-us-kenya-announce-the-launch-of-the-u-s-kenya-strategic-trade-and-investment-partnership)

indication that digital trade discussions would cover security and trust in the digital economy, information access, development and competition promotion, MSMEs participation, resolve of discriminatory practices, digital inclusion and accessibility and consumer protection. There was also an agreement to consider emerging digital trade issues.²⁵⁹ The negotiations are closed doors and the progress made in the negotiations is not public.

The above agreements show the evolution in the recognition and regulation of e-commerce and digital trade in trade agreements with African countries. Initial agreements did not contain provisions on e-commerce. Gradually, there has been recognition in the agreements of the role of ICT and the digital economy in boosting e-commerce. More recent agreements seem to dedicate stand-alone chapters or articles on e-commerce/digital trade. There is also increased interest in developing agreements dedicated entirely to digital trade and/or e-commerce.

4.5 Development of digital trade at the African-domestic level

Whereas digital trade offers numerous benefits to countries trading on the digital platform, a significant number of African countries have not leveraged such benefits due to poor ICT infrastructure and limited penetration of the internet in their countries.²⁶⁰ Thus, the biggest challenge to the growth of digital trade in Africa is poor internet connectivity.²⁶¹ According to the UNCTAD, compared to other continents, less than a third of Africa's population could access the internet in 2019.²⁶² This was similarly the case in 2020, as there was no improvement.²⁶³ Save for Takealot, Jumia, Kilimall, Konga and Bidorbuy²⁶⁴ most of the other leading e-commerce companies in Africa are non-African.²⁶⁵ Africa is

[United States Trade Representative \(ustr.gov\)](https://ustr.gov) (accessed 10 May 2023).

²⁵⁹ As above.

²⁶⁰ L Baghdadi & I Guedidi 'Global Value Chains in the Age of Internet: What Opportunities for Africa?' in M Smeets (eds) *Adapting to the Digital trade era: challenges and opportunities* (World Trade Organization 2021) 56-64.

²⁶¹ As above.

²⁶² See UNCTAD 'The UNCTAD B2C E-Commerce Index 2020: Spotlight on Latin America and the Caribbean' UNCTAD Technical Notes on ICT for Development No. 17, available at https://unctad.org/system/files/official-document/tn_unctad_ict4d17_en.pdf, 7.

²⁶³ As above.

²⁶⁴ She Leads Africa '5 top e-commerce platforms in Africa' <https://sheleadsafrica.org/growth-of-ecommerce/> (accessed 1 September 2022).

²⁶⁵ See UNCTAD 'Global E-commerce Jumps to \$26.7 Trillion, Covid-19 Boosts Online Retail Sales' (3 May 2021) <https://unctad.org/press-material/global-e-commerce-jumps-267-trillion-covid-19->

also behind in terms of legislation on e-commerce.²⁶⁶ Conversely, in terms of services that can be delivered digitally, the total share of exports in Africa had grown to about 25 percent in 2019.²⁶⁷ This is an indicator that should there be increased investment in internet connectivity and regulation, digitally traded services in Africa would increase. In terms of participation in the WTO's Work Programme, only Burkina Faso, Kenya, Nigeria, Benin, Cameroon and Côte D'Ivoire have been participating.²⁶⁸

4.5.1 Mauritius

Compared to other African countries, Mauritius is at the forefront in its digital trade development.²⁶⁹ In 2019 and 2020 for example, Mauritius was ranked by UNCTAD as the most e-commerce prepared nation in sub-Saharan Africa.²⁷⁰ In December 2020, 63.2% of Mauritians had access to the internet.²⁷¹ Mauritius has also developed legislation to regulate its e-commerce, i.e. the Electronic Transactions Act of 2000, which provides a framework for uniform rules on e-commerce.²⁷² The Act objectified the creation of legal infrastructure to implement secure e-commerce, regulate e-commerce, foster e-commerce development, prevent fraud in e-commerce and promote public trust in e-commerce.²⁷³ To facilitate cross-border e-commerce, Mauritius enacted the Banking Act

boosts-online-retail-sales (accessed 28 August 2021).
²⁶⁶ UNCTAD (n 262) 7.
²⁶⁷ As above,
²⁶⁸ Smeets (n 5) 90. Smeets notes that the other African countries have been hesitant to participate in the Work Programme's activities for diverse reasons ranging from lack of national laws and fear of limitation of their rights to regulate at the national level and some are not ready to commit themselves at the WTO level.
²⁶⁹ B Seetanah *et al* 'Opportunities and Challenges of E-commerce in Mauritius' in M Smeets (eds) *Adapting to the Digital trade era: challenges and opportunities* (World Trade Organization 2021) 70.
²⁷⁰ See UNCTAD (n 262) 7. In 2020, South Africa came in second, followed by Tunisia, Algeria, Ghana, Libya, Kenya, Nigeria, Morocco and Senegal as the top ten African countries. In 2019, South Africa came in second, followed by Nigeria, Kenya, Namibia, Tanzania, Ghana, Senegal, Botswana and Uganda. See UNCTAD 'UNCTAD B2C E-Commerce Index 2019: UNCTAD Technical Notes on ICT for Development No. 14, available at https://unctad.org/system/files/official-document/tn_unctad_ict4d14_en.pdf.
²⁷¹ Seetanah *et al* (n 269) 72.
²⁷² Electronic Transactions Act 23 of 2001, available at [Volume 3.pdf \(govmu.org\)](https://govmu.org/Volume%203.pdf).
²⁷³ As above sec 3.

in 2004,²⁷⁴ Data Protection Act in 2017²⁷⁵ and National Payment Systems Act in 2018.²⁷⁶ These Acts provide the necessary legal infrastructure for e-commerce to thrive in Mauritius through protection of personal data, regulation of cross-border data transfer and cross-border electronic payments. To facilitate digital trade, Mauritius applies the principle of National Treatment (NT).²⁷⁷ Important to note however is that more than two-thirds of e-commerce in Mauritius contains the physical delivery aspect,²⁷⁸ which is outside the scope of this research which is limited only to e-commerce delivered in digital form.

4.5.2 Kenya

Kenya has made progress in creating policies on digital trade.²⁷⁹ The Kenya Digital Economy Blueprint creates a framework for strengthening Kenya's participation in the digital economy.²⁸⁰ It is guided by five pillars: digitalisation of government, business digitalisation, creation of reliable and resilient infrastructure, entrepreneurship guided by innovation, and development of a workforce that is digitally skilled.²⁸¹ The pillar on digitalisation of businesses is guided by three pillars: 'digital trade, digital financial services and digital content'.²⁸² This is to be realised through open and efficient payment systems, financial inclusion, legal frameworks to protect consumers, resolve disputes and enforce contracts and regional market development to promote cross-border trading.²⁸³ The digital business pillar objectifies the creation of markets for cross-border trade.²⁸⁴ The Blueprint notes further that the development of the digital infrastructure is pertinent in boosting digital trade.²⁸⁵ Following the adoption of the Blueprint, Kenya in 2020 developed

²⁷⁴ The Banking Act 35 of 2004 (amended March 2019), available at https://www.bom.mu/sites/default/files/banking_act_amended_march_2019.pdf

²⁷⁵ Data Protection Act 20 of 2017, available at https://dataprotection.govmu.org/Documents/DPA_2017_updated.pdf?csf=1&e=0rlrff.

²⁷⁶ The National Payment Systems Act 17 of 2018 (amended August 2022), available at https://www.bom.mu/sites/default/files/the_national_payment_systems_act_2018_amended_august_2022.pdf.

²⁷⁷ As above.

²⁷⁸ Seetanah *et al* (n 269) 83.

²⁷⁹ UNCTAD (n 262) 37.

²⁸⁰ Kenya's Digital Economy Blueprint: Powering Kenya's Transformation' available at <https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf>.

²⁸¹ As above, Chapter Two at 27.

²⁸² See Kenya's Digital Economy Blueprint (n 280) 38.

²⁸³ See Kenya's Digital Economy Blueprint (n 280) 38.

²⁸⁴ See Kenya's Digital Economy Blueprint (n 280) 38.

²⁸⁵ See Kenya's Digital Economy Blueprint (n 280) 44-45.

the Digital Economy Strategy to facilitate the implementation of the Blueprint.²⁸⁶ In addition to the five pillars contained in the Blueprint, the Strategy is also guided by the pillar of ‘digital inclusion’.²⁸⁷ This pillar seeks to mitigate the exclusion of women, elderly, youth, minorities, rural communities, and persons with disabilities from economic digital transformation through digital literacy, increased connectivity, safety and security.²⁸⁸

In addition to the foregoing, Kenya has also enacted national laws that speak to e-commerce, namely, the Computer Misuse and Cybercrimes Act, to secure the digital environment,²⁸⁹ Kenya Data Protection Act to regulate data protection and cross-border data flows,²⁹⁰ Access to Information Act to regulate online information exchanges²⁹¹ and Consumer Protection Act to regulate online consumer behaviours and build trusts.²⁹² Moreover, Kenya in 2014 launched an online platform for clearance of cargo referred to as the ‘National Electronic Single Window System’.²⁹³

Despite the significant progress made in strengthening digital trade in Kenya, the growth of digital trade in Kenya is hindered by the unavailability of finances, limited internet connectivity, skills gap and infrastructural challenges.²⁹⁴

4.5.3 South Africa

The usage of e-commerce in South Africa is significantly high considering that by 2022, 80 percent of South Africans were using the internet. This is projected to grow by ten percentage points by 2027.²⁹⁵ Statista also estimated that in 2022, there were 27 million

²⁸⁶ Kenya Ministry of Information, Communication, Technology, Innovation and Youth Affairs ‘Digital Economy Strategy- Draft 1’ available at <https://ict.go.ke/wp-content/uploads/2020/08/10TH-JULY-FINAL-COPY-DIGITAL-ECONOMY-STRATEGY-DRAFT-ONE.pdf>.

²⁸⁷ As above, 7.

²⁸⁸ As above. 44.

²⁸⁹ Act 5 of 2018, assented 16 May 2018, commenced 30 May 2018.

²⁹⁰ Act 24 of 2019, assented 8 November 2019, commenced 25 November 2019.

²⁹¹ Act 31 of 2016, assented 31 August 2016, commenced 21 September 2016.

²⁹² Act 46 of 2012, assented 13 December 2012, commenced 14 March 2013.

²⁹³ TK Nganga & M Mbithi ‘The Digital Trade era-Opportunities and Challenges for Developing Countries: the Case of Kenya’ in M Smeets (eds) *Adapting to the Digital trade era: challenges and opportunities* (World Trade Organization 2021) 97.

²⁹⁴ Nganga & Mbithi (n 293) 93; see also The World Bank Group ‘Kenya Economic Update: Accelerating Kenya’s Digital Economy’ 30 October 2019 <https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-accelerating-kenyas-digital-economy> (accessed 1 September 2021).

²⁹⁵ Statista ‘E-commerce in South Africa - statistics & facts’ <https://www.statista.com/topics/11038/e-commerce-in-south-africa/> (accessed 12 November 2023).

users of e-commerce in South Africa and is expected to grow to 37.9 million users by 2027.²⁹⁶ South Africa also had the highest number of online marketplaces in Africa in 2019.²⁹⁷ Some of the renowned e-commerce platforms in Africa are based in South Africa, such as Takealot.²⁹⁸ Many global digital platforms, such as Netflix and Spotify have used South Africa as entry points into the African market.²⁹⁹ The growth in digital trade in South Africa is attributed to high internet connectivity and a sophisticated banking sector.³⁰⁰ Mobile banking has contributed to the growth of e-commerce in South Africa.³⁰¹

In response to the increased usage of e-commerce, South Africa has developed several initiatives and policies. This commenced in 2002 following the enactment of the Electronic Communication and Transaction Act to regulate e-communications and transactions.³⁰² Notable provisions under this Act are provisions on facilitation of e-transactions, consumer protection and personal data information.³⁰³ In terms of personal data information for example, the Act mandates data controllers to obtain the express written consent of a data owner before collecting, processing or disclosure of personal information.³⁰⁴

The provisions on personal data protection have been further legislated under the South African Protection of Personal Information Act (POPIA).³⁰⁵ POPIA also regulates cross-border transfer of information, in that personal data cannot be transferred across borders unless it is established that the recipient of the data is subject to an adequate data protection law and there is consent to the transfer by the data owner.³⁰⁶

The above three countries have been selected for analysis in this section to demonstrate the progress made by African countries in the regulation and creation of

²⁹⁶ As above.

²⁹⁷ A Lemma, M Mendez-Parra & L Naliaka 'The AfCFTA: unlocking the potential of the digital economy in Africa' ODI Report published July 2022, 36.

²⁹⁸ Takealot 'Home Page' <https://www.takealot.com/> (accessed 12 November 2023).

²⁹⁹ Lemma *et al* (n 297), 36.

³⁰⁰ Lemma *et al* (n 297), 36-37.

³⁰¹ A Assensoh-Kodua, S Migiyo & E Mutambara 'Mobile banking in South Africa: a systematic review of the literature' (2016) 11(1) *Banks and Bank Systems* 34-41, 34.

³⁰² Electronic Communications and Transactions Act 25 of 2002.

³⁰³ Electronic Communications and Transactions Act 25 of 2002 chapters III, VII & VIII.

³⁰⁴ Electronic Communications and Transactions Act 25 of 2002 sec 51.

³⁰⁵ Protection of Personal Information Act 4 of 2013 sec 4.

³⁰⁶ Protection of Personal Information Act 4 of 2013 sec 72.

infrastructure to facilitate digital trade. The selection was determined based on the availability of laws and initiatives on e-commerce/digital trade, internet users and geographical location within Africa. Noteworthy, they are not the only African countries with fairly established digital trade environments. Several other African countries also have a big share of internet users, for instance, Algeria, Egypt, Morocco and Nigeria.³⁰⁷ However, the subsequent chapter of this study examines opportunities and challenges impacting digital trade in some of these countries.

4.6 Africa's contribution to discussions on digital trade at the international level

4.6.1 Africa's participation in the Joint Statement Initiative on E-commerce

As discussed in the previous chapter, 71 Members of the WTO agreed during the 11th Ministerial Conference in 2017 in Buenos Aires, Argentina, to initiate discussions plurilaterally on e-commerce with the hope that their input would influence further discussion on e-commerce at the WTO.³⁰⁸ Subsequently, the Joint Statement Initiative on E-commerce (JSI) was constituted and as of June 2024, 91 WTO Members had joined the group.³⁰⁹ African countries that are Members to the JSI are Benin, Burkina Faso, Cabo Verde, Cameroon, Côte d'Ivoire, Gambia, Kenya, Mauritius and Nigeria.³¹⁰ These countries represent but a small fraction of African states that are Members of the WTO.

The JSI presents an opportunity for African WTO Members to contribute to and influence the decisions on e-commerce at the WTO and, in particular, advocate for inclusionary provisions.³¹¹ As usual, a majority of African members has opted for the back seat. As discussed in the previous chapter, South Africa has notified the WTO of its disapproval of the JSI on account that it excludes some of the WTO Members in the

³⁰⁷ Statista 'Number of internet users in Africa as of January 2024, by country' <https://www.statista.com/statistics/505883/number-of-internet-users-in-african-countries/> (accessed 10 February 2024).

³⁰⁸ WTO 'Joint Initiative on E-commerce' https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm (accessed 1 September 2022).

³⁰⁹ World Trade Organization 'Joint Initiative on E-commerce' https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm (accessed 27 June 2024).

³¹⁰ As above.

³¹¹ G Govindrajana & A Singh 'Curb Your Enthusiasm: The WTO E-Commerce Negotiations and the Developing World' (2021) 13 *Trade Law & Development Journal* 1-37, 4.

important discussions on WTO rules and, thus, contravenes the key principles of the WTO.³¹² On this basis, South Africa has not joined the JSI. Important to note, the JSI has received great attention at the WTO and is more likely than not to set the pace for negotiations at the WTO on e-commerce, more especially, since it has made ‘substantial progress’.³¹³ It may be therefore necessary for African WTO Members to re-assess their role and contribution to JSI.

4.6.2 Africa’s participation in the WTO Work Programme on E-commerce

Like other WTO Members, African Members’ contribution to the work of the Work Programme on E-commerce has been minor considering the insignificant progress the Work Programme has made in realising its mandate.³¹⁴ African Members’ mandate has been limited to supporting the work of the Work Programme and continuously consenting to the non-application of customs duties on electronic transmissions. Since the 11th Ministerial Conference, however, developing countries have challenged the mandate of the Work Programme on account of the digital divide that exist between them and developed countries which limits their participation in the work of the Work Programme.³¹⁵ They argue that their development concerns have been disregarded in e-commerce discussions at the WTO. Notably, the African Group at the WTO in a 2017 communication highlighted the digital divide and high market concentration on e-commerce as the key challenges facing African Members.³¹⁶

Further, as regards the moratorium on the imposition of customs duties on electronic transmissions introduced in 1998,³¹⁷ South Africa has asked for the moratorium not to be made permanent on account that by so doing, developing countries will be

³¹² WTO ‘The Legal Status of ‘Joint Statement Initiatives’ and their Negotiated Outcomes’ WT/GC/W/819 (19 February 2021).

³¹³ WTO ‘E-commerce co-convenors welcome substantial progress in negotiations’ https://www.wto.org/english/news_e/news21_e/ecom_14dec21_e.htm (accessed 1 October 2022).

³¹⁴ Govindrajan & Singh (n 311) 6.-7.

³¹⁵ Govindrajan & Singh (n 311) 8-11.

³¹⁶ WTO ‘JOB/GC/133’ (n 10) para 1.2 & 1.4.

³¹⁷ World Trade Organization ‘Declaration of Global Electronic Commerce’ adopted 20 May 1998, WT/MIN(98)/DEC/2 of 25 May 1998.

disadvantaged and their industrialisation and ability to raise revenue through tariff and other charges, greatly prejudiced.³¹⁸

4.7. Conclusion

In conclusion, this chapter has examined digital trade rules under African regional law. It has in particular analysed the contributions made to digital trade by the African Union, AfCFTA, regional economic communities, trade agreements and domestically, by African states. Key contributions made by the African Union are the adoption of the AU Convention on Cybersecurity and Personal Data Protection, incorporation of e-commerce under Agenda 2063, adoption of the AU Data Policy Framework, development of the African Union Digital Transformation Strategy (2020-2030) and Policy and Regulation Initiative for Digital Africa, establishment of the Centre for Excellence for Digital Identity and Digital Trade and Digital Economy and development of the Digital Earth Africa Programme. All these initiatives contribute to and influence the growth of e-commerce at the continental level.

This chapter has discussed that though the AfCFTA did not incorporate e-commerce in the negotiations of the AfCFTA Agreement and annexed Protocols, e-commerce has been introduced to the negotiations and now inform phase III negotiations of the AfCFTA. Consequently, the AfCFTA in February 2024 adopted the Protocol to the AfCFTA on Digital Trade. It has been discussed further that EAC, COMESA, ECOWAS and SADC are the only RECs that have rolled out initiatives that promote digital trade. As discussed, digital trade in Africa is further regulated by trade agreements entered into between African countries and other partners. Lastly, this chapter has discussed that African states have in their domestic set-ups established legislations to regulate e-commerce and create an environment that enables both domestic and cross-border digital trade. This study has identified e-commerce practices in Mauritius, Kenya and South Africa as some of the countries that have made progress in terms of recognition

³¹⁸ World Trade Organization Work Programme on Electronic Commerce 'The E-Commerce Moratorium: Scope and Impact' WT/GC/W/798 (11 March 2020) Communication from India and South Africa.

and facilitation of e-commerce in Africa. However, majority of African states are still grappling with underdeveloped digital infrastructure.

The subsequent chapter of this study will examine WTO rules surrounding the application of safeguard measures to digital trade. It will examine the context in which safeguard measures are applied to goods under GATT, the Agreement on Safeguards, African RECs, free trade agreements, and domestically by African states. It will also explore the context in which emergency safeguard measures are applied to services. GATS provisions under the WTO will be examined and in Africa, the provisions under the Investment Agreement for the COMESA Common Investment Area will be explored. Additionally, the chapter will examine how the WTO rules of MFN, NT, likeness of products and services, transparency, technological neutrality, injury and causation apply to safeguard measures and subsequently, digital trade.

CHAPTER FIVE:

WORLD TRADE ORGANIZATION RULES SURROUNDING THE IMPOSITION OF SAFEGUARD MEASURES IN DIGITAL TRADE

5.1. Introduction

The previous chapters of this study have discussed digital trade development at the international and African levels. As pointed out, there is an upsurge in digital trade that points to a need for a clear framework for their regulation. The upsurge in digital trade at the African level points to a need for a framework for the imposition of safeguard measures on digital trade to protect African domestic industries. As will be discussed later in this chapter, developing countries lose significantly due to the ongoing moratorium on the imposition of customs duties on electronic transmissions at the WTO. This study argues that lifting the moratorium is a step towards opening up the regulatory space to allow for the imposition of safeguard measures on digital trade.¹ Key terminologies and concepts relevant to the application of safeguard measures to digital trade were introduced and examined at length in the second chapter of this study and would therefore inform the discussions in this chapter.²

To understand the context in which safeguard measures are applied to digital trade, this chapter examines the rules surrounding the imposition of safeguard measures. As has been discussed previously, the imposition of safeguard measures in international trade in goods and services was birthed in Article XIX of GATT and was refined during the Uruguay Round of multilateral negotiations that led to the establishment of the World Trade Organization (WTO). The processes and ways for doing so have been replicated in similar or closely similar terms in regional trade agreements, bilateral trade agreements and domestic set-ups. While there has been contextual application of safeguards and emergency safeguards rules at the regional and domestic levels, a lot of lessons are drawn from the practices at the WTO. This chapter examines these rules at length. Particularly, the application to safeguard measures of the rules on most-favoured nation,

¹ WTO General Council 'The Moratorium on Customs Duties on Electronic Transmissions: Need for Clarity on its Scope and Impact' WT/GC/W/833 (8 November 2021) para 1.3.

² Chapter Two of this Study, section 2.4.

national treatment, likeness, transparency, technological neutrality and injury and causation are explored at length.

This chapter is structured as follows: the subsequent section will contextually examine existing literature and rules for the imposition of safeguard measures and emergency safeguard measures in international trade on goods. The chapter will then explore the context in which the rules on most-favoured nation, national treatment, likeness, transparency, technological neutrality and injury and causation are applied and examine the likely forms/means for their application to digital trade. Thereafter, an analysis of the relevance of these rules to digital trade will be made. In the last section, conclusions on the discussions put forth in this chapter will be made.

Noteworthy, the existing framework for the application of these rules to safeguard measures relate to physically traded goods and services. There is limited literature on the application of the rules to digital trade. The discussions herein will therefore revolve around the relevance of these rules to digital trade. To understand the context in which they can be applied, it is necessary to analyse the existing framework for their application.

5.2 Analysis of Safeguard Measures and Emergency Safeguard Measures

Before examining the rules relevant to the application of safeguard measures and emergency safeguard measures, it is necessary to understand the context in which they are applied. This section briefly examines the existing legal and institutional framework for the imposition of safeguard measures. As has been discussed previously, there is a lack of precision and clarity on the application of trade rules to digital trade. Hence, this chapter proceeds on this understanding to examine how safeguard measures are applied to both goods and services. It will therefore examine safeguards measures applied to goods and emergency safeguard measures applied to services. A contextual analysis to digital trade will thereafter be made.

5.2.1 Safeguard Measures

The legal and institutional framework for imposing safeguard measures is elaborate at the WTO, African-regional and domestic levels. The practice of applying safeguard

measures has evolved over the years to adapt to changes in international trade.³ At the WTO, the Agreement on Safeguards is the governing instrument.⁴ Safeguard measures are also incorporated under GATT in the form of ‘emergency action’, albeit narrowly.⁵ The processes for applying safeguard measures are also provided for under the Agreement Establishing the African Continental Free Trade Area (AfCFTA), as well as in various other African Regional Trade Agreements (RTAs), and African-national legislations. These are explored further below.

The General Agreement on Tariffs and Trade (GATT)

GATT 1947 established the basis for imposing safeguard measures on internationally traded goods.⁶ The genesis for its inclusion under GATT was that safeguard measures provisions were introduced to the multilateral trading system by the United States (US) and later the US in collaboration with Mexico. The US Reciprocal Trade Agreements Act of 1934 provided a framework for negotiating reciprocal trade agreements by the US.⁷ The Act informed the negotiation of the US-Mexico Reciprocal Trade Agreement of 1942 which introduced safeguard measures in the form of an ‘escape clause’.⁸ The escape clause cushioned the US from impacts that resulted from the reduction of tariff measures in bilateral trade agreements. It was imposed where it was established that a reduction in sales and profits of domestic industry was a result of increased importation of a product.⁹ A similar regulatory approach was adopted in subsequent bilateral trade agreements by the US.

The escape clause became the basis for the negotiation of similar provisions in the international trade sphere by the US. As part of its contribution to the negotiations for the Charter of the International Trade Organization (ITO), for instance, the US put forth a

³ G Messenger *The Development of World Trade Organization Law: Examining Change in International Law* (Oxford University Press 2016) 81.

⁴ 15 April 1994, available at https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf.

⁵ GATT art XIX.

⁶ As above.

⁷ The Trade Agreements Act of 1934 (1937) 46(4) *The Yale Law Journal* 647–670.

⁸ Messenger (n 3) 91.

⁹ IB Kravis ‘The Trade Agreements Escape Clause’ (1954) 44(3) *The American Economic Review* 319–338, 319.

working proposal that contained an ‘escape clause’.¹⁰ According to the ‘escape clause’, a safeguard measure can only be applied once it is established that there is an increase in imports as a result of an unforeseen development and GATT obligations, in a manner that causes injury or threatens to cause injury to domestic industries dealing in like or similar products and importantly, there must be a causal link between the increase in imports and the injury.¹¹ These are the overarching requirements for the application of a safeguard measure. These proposals by the US and Mexico were incorporated into GATT with a few improvements, as discussed further below.

GATT allows for the imposition of safeguard measures where a product is being imported in increased quantities and in ways that are likely to cause serious injury or threaten to cause serious injury to a domestic industry producing a like or directly competitive product.¹² The measures can however only be imposed after giving notice in writing and allowing the concerned Contracting Party to consult on it.¹³ The measure can then be applied if no agreement is reached.¹⁴ Article XIX of GATT is the only provision on safeguard measures under GATT. The manner in which safeguard measures are addressed under this provision is limited. Important to note is that this GATT provision applies only to physically traded goods.

Safeguard measures under GATT 1947 were not frequently applied and were mostly applied by developed economies.¹⁵ This was because GATT 1947 was provisionally applied. The procedures for imposing safeguard measures under GATT 1947 were also not elaborate.¹⁶ The way the measures were imposed was discriminatory as there was no uniform structure for so doing.¹⁷ As a result of these inadequacies most of the countries that applied safeguard measures opted for voluntary export restrictions,

¹⁰ YS Lee *Safeguard Measures in World Trade: The Legal Analysis* (2014) 25.

¹¹ Lee (n 10) 25.

¹² GATT art XIX.1(a) & (b).

¹³ GATT art XIX.2.

¹⁴ GATT art XIX.3.

¹⁵ RK Gupta ‘Safeguard Measures’ <https://www.unescap.org/sites/default/files/Safeguard%20Measures.pdf>.

¹⁶ World Trade Organization ‘Agreement on Safeguards’ https://www.wto.org/english/tratop_e/safeg_e/safeint.htm (accessed 15 November 2021).

¹⁷ As above.

i.e., ‘grey area measures’. This gave rise to the need to develop more elaborate rules to address these ‘grey area measures’.

Negotiations on safeguards were incorporated into the Uruguay Round of negotiations of the WTO in the 1980s.¹⁸ The WTO notes that the negotiations on the Agreement on Safeguards arose from the September 1986 *Punta del Este* Declaration.¹⁹ This Declaration sought to establish an agreement on safeguards that was premised on GATT’s basic principles. It further objectified an agreement that was broader in scope, transparent and addressed issues relating to ‘serious injury’, ‘threat of serious injury’, ‘notification’, ‘consultation’ and ‘resolution of disputes’.²⁰ The Uruguay Round negotiations on safeguards culminated in the Agreement on Safeguards, discussed further below, as well as GATT 1994.²¹

Agreement on Safeguards

The Agreement on Safeguards (AS) was negotiated to provide for more elaborate regulation and to improve the framework for the imposition of safeguard measures provided for under GATT.²² The introductory part of the AS provides that its purpose is to ‘clarify and reinforce disciplines under GATT, and more specifically, disciplines relating to emergency action on imports of particular products’.²³ It was also necessary to take control of the international framework on safeguards.²⁴ Indeed, this has been achieved as can be seen through the subsequent adoptions in similar or closely similar structures for imposing safeguard measures in trade agreements that have been negotiated in the

¹⁸ WTO Report ‘Chapter 7: Safeguards’
<https://www.meti.go.jp/english/report/downloadfiles/2011WTO/2-7Safeguards.pdf>, at 455-466.

¹⁹ WTO Report (n 18) 465.

²⁰ WTO Report (n 18) 466.

²¹ It was decided in *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products* WT/DS98/12, adopted 12 January 2000 (*Korea – Dairy Products*) by both the Panel and Appellate Body that the AS did not replace and/or repeal Article XIX of GATT. Rather, they complement each other. Article XIX of GATT and AS apply “cumulatively”.
https://www.wto.org/english/res_e/publications_e/ai17_e/safeguards_art1_jur.pdf.

²² In case of conflict between Article XIX of GATT provisions and AS, AS provisions take precedence. See Matsushita and others *The World Trade Organization: Law, Practice and Policy*, Third Edition, (Oxford University Press 2015) 412.

²³ Agreement on Safeguards preamble. See S Rai *Recognition and Regulation of Safeguard Measures Under GATT/WTO* (2011) 32.

²⁴ As above.

years that followed. Sykes, however, notes that much as the AS elaborates on Article XIX of GATT, it does not address all the problems that were faced under GATT, for instance, interpretation of key terms such as ‘unforeseen development’, ‘serious injury’ and ‘causation’.²⁵

While it is not expressly stated under GATT, safeguard measures are considered to be a specific exception to Articles I, II and XI of GATT on general most-favoured nation treatment, schedules of concessions and general elimination of quantitative restrictions, respectively.²⁶ This is because it allows Members to divert from their import concessions.²⁷ The AS provides a framework and basis for imposing safeguard measures on a product’s import where it is established that there is serious injury or a threat of serious injury to a domestic industry unless the measures are imposed.²⁸ By its nature, a safeguard measure is a temporary restriction, hence, it can only be applied for a limited period of time and to specifically avert an injury or threat of injury caused to a domestic industry.²⁹

Not any measure will qualify as a safeguard measure. Instead, to be a safeguard measure it must suspend, modify or withdraw a Member’s obligations under the GATT.³⁰ The Panel in *Indonesia – Iron or Steel Products* gave an example of suspension of obligations for an identified period or restrictions of imports to prevent or remedy a serious injury that has been caused to a domestic industry.³¹ Safeguard measures, thus, take the forms of additional duties, quantitative restrictions (quotas) or a combination thereof.³²

Provisional safeguard measures can be applied where a preliminary determination is made that increased imports have caused injury or a threat to injury to a domestic

²⁵ AO Sykes ‘The Safeguards Mess: A Critique of WTO Jurisprudence’ John M Olin Law & Economic Working Paper 187 (2nd Series) 2003) 2-4.

²⁶ Lee (n 10) 6. See Rai (n 23) 48; See also Agreement on Safeguards art 9.

²⁷ Lee (n 10) 7-8. Safeguard measures further permit WTO Members to escape from their obligations at the WTO. See Matsushita and others (n 22) 410.

²⁸ See generally the Agreement on Safeguards.

²⁹ Messenger (n 3) 82.

³⁰ Panel Report ‘*Indonesia – Iron or Steel Products*’ paras 7.13-7.14.

³¹ Panel Report ‘*Indonesia – Iron or Steel Products*’ para 7.14.

³² Agreement on Safeguards arts 1 and 5. It is important to note that the Agreement on Safeguards only refers to quotas and cross-references Article XIX of GATT on GATT obligations, ‘tariff concessions’ included.

industry, and on condition that there are critical circumstances that require the imposition of such provisional measure.³³ At the WTO, a significant number of safeguard measures have been imposed either definitively or provisionally and several others are under investigation.³⁴

In specific terms, the AS necessitates that a safeguard measure may only be applied if a product is being imported in such increased quantities so as to cause or threaten to cause serious injury to a domestic industry producing a like or directly competitive product.³⁵ The Appellate Body in *Indonesia – Iron or Steel Products* noted that an application of a safeguard measure must conform with the Agreement on Safeguards.³⁶ The Appellate Body noted in particular that: -

First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.³⁷

For an increase in imports to arise, it must be shown that the imports are in increased quantities, either in absolute terms or relative to production in the importing country.³⁸ Secondly, both the 'amount' and the 'rate' of imports must have increased.³⁹ The Appellate Body in *Argentina – Footwear (EC)*, has further indicated that any increase

³³ Agreement on Safeguards art 6.

³⁴ For the period between 1 January 1995 and 30 June 2023 the following statistics are notable:-

- 1) A total of 210 safeguard measures had been imposed by Members. Indonesia (28), India (24) and Turkey (20) were the biggest users of safeguard measures during this period. In Africa, Egypt (8), South Africa (6) and Madagascar (4) were the most biggest; see WTO Statistics on Safeguard Measures 'Safeguard Measures by Reporting Member' https://www.wto.org/english/tratop_e/safeg_e/SG_MeasuresByRepMember.pdf.
- 2) A total of 416 safeguards investigations were initiated at the WTO; see WTO Statistics on Safeguard Measures 'Safeguard Initiations by Reporting Member' https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.
- 3) https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf. In terms of sectors, the base metals and arts of base metal (55) and products of the chemical or allied industries (37) applied the most safeguard measures; WTO Statistics on Safeguard Measures 'Safeguard Measures by Sector' https://www.wto.org/english/tratop_e/safeg_e/SG_MeasuresBySector.pdf.

³⁵ Agreement on Safeguards art 2.1.

³⁶ Appellate Body Report '*Indonesia – Iron or Steel Products*' para 5.62.

³⁷ Appellate Body Report '*Indonesia – Iron or Steel Products*' para 5.60.

³⁸ Agreement on Safeguards art 2.1; Appellate Body Report '*US – Steel Safeguards*' para 390; Panel Report '*Argentina – Peaches*' para. 7.37.

³⁹ Agreement on Safeguards art 4.2(a); Panel Report '*Argentina – Footwear*' para 8.159.

in imports must have been sudden, sharp, recent and significant.⁴⁰ Additionally, before a safeguard measure may be imposed, it must be shown that imports increased ‘under such conditions’ as to cause or threaten serious injury.⁴¹

The Agreement on Safeguards calls upon investigating authorities to establish a causal link between the increase in volumes of imports and the serious injury or threat to serious injury caused to a domestic industry.⁴² The investigation must ascertain that the serious injury or threat of serious injury is not caused by factors other than an increase in quantities of imports.⁴³ Thus, the causal link is about drawing a nexus between the increase in the quantities of imports and the serious injury caused. As compared to countervailing measures and anti-dumping duties, the factors for demonstrating causal link for safeguard measures are construed to be narrow.⁴⁴ Rai examines the following ‘three-step test’ determined in *Argentina – Footwear (EC)*, for establishing causal link under safeguard measures:⁴⁵

1. Whether an upward trend in import coincided with downward trend in the injury factors, and if not, whether a reasoned explanation was provided as to why nevertheless the data showed causation;
2. Whether the conditions of competition in the domestic market between imported and domestic product as analysed, demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and
3. Whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.

Arising from the above factors, causal link is confirmed by demonstrating an increase in import volumes and a corresponding decline in the industry’s economic performance, as set out by the injury factors.⁴⁶ There ought not to be a decline in injury

⁴⁰ Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 131.

⁴¹ The words “under such conditions” under the Agreement on Safeguards have been construed not to impose an additional obligation for applying safeguard measures. It is therefore not an essential element in analysing whether or not there has been an increase in quantities of imports; see Panel Report ‘*Korea – Dairy*’ para 7.52, Panel Report ‘*Argentina – Footwear (EC)*’ para 8.249 and Panel Report ‘*US – Wheat Gluten*’ para 8.108.

⁴² Agreement on Safeguards art 4.2(b).

⁴³ As above.

⁴⁴ Rai (n 23) 92-93.

⁴⁵ Rai (n 23) 94. See also Appellate Body Report ‘*US – Wheat Gluten*’ para 68; Appellate Body Report ‘*US – Lamb*’ para 178; F Piérola *The Challenge of Safeguards in the WTO* (2014) 243.

⁴⁶ Rai (n 23) 94-95; F Piérola-Castro *WTO Agreement on Safeguards and Article XIX of GATT: A*

factors prior to increase in volumes of imports.⁴⁷ Conditions of competition is characterised by the quantities of imports, the market share of imported products and profits or losses made.⁴⁸ Competition has also been assessed based on consumer preferences, demand and supply of the products, technological developments, physical characteristics of a products, mode of delivery, quality and nature of the product.⁴⁹ Price is considered the most important factor in analysing competition between imported and domestic products and in explaining how injury is caused by increased volumes of imports.⁵⁰

GATT 1994 as read together with AS allows a Member to impose a safeguard measure where products are being imported in increased quantities due to ‘unforeseen developments’.⁵¹ ‘Unforeseen developments’ are construed as unexpected,⁵² unpredictable and/or sudden developments⁵³ that occur after concessions have been negotiated.⁵⁴ Thus, a Panel has held that what ‘was “unforeseen”⁵⁵ when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today.’⁵⁶ Changes in preferences by consumers, currency value changes and technological breakthrough are some of the developments that have been found to result in unforeseen developments.⁵⁷

The Panel in *Korea – Dairy Products* examined that the phrase ‘unforeseen developments’ in GATT was used to describe the context in which products are being imported in increased quantities so as to necessitate the imposition of safeguard measures.⁵⁸ The Appellate Body noted in *Korea – Dairy Products* that unforeseen

⁴⁷ *Detailed Commentary* (2022) 159; Appellate Body Report ‘*US – Steel Safeguards*’ n 495.

⁴⁸ Rai (n 23) 95.

⁴⁹ Rai (n 23) 96.

⁵⁰ As above. See Panel Report ‘*Argentina Footwear (EC)*’ para 8.251.

⁵¹ Rai (n 22) 96; Piérola-Castro (n 46) 169-171.

⁵² GATT art XIX & Agreement on Safeguards art 2.1.

⁵³ Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 91.

⁵⁴ Appellate Body Report ‘*Korea – Dairy Products*’ para 84.

⁵⁵ Panel Report ‘*Korea – Dairy Products*’ paras 7.44 & 7.45.

⁵⁶ See Appellate Body Report ‘*Korea – Dairy Products*’ para 84, where the Appellate Body found that there is a difference between ‘unforeseen’ and ‘unforeseeable’. See also Piérola (n 45) 143; Lee (n 10) 59-61.

⁵⁷ Panel Report ‘*US – Steel Safeguards*’ para 10.42.

⁵⁸ Matsushita and others (n 22) 415.

⁵⁹ Panel Report ‘*Korea – Dairy Products*’ paras 7.43 & 7.44.

developments add an additional factor to the paragraph that must be proven before applying a safeguard measure.⁵⁹ It was reiterated by the Appellate Body in *Argentina – Footwear (EC)* that the phrase ‘unforeseen developments’ in GATT is an independent clause that does not establish independent conditions but describes certain circumstances that must be met before the application of a safeguard measure.⁶⁰ Thus, the phrase, ‘unforeseen developments’ needs to be demonstrated only on a factual basis and is generally not an ‘independent condition’.⁶¹

The Appellate Body in *Argentina – Footwear (EC)* noted that Article XIX of GATT 1994 and the AS must be read together.⁶² The Panel in *Korea – Dairy Products* observed that the term ‘unforeseen developments’ was not included in the Agreement on Safeguards since the context had evolved and Members understood the GATT system of binding obligations.⁶³ AS like other Annex 1A agreements represented an ‘elaboration or evolution of the provisions of GATT 1994’.⁶⁴ The Appellate Body in *Korea – Dairy Products* also agreed with the Panel that GATT 1994 was incorporated into the WTO Agreement and was therefore applicable together with AS to safeguard measures.⁶⁵ Thus, ‘unforeseen developments’ apply under AS since it was not expressly omitted during the Uruguay Round negotiations.⁶⁶

Therefore, safeguard investigations under AS must also satisfy the requirements under Article XIX of GATT, including a justification that there is an ‘unforeseen development’.⁶⁷ However, the application of safeguards to digital trade would be different. In trade in goods, parties negotiated tariff and other concessions under Articles II and XI of GATT. No similar concessions were negotiated in respect of digital trade. Accordingly,

⁵⁹ Appellate Body Report ‘*Korea – Dairy Products*’ para 85. Pursuant to art II.2 of the WTO Agreement, Members are bound by all Agreements contained in Annex 1A. The Preamble of AS also provides that the AS improves and strengthens the rules under GATT and particularly, Article XIX.

⁶⁰ Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 92.

⁶¹ Rai (n 23) 38.

⁶² Appellate Body Report ‘*Argentina – Footwear (EC)*’ paras 79, 81 & 82.

⁶³ Panel Report ‘*Korea – Dairy Products*’ para 7.47.

⁶⁴ Panel Report ‘*Korea – Dairy Products*’ para 7.47.

⁶⁵ Appellate Body Report ‘*Korea – Dairy Products*’ paras 75 – 78; see also Appellate Body Report ‘*Argentina – Footwear (EC)*’ paras 79, 81 & 82.

⁶⁶ Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 88.

⁶⁷ Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 97.

this requirement does not need to be demonstrated in the investigation and before application of a safeguard measure to digital trade.

In the application of safeguard measures, the procedure is critical. Application of safeguard measures begins with an investigation. The Appellate Body in *Argentina – Footwear (EC)*⁶⁸ found that a safeguard measure can only be applied once it has been investigated and established that due to increased imports serious injury or a threat of serious injury has been caused to a domestic industry.⁶⁹ Injury caused by other factors may not be attributed to the increased imports and a clear link must be established between the injury and the increased imports.⁷⁰ Investigations are initiated through a public notice to all interested parties, taking of evidence and views of other parties and justification of the need to apply a safeguard measure.⁷¹ Several notifications must be made to the WTO Committee on Safeguards during the course of an investigation,⁷² while the AS also requires that consultations take place with the governments of affected countries at certain points in the investigation.⁷³ A report of the findings and conclusions is thereafter published by the competent authority.⁷⁴

The application of safeguard measures is subject to several limitations. First, parallelism must be applied, which is assessed based on the proportionality between the investigations and the findings arrived at by the investigating authority and, in addition, the scope for imposing the safeguard measure.⁷⁵ Thus, a safeguard measure may only, and must, be applied to imports considered in the determination of whether imports increased. As such, the safeguard measure is applied ‘only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.’⁷⁶ The safeguard measure is also applied to the imported product irrespective of its source.⁷⁷ This includes countries

⁶⁸ Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 111.

⁶⁹ Appellate Body Report ‘*Argentina – Footwear (EC)*’ paras 111-113.

⁷⁰ As above, para 22. See US – Wheat Gluten (DS166), para 9.2; Piérola-Castro (n 46) 172-179.

⁷¹ Agreement on Safeguards art 3.

⁷² See arts 12.1, 12.2, 12.4 and 12.5.

⁷³ See arts 8.1, 12.3 and 12.4.

⁷⁴ As above, art 3(1); Piérola-Castro (n 46) 194-195; Appellate Body Report ‘*US Steel Safeguards*’ paras 285-289; Panel Report ‘*Argentina – Preserved Peaches*’ para 7.33.

⁷⁵ Appellate Body Report ‘*US – Line Pipe*’ paras 179-181.

⁷⁶ Agreement on Safeguards art 5. See Appellate Body Report ‘*US – Line Pipe*’ paras 231 & 234.

⁷⁷ Appellate Body Report ‘*Argentina – Footwear (EC)*’ paras 111-113. This is subject to exclusions for certain developing countries under AS art 9.1.

that are members to a Free Trade Area (FTA).⁷⁸ This was for instance the finding of the Panel in *US – Wheat Gluten*.⁷⁹ Exclusion of Canada from the imposition of safeguard measures on the basis that it was a party to North American Free Trade Agreement (NAFTA) was found to be discriminatory since the US had included imports from all sources in its investigation.⁸⁰

The second limitation is non-attribution.⁸¹ This calls for the application of safeguard measures only once it is established that there is a causal link between increases in imports and the serious injury or threat to serious injury. Other factors that contribute to serious injury must be excluded from the application of safeguard measures on the basis of non-attribution.⁸² Third, the AS calls for the application of a safeguard measure only to avert serious injury (or threat thereof) and to provide an opportunity for the adjustment of the domestic industry.⁸³ Further, in the event a quantitative restriction is applied, it ought not to go below the average volumes of imports in the recent past.⁸⁴ If a quota is allocated, it must be allocated to importing countries either through an agreement or depending on their proportion of imports of a product during the period under investigation.⁸⁵ Safeguard measures can therefore only be applied subject to these limitations. It is proposed that safeguards could also apply under similar conditions, but with the necessary modifications, to digital trade.

The problems and prospects for the imposition of safeguard measures to digital trade inform the discussions in this thesis. This is particularly due to the threshold for imposing safeguard measures under the AS. Particularly, serious injury or threat of serious injury must be established prior to the imposition of safeguard measures.⁸⁶ This threshold is high and is often times difficult to attain.⁸⁷ Messenger discusses that the

⁷⁸ Matsushita and others (n 22) 420.

⁷⁹ Panel Report '*US – Wheat Gluten*' para 8.108.

⁸⁰ Matsushita and others (n 22) 420-421.

⁸¹ Matsushita and others (n 22) 422.

⁸² As above, 422.

⁸³ Art 5.1.

⁸⁴ Art 5.1.

⁸⁵ Art 5.2.

⁸⁶ Agreement on Safeguards art 4. "Serious injury" is defined as "significant overall impairment in the position of a domestic industry"; while "threat to serious injury" is defined as "serious injury that is clearly imminent...based on facts."

⁸⁷ Messenger (n 3) 82. This is different with other trade remedies, particularly, countervailing

imposition of safeguard measures has proved to be more costly in comparison to the applications of other trade remedies, particularly, countervailing measures and anti-dumping duties.⁸⁸ This chapter therefore examines the manner in which these rules under the AS can be adapted to digitally traded goods and/or data. It also examines how the rules on safeguards provided for under AS can be applied to digital trade to safeguard African domestic industries from surges in digital trade.

Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) and Protocols

At the African-continental level, several measures have been taken to further liberalise African trade in goods and services. While there exist several regional economic communities in Africa that aim at liberalising trade among its Members, the AfCFTA brings together all African countries.⁸⁹ As discussed previously, 54 out of 55 African states have signed the AfCFTA Agreement.⁹⁰

One of the general objectives of the AfCFTA Agreement is to ‘create a liberalised market for trade in goods and services’.⁹¹ To give effect to this objective, the Protocol on Trade in Goods, Protocol on Trade in Services and Protocol on Rules and Procedures on the Settlement of Disputes were adopted as integral components of the AfCFTA Agreement.⁹² These instruments are relevant to this study.

The Protocol on Trade in Goods’ rules on safeguards are drawn from the provisions of the WTO Agreement on Safeguards. Under the Protocol, global and preferential safeguards may be applied.⁹³ As used under the Protocol, global safeguards apply to non-State Parties i.e. they are imposed under WTO rules, which could include measures against State Parties that are not exempted under Article 9.1 of the Agreement

measures and anti-dumping duties which require that a Member State must demonstrate “material injury”.

⁸⁸ Messenger (n 3) 82.

⁸⁹ Tralac ‘Status of AfCFTA Ratification’ <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 19 January 2022).

⁹⁰ Eritrea did not sign the Agreement.

⁹¹ AfCFTA Agreement art 3(b).

⁹² AfCFTA Agreement art 8

⁹³ Protocol on Trade in Goods arts 18 & 19

on Safeguards, while preferential safeguards apply to State Parties. The manner of their application is, however, similar. The Protocol expressly provides that the application of global safeguard measures is as per the Agreement on Safeguards and GATT 1994, Article XIX.⁹⁴ This is in addition to AfCFTA Guidelines on Implementation of Trade Remedies and Annex 9 of the Protocol on Trade in Goods on Trade Remedies.⁹⁵ Preferential safeguards appear distinct but similar, such that they are applied where there is a sudden surge in imports of a product from a State Party or Parties so as to cause or threaten to cause serious injury to a domestic industry producing a like or directly competitive product.⁹⁶ Preferential safeguards are applied in accordance with Annex 9 and AfCFTA Guidelines on Implementation of Trade Remedies.⁹⁷ The procedure and manner for imposing safeguard measures under Annex 9 of the Protocol on Trade in Goods is mutatis mutandis the WTO Agreement on Safeguards.⁹⁸

The Protocol on Trade in Goods further allows for the application of measures to protect infant industries. Such measures are applied on a non-discriminatory basis and for a limited period.⁹⁹ These measures would by interpretation include safeguard measures as they are applied to protect domestic industries, which includes infant industries, and are imposed for a specified period.

The Protocol on Trade in Services defines trade in services in the four modes of services recognised under GATS.¹⁰⁰ This connotes that, by extension and as discussed in Chapter Two of this study, it applies to digital trade. There is no mention of emergency safeguard measures under the Protocol as is the case under GATS. The Protocol on Rules and Procedures on the Settlement of Disputes provides a framework for settlement

⁹⁴ Protocol on Trade in Goods art 18; see also Annex 9 to the Protocol on Trade in Goods art 3.

⁹⁵ Protocol on Trade in Goods art 18.

⁹⁶ Protocol on Trade in Goods art 19.1.

⁹⁷ Protocol on Trade in Goods art 19.2.

⁹⁸ Annex 9 to the Protocol on Trade in Goods arts 3-11. Available at <https://www.tralac.org/documents/resources/cfta/1999-compiled-annexes-to-the-afcfta-agreement-legally-scrubbed-signed-16-may-2018/file.html>.

⁹⁹ Protocol on Trade in Goods art 24.

¹⁰⁰ Protocol on Trade in Services art 1(p).

of disputes under the AfCFTA Agreement and Protocols¹⁰¹ and would, therefore, apply to the resolution of disputes relating to safeguard measures.

As was discussed in the previous chapter of this study, the AfCFTA did not modify its rules to address changes in international trade that have arisen since 1995 when the Agreement establishing the WTO and its Annexures, particularly the Agreement on Safeguards, took effect. It for instance did not incorporate changes brought about by technological advancement that has resulted in an upsurge in digital trade. It also did not consider interpretations and modifications made to key terms used under the Agreement on Safeguards, for instance, what constitutes like products and directly competitive products. It therefore implies that the problems that exist in the WTO's structure for imposing safeguard measures have been replicated under AfCFTA. The AfCFTA Protocol on Digital Trade that was concluded in February 2024 did not address these gaps, much as it was anticipated to do so.¹⁰² This is because the Protocol on Digital Trade is not premised on existing agreements on digital trade or e-commerce. Such that, unlike other AfCFTA protocols that have borrowed heavily from relevant WTO agreements, the WTO does not have a digital trade agreement in force from which the AfCFTA could draw inspiration.¹⁰³

Safeguard Measures under African Regional Economic Communities and Economic Partnership Agreements

As mentioned in the previous chapter of this study, eight Regional Economic Communities (RECs) are recognised by the African Union.¹⁰⁴ Some of these RECs have incorporated provisions on safeguard measures in their agreements. The existing frameworks are explored in detail below.

¹⁰¹ Protocol on Rules and Procedures on the Settlement of Disputes art 3.

¹⁰² The African Union Assembly resolved that Phase III negotiations would focus on an AfCFTA Protocol on E-Commerce and the negotiations are to begin immediately Phase II negotiations conclude. See African Union 'Decision on the African Continental Free Trade Area (AfCFTA) Doc. Assembly/AU/4(XXXIII)' Assembly/AU/Dec.751(XXXIII) paras 23 & 24.

¹⁰³ Important to this study, is provisions on cross-border e-commerce and taxation of e-commerce which hopefully will take centre stage in the negotiations.

¹⁰⁴ African Union 'Regional Economic Communities' <https://au.int/en/recs> (accessed 10 August 2022).

The East African Community's (EAC) rules on safeguards are contained in the EAC Customs Union (Safeguard Measures) Regulations.¹⁰⁵ The Regulations give effect to the Protocol establishing the EAC Customs Union which allows for imposition of safeguard measures by Partner States whenever there is a 'sudden surge' of imports of a product from a Partner State such that domestic producers suffer or are threatened with a serious injury.¹⁰⁶ The Protocol calls upon EAC Partner States to co-operate in the identification and investigation of surges in imports and in the imposition of safeguard measures.¹⁰⁷ The EAC Safeguard Measures Regulations is the substantive law on safeguards. The procedure for imposing safeguard measures under the Regulations is like the rules under WTO save for contextual modifications.¹⁰⁸

The Southern African Development Community (SADC) allows for the application of safeguard measures under its Protocol on Trade.¹⁰⁹ The structure for application of safeguards under the Protocol is like that of the WTO's AS.¹¹⁰ In addition to the foregoing, SADC has in place several Economic Partnership Agreements (EPAs) with the European Union (EU). The first, between SACU-M and the EU, was signed on 10 June 2016.¹¹¹ This EPA is fully operational.¹¹² The EPA provides a framework for applying safeguard measures in the event that there is a rapid increase in imports from the either the EU or SADC countries so as to cause injury or threaten to cause injury to the other's domestic industries. While the EPA Parties are allowed to adopt safeguard measures in

¹⁰⁵ EAC Information Repository 'The East African Community Customs Union (Safeguard Measures) Regulations: Annex VI' available at: <http://repository.eac.int/handle/11671/24282?show=full>.

¹⁰⁶ The Protocol is available at <https://eastafricanchamber.org/attachments/article/85/EAC%20CUSTOMS%20UNION%20PROTOCOL.pdf> art 19(1).

¹⁰⁷ EAC Customs Union Protocol art 20.

¹⁰⁸ See the Regulations generally.

¹⁰⁹ SADC Protocol on Trade, signed 1 August 1996 and entered into force 25 January 2001 (was amended in 2010), available at: https://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf.

¹¹⁰ As above, art 20.

¹¹¹ Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0916\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0916(01)&from=EN). Particular SADC Members that Parties to this EPA are Botswana, Lesotho, Mozambique, Namibia, South African and Swaziland (together referred to as "SADC EPA States").

¹¹² European Commission 'Southern African Development Community (SADC)' <https://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/> (accessed 10 January 2022).

accordance with GATT and AS provisions, the EU was required to exclude imports from SADC EPA States.¹¹³ The exclusion was, however, for a limited period, particularly, five years from the date of entry into force of the EPA, subject to review for an extension.¹¹⁴ Safeguard measures under the EPA take the forms of tariff quotas, increases in custom duties to the applicable MFN rate and/or suspension of further reductions of a product's import duty rate.¹¹⁵ Save for contextual modifications, other aspects for application of safeguard measures are drawn from the WTO Agreement on Safeguards. To date, one safeguard measure has been imposed in terms of the SACU-M EPA.¹¹⁶

Additionally, the EPA provides for the maintenance of agricultural safeguards,¹¹⁷ food security safeguards¹¹⁸ and safeguards to protect infant industries.¹¹⁹ In order to protect infant domestic industries, Botswana, Lesotho, Eswatini, Mozambique and Namibia (but not South Africa) are permitted under the EPA to either suspend or 'increase the rate of customs duty up to a level which does not exceed the applied MFN duty' where an EU product is being imported 'in such increased quantities and under such conditions as to threaten the establishment of an infant industry or cause or threaten to cause disturbances' to infant domestic industries producing like or directly competitive products.¹²⁰ These forms of imposition of safeguards under the EPA offer ideal scenarios for the imposition of safeguard measures on digital trade so as to protect African domestic industries.¹²¹ This is because the safeguard measures are applied on a special and differential treatment basis while taking into account the small economies in Africa.

¹¹³ EU-SADC EPA art 33(2).

¹¹⁴ As above, art 33(3). The Agreement entered into force on 10 June 2016, this period therefore ended on 10 June 2021. Note that it was not extended.

¹¹⁵ EU-SADC EPA art 34(3).

¹¹⁶ This is related to frozen bone-in chicken portions. See European Commission 'Panel rules in favour of EU on Southern African Customs Union's safeguard on EU poultry cuts' https://policy.trade.ec.europa.eu/news/panel-rules-favour-eu-southern-african-customs-unions-safeguard-eu-poultry-cuts-2022-08-03_en (accessed 10 November 2023).

¹¹⁷ EU-SADC EPA art 35.

¹¹⁸ EU-SADC EPA art 36.

¹¹⁹ EU-SADC EPA art 38. This a major advantage under the EPA; see European Commission 'Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group: Key Advantages' (June 2016) https://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152818.pdf.

¹²⁰ EU-SADC EPA art 38(1). See also art 37, which allows the concerned countries to maintain transitional safeguards. Note that the provision does not apply to South Africa.

¹²¹ Safeguards measures becomes critical in protecting African infant and agricultural domestic industries in the event of an upsurge in digital trade.

Technologically, Africa is also behind and would thus require such special and differential treatment in the application of safeguard measures to digital trade. Africa could, for instance, be permitted to impose safeguard measures on digital trade while being exempted from any safeguard measure on digital trade applied by big economies, even if such exemption is for a prescribed period. This would give African countries the opportunity to grow their digital trade while protecting African domestic industries.

The Southern African Customs Union (SACU) and Mozambique-United Kingdom Economic Partnership Agreement (SACUM-UK EPA)¹²² presents another opportunity to examine the application of safeguard measures in EPAs. It allows Parties to apply safeguard measures that are consistent with GATT, the AS and the Agreement on Agriculture.¹²³ The UK is called upon to exclude SACUM from any safeguard measures that it has and will impose within five years from conclusion of the Agreement, considering that their economies are small.¹²⁴ On the other hand, SACU Parties are allowed to maintain a safeguard measure necessary to prevent serious injury or a threat of serious injury caused to their domestic industries by increased volumes of imports.¹²⁵ The safeguard measures take the forms of suspension of import duty rate reductions, increase in custom duty to a maximum of the applicable MFN rate and imposition of tariff quotas.¹²⁶ These forms of safeguard measures are slightly different from those permitted under the WTO. It is recalled that the WTO allows for safeguard measures in the forms of additional duties, quotas and/or tariff quotas.

¹²² SACUM-UK EPA, signed 9 October 2019, entered into force 1 January 2021. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844509/MS_34.2019_v1_pt1_UK_SACU_Mozambique_EPA.pdf
Particular SACU Members that are Parties to the EPA are Botswana, Eswatini, Lesotho, Namibia and South Africa.

¹²³ SACUM-UK EPA art 33(1).

¹²⁴ SACUM-UK EPA art 33(2) & (3). The five year period began to run on 10 October 2016 (SACU) and 4 February 2018 (Mozambique). This period is subject to extension depending on the development needs of SACUM.

¹²⁵ SACUM-UK EPA art 34(1) & (2). Under Article 34(5) safeguard measures are maintained only for as long as necessary to prevent an injury or threat to injury. It can however be maintained for a maximum of two years subject to extension for a period not exceeding two years. SACUM are permitted to maintain the measures for a maximum of four years and an extended period of four years, if need be.

¹²⁶ SACUM-UK EPA art 34(3).

The Common Market for Eastern and Southern Africa (COMESA) provides for safeguard measures under the Treaty establishing COMESA of 1993¹²⁷ and the COMESA Regulations on Trade Remedy Measures of 2002.¹²⁸ The overall structure for applying safeguard measures under these instruments is similar to those of the WTO and the EAC. Distinct, however, is that the COMESA Treaty refers to ‘serious disturbance’ in place of ‘serious injury or threat of serious injury’ in assessing the impact of increased imports of a product.¹²⁹ Kenya became the first country in 2002 to apply safeguards measures under COMESA.¹³⁰ Kenya’s request to COMESA to apply safeguard measures on its sugar sector was granted pursuant to Article 61 of the COMESA Treaty. There was a surge in sugar imports from the COMESA region affecting the competitiveness of Kenya’s sugar.¹³¹ The safeguard measure was to primarily allow Kenya to restructure its sugar industry to make it competitive within COMESA.¹³² The period for maintenance of the safeguard measure has been extended several times and the latest extension was granted in November 2023 for a two-year period.¹³³ The numerous extensions of the safeguard measure raises questions on its legality considering that under COMESA rules safeguard measures are to be maintained for a maximum of eight years from when they were introduced.¹³⁴ Safeguard measures imposed under COMESA rules are explored further in the next chapter of this study.

¹²⁷ COMESA Treaty art 61. The Treaty is available at <https://www.comesa.int/wp-content/uploads/2020/07/Comesa-Treaty.pdf>.

¹²⁸ COMESA Regulations on Trade Remedy Measures, approved October 2002 part II.

¹²⁹ COMESA Treaty art 61(1) & (2).

¹³⁰ COMESA ‘COMESA Sugar Safeguard on Kenya is Paying-Off’ <https://www.comesa.int/comesa-sugar-safeguard-on-kenya-is-paying-off/> (accessed 10 January 2022).

¹³¹ TradeMark Southern Africa ‘Training Module on Safeguards’ available at https://au.int/sites/default/files/documents/30990-doc-safeguards_training_module.pdf, 9.

¹³² As above. See also COMESA ‘Sub-Committee on Kenya Sugar Safeguard Measures Reviews Progress’ <https://www.comesa.int/sub-committee-on-kenya-sugar-safeguard-measures-reviews-progress/> (accessed 10 January 2022). This period run from March 2021 until March 2023.

¹³³ Nation ‘Kenya secures more time to control cheap sugar imports’ (26 November 2023) <https://nation.africa/kenya/business/kenya-secures-more-time-to-control-cheap-sugar-imports--4445548> (accessed 1 December 2023).

¹³⁴ Regulation 12.3 of the COMESA Regulations on Trade Remedy Measures provides for a maximum duration, including extensions, of 8 years. See also COMESA ‘Adopted Report of the Sixth Meeting of Kenya Sugar Safeguard Sub-Committee’ 19-20 September 2023, available at https://www.comesa.int/wp-content/uploads/2023/10/6.-Adopted-Report-of-6th-Sugar-meeting_EN.pdf, para 23.

The Economic Community of West African States (ECOWAS) permits for application of safeguard measures under its Revised Treaty¹³⁵ and Common External Tariff (CET).¹³⁶ ECOWAS adopts a structure similar to that of the WTO for the application of safeguard measures. The measures under ECOWAS can be applied pending necessary approvals from the Council of Ministers.¹³⁷

Safeguard Measures under African-Domestic Legislations

At the domestic level, several African countries have domestic laws on safeguard measures that are either drawn from the WTO framework or the frameworks under African RECs, as discussed in the previous section of this chapter. Some of the African countries with existing legal frameworks on safeguard measures are, Egypt, Kenya, Madagascar, Mauritius, Morocco, South Africa, Tunisia, Zambia, and Zimbabwe.¹³⁸

Madagascar enacted Decree No. 2017-695 in 2017 to provide a framework for the application of trade remedies.¹³⁹ In 2018, Madagascar Law No. 2018-020 amended its competition law.¹⁴⁰ It mandates the National Authority for Trade Remedies to take appropriate safeguard measures to protect domestic industries and producers.¹⁴¹ Madagascar rules for applying safeguard measures have been adapted from the WTO rules. Madagascar is the most prolific user of safeguards in Africa.¹⁴² Out of the 57

¹³⁵ ECOWAS Revised Treaty art 49.

¹³⁶ See also ECOWAS Trade Information System 'Trade Policy: ECOWAS Common External Tariff (CET)' <https://ecotis.projects.ecowas.int/policy-development/common-external-tariff-cet/> (accessed 10 January 2022).

¹³⁷ ECOWAS Revised Treaty art 49(1).

¹³⁸ See footnote 220 of Chapter Two of this Thesis.

On 18 December 1998, Tunisia adopted a domestic law on Import Safeguard Measures; see WTO 'Notification of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures: Tunisia' G/SG/N/1/TUN/2, dated 22 December 2000.

On 18 February 2013, Morocco adopted a domestic law of Trade Defence Measures; see WTO 'Notification of Laws and Regulations under arts 18.5 and 32.6 of the Agreements: Morocco' G/ADP/N/1/MAR/3, G/SCM/N/1/MAR/3, G/SG/N/1/MAR/2, dated 01 March 2013.

On 16 August 2017, Madagascar adopted domestic regulations on Trade Remedies; see WTO 'Notification of Laws and Regulations under arts 18.5, 32.6 and 12.6 of the Agreements: Madagascar' G/ADP/N/1/MDG/2, G/SCM/N/1/MDG/1, G/SG/N/1/MDG/2, dated 20 November 2018.

¹³⁹ Decree No. 2017-695, adopted 16 August 2017 art 1.

¹⁴⁰ WTO, 'Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements: Madagascar' G/ADP/N/1/MDG/2, G/SCM/N/1/MDG/1, G/SG/N/1/MDG/2, 20 November 2018.

¹⁴¹ As above, art 7.

¹⁴² WTO 'Safeguards Initiations by Reporting Member: January 1995-December 2023', available at

safeguard measures initiated by six African countries at the WTO between 1995 and 2023, twelve were initiated by Madagascar.¹⁴³ Madagascar has also applied several safeguards under COMESA and other regional and bilateral arrangements, as shall be discussed further in the subsequent chapter of this study.

Egypt enacted Law 161 in 1998 to protect its economy from injury caused by unjustified increase in imports.¹⁴⁴ To implement Law 161, Implementing Regulations were enacted in 1998 to provide comprehensive rules for investigation and application of safeguard measures.¹⁴⁵ In 2008, Law 161 and Implementing Regulations were amended by Decree 569 of 2008.¹⁴⁶ The Decree draws guidance from the WTO rules on safeguard measures and the decisions of the WTO dispute settlement body.¹⁴⁷ The Decree currently applies to safeguard measures in Egypt. Egypt is the second-most prolific user of safeguards in Africa.¹⁴⁸ Out of the 57 safeguard measures initiated by six African countries at the WTO between 1995 and 2023, fifteen were initiated by Egypt.¹⁴⁹

South Africa enacted the International Trade Administration Act in 2002.¹⁵⁰ South Africa also enacted the Safeguard Regulations in 2004,¹⁵¹ which were amended in 2005 by Amended Safeguard Regulations.¹⁵² South Africa also has the Amended Guidelines and Conditions Relating to the Extension of Safeguard Measures of 2021,¹⁵³ and is the third-most prolific user of safeguards in Africa.¹⁵⁴ Out of the 57 safeguard measures

https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

¹⁴³ As above.

¹⁴⁴ WTO 'Notifications of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements: Egypt' G/ADP/N/1/EGY/2, G/SCM/N/1/EGY/2, 11 November 1998, art 1 of Law 161 of 1998.

¹⁴⁵ WTO 'Notifications of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements: Egypt' G/ADP/N/1/EGY/2/Rev.1*, G/SCM/N/1/EGY/2/Rev.1*, G/SG/N/1/EGY/2, 18 December 1998.

¹⁴⁶ WTO 'Notifications of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements: Egypt' G/ADP/N/1/EGY/2/Rev.1/Suppl.1, G/SCM/N/1/EGY/2/Rev.1/Suppl.1, G/SG/N/1/EGY/2/Suppl.1, 22 August 2008.

¹⁴⁷ As above, art 88.

¹⁴⁸ WTO 'Safeguards Initiations by Reporting Member: January 1995-December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

¹⁴⁹ As above.

¹⁵⁰ International Trade Administration Act 71 of 2002, assented 30 December 2002.

¹⁵¹ The International Trade Administration Commission Safeguard Regulations Notice 1808 of 2004, available at https://www.gov.za/sites/default/files/gcis_document/201409/26715.pdf.

¹⁵² International Trade Administration Act 71 of 2002 Amended Safeguard Regulations of 2005, available at https://www.gov.za/sites/default/files/gcis_document/201409/277620.pdf.

¹⁵³ Department of Trade, Industry and Competition Notice 52 of 2021, available at https://www.gov.za/sites/default/files/gcis_document/202109/45131gen542.pdf.

¹⁵⁴ WTO 'Safeguards Initiations by Reporting Member: January 1995-December 2023', available at

initiated by six African countries at the WTO between 1995 and 2023, nine were initiated by South Africa.¹⁵⁵ South African has also applied safeguards measures under regional and bilateral agreements. This is explored further in the subsequent chapter of this study.

Kenya enacted its Trade Remedies Act in 2017 to provide a framework for the regulation of all safeguard measures, subsidies and countervailing measures and anti-dumping duties.¹⁵⁶ The comprehensive rules on safeguard measures under the Act are adapted from the WTO rules.¹⁵⁷ Kenya is yet to apply any safeguard measure under the WTO but has a safeguard measure on sugar under COMESA. Kenya also applied a safeguard measure on wheat under COMESA rules between 2005 and 2009.¹⁵⁸ The subsequent chapter of this study will also discuss other attempts made by Kenya in applying safeguard measures under COMESA.

Tunisia has in place Law No. 98-106 of 1998 that regulates safeguard measures.¹⁵⁹ Like other rules on safeguard measures, the Law aimed to protect domestic industries from serious injuries caused by massive imports.¹⁶⁰ While Tunisia has initiated seven safeguards under the WTO, it has not yet imposed any safeguard measures.¹⁶¹ Zambia has in place the Control of Goods (Amendment) Act 12 of 2004 regulates safeguard measures in Zambia.¹⁶² Like other African legislations on safeguard measures,

https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

155 As above.

156 Kenya Trade Remedies Act 32 of 2017, assented 21 July 2017, commenced 16 August 2017.

157 Kenya Trade Remedies Act sec 2.

158 R Gitau, S Mburu, MK Mathenge & M Smal 'Trade and Agricultural Competitiveness for Growth, Food Security and Poverty Reduction: A Case of Wheat and Rice Production in Kenya' Working Paper 45 of 2011 (Tegemeo Institute of Agricultural Policy and Development, Egerton University) 11.

159 WTO 'Notification of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures: Tunisia' G/SG/N/1/TUN/2 22, December 2000.

160 As above, art 2.

161 WTO 'Safeguards Initiations by Reporting Member: January 1995-December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

162 WTO 'Notification of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures: Zambia' G/SG/N/1/ZMB/2, 27 August 2009. To date, Zambia has conducted a single safeguard investigation, but although a provisional measure was imposed, no definitive measure was imposed. See WTO 'Safeguards Initiations by Reporting Member: January 1995-December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

the Act draws inspiration from WTO and COMESA rules on safeguards.¹⁶³ Zambia has initiated one safeguard measure under the WTO.¹⁶⁴

Other African countries with domestic legislations on safeguard measures are Mauritius with the Trade (Anti-dumping, Countervailing and Safeguard Measures) Act enacted in 2022;¹⁶⁵ and Zimbabwe with the Competition (Safeguards) (Investigation) Regulations of 2006.¹⁶⁶ These frameworks drew inspiration from the WTO and relevant RECs in their formulation of the laws on safeguards. The structure for applying safeguard measures in these countries is therefore similar to that of the WTO.

5.2.2 Emergency Safeguard Measures

General Agreement on Trade in Services (GATS)

As has been discussed previously, there has not been a clear structure for the imposition of emergency safeguard measures on trade in services despite this being contemplated under the GATS.¹⁶⁷ GATS called on Members to negotiate on emergency safeguard measures on the basis of non-discrimination. No such negotiations ever took place. There is a lack of clarity on when negotiations should commence since there is no consensus amongst WTO Members as to whether or not emergency safeguard measures should be included in trade in services.¹⁶⁸

Much as 'emergency safeguard measures' on services have been incorporated in Regional Trade Agreements (RTAs) there are no mutually agreed guidelines and procedures for their application.¹⁶⁹ Past and on-going discussions at the WTO suggest that application of emergency safeguard measures must in the meantime adopt the same

¹⁶³ As above, secs 4N (5) & 4O.

¹⁶⁴ WTO 'Safeguards Initiations by Reporting Member: January 1995-December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

¹⁶⁵ Mauritius Trade (Anti-dumping, Countervailing and Safeguard Measures) Act 19 of 2022, assented 2 December 2022.

¹⁶⁶ WTO, 'Notifications of Laws and Regulations under Article 12.6 of the Relevant Agreement: Zimbabwe' G/SG/N/1/ZWE/3, 28 February 2020.

¹⁶⁷ Art X of GATS, available at: https://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

¹⁶⁸ M Marconini 'Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable' (2005) *United Nations Conference on Trade and Development*, UNCTAD/DITC/TNCD/2005/4, 4-5.

¹⁶⁹ WTO Working Party on GATS Rules 'Report on the Meeting held on 18 March 2015: Note by the Secretariat' S/WPGR/M/86 (22 May 2015) para 1.2.

structure as those of safeguard measures in goods.¹⁷⁰ Important to note however is that emergency safeguard measures on services have been applied in different contexts in RTAs.¹⁷¹ This is because of a lack of clear rules on their application.

Investment Agreement for the COMESA Common Investment Area

In Africa, the COMESA Investment Agreement has incorporated a provision on emergency safeguard measures. The COMESA Investment Agreement¹⁷² was adopted in 2007 and was thereafter reviewed to reflect the trends in international investment. A final revised draft was submitted for adoption in 2017.¹⁷³ No single COMESA Member State has however ratified the COMESA Investment Agreement despite its existence since 2007.¹⁷⁴ The COMESA Investment Agreement's main objective is to provide a framework for harmonization of investment and investor protection amongst COMESA Members.¹⁷⁵

The COMESA Investment Agreement provides a framework for imposition of emergency safeguard measures on services.¹⁷⁶ The Agreement calls upon COMESA Members to apply emergency safeguard measures should they suffer or be threatened with serious injury while implementing the Agreement's provisions. Noteworthy, the Agreement only permits the imposition of emergency safeguard measures on a provisional and non-discriminatory basis.¹⁷⁷ The Members do not act on their own, rather, they should notify the COMESA Common Investment Area (CCIA) Committee within

¹⁷⁰ WTO Working Party on GATS Rules, para 1.4.

¹⁷¹ Working Party on GATS Rules 'Report on the Meeting held on 18 March 2015: Note by the Secretariat' S/WPGR/M/85 (5 November 2014), paras 1.7, 1.8 & 1.12.

¹⁷² The Agreement was signed on 23 May 2007. The initial Agreement is available at <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf>.

¹⁷³ The Revised Agreement is available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download>.

¹⁷⁴ COMESA 'Plans Afoot to Publicize Common Investment Area Agreement' (27 April 2020) <https://www.comesa.int/plans-afoot-to-publicize-common-investment-area-agreement/> (accessed 10 November 2021).

¹⁷⁵ COMESA Members States referred to in the Agreement are: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

¹⁷⁶ COMESA Investment Agreement art 24

¹⁷⁷ COMESA Investment Agreement art 24 (1).

fourteen days of imposition of an emergency safeguard measure.¹⁷⁸ The CCIA Committee is empowered to determine the procedures for the imposition of emergency safeguard measures and to equally decide what amounts to either an injury or threat of injury.¹⁷⁹ The CCIA Committee will also ensure that consultations are conducted between the imposing and other Members and under its auspices within 30 days of the imposition of the measure.¹⁸⁰ Since the COMESA Investment Agreement has not been ratified by any Member, no emergency safeguard measure has ever been imposed by COMESA Members under the Agreement.

AfCFTA Protocol on Investment

The AfCFTA Protocol on Investment¹⁸¹ was adopted by the AU Heads of State on 19 February 2023 to govern investment under the AfCFTA.¹⁸² As an exception to the transfer of funds under the Protocol, a State Party may apply safeguard measures.¹⁸³ Such measures are applied on a non-discriminatory basis. Such measures may also be applied at the request of the International Monetary Fund (IMF).¹⁸⁴ The measures must be notified to the AfCFTA Secretariat and a schedule for removal provided within a reasonable time. The measures are temporarily applied and phased out progressively.¹⁸⁵

The safeguard measures contemplated under the Protocol are distinct from those discussed in this study, as they relate to transfer of funds relating to balance of payments and not goods or services.¹⁸⁶ Such measures are applied in two instances: -

¹⁷⁸ COMESA Investment Agreement art 24(2).

¹⁷⁹ COMESA Investment Agreement art 24(3).

¹⁸⁰ COMESA Investment Agreement art 24(4).

¹⁸¹ Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, 2023, available at https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_investment.pdf.

¹⁸² AfCFTA 'The AfCFTA Investment Protocol – A potential game changer for the African continent?' <https://au-afcfta.org/2023/05/the-afcfta-investment-protocol-a-potential-game-changer-for-the-african-continent/> (accessed 1 December 2023).

¹⁸³ AfCFTA Protocol on Investment art 23.

¹⁸⁴ AfCFTA Protocol on Investment art 23.3

¹⁸⁵ AfCFTA Protocol on Investment art 23.4.

¹⁸⁶ AfCFTA Protocol on Investment art 23.2.

- (a) in the event or threat of serious balance-of-payments deficits or external financial difficulties; or
- (b) in exceptional circumstances where movements of capital cause or threaten to cause serious economic or financial difficulties in the State Party concerned.

The measures are also distinct from emergency safeguard measures contained under GATS as they do not relate to a service. Nonetheless, these measures are conditional on there being a ‘threat of serious injury’ in the forms of ‘external financial difficulties’ and ‘financial difficulties’. They also focus on the domestic market. In that, the transfer of funds is restricted to remedy a problem that arises in the domestic market, for instance, to fulfil a tax obligation, financial reporting, severance entitlement of employees, amongst others.¹⁸⁷

5.3 Application of WTO Rules to Safeguard Measures

Having extensively examined the existing framework for the application of safeguard measures and emergency safeguard measures, this section proceeds to examine how particular WTO rules/principles apply to safeguard measures. As discussed previously, the multilateral legal framework for the regulation of digital trade is not clear. Lopez, Condon and Munoz for instance term the lack of a multilateral regulatory framework on digital trade as ‘incomplete’.¹⁸⁸ Thus, despite increased digital trade, there are no precise rules governing them. Similarly, and as discussed previously, the WTO negotiations did not factor in the potential emergence and growth in digitally traded goods and services during the negotiations of the pre-existing rules on trade in goods and services. Thus, there are no rules governing the imposition of safeguard measures to digital trade. Important to note however is that, like physically traded goods and services, goods and services must be digitally traded on a non-discriminatory basis.¹⁸⁹

¹⁸⁷ AfCFTA Protocol on Investment art 23.21.

¹⁸⁸ D Lopez, B Condon & F Munoz ‘The New Rules on Digital Trade in Latin America: Regional Trade Agreement’ in Maarten Smeets (eds) *Adapting to the Digital trade era: challenges and opportunities* (World Trade Organization 2021) 214.

¹⁸⁹ WTO ‘WTO Electronic Commerce Negotiations: Consolidated Negotiating Text – December 2020’ INF/ECOM/62/Rev.1 (14 December 2020).

The WTO Agreement on Safeguards calls for the application of safeguard measures against all imported subject products, its source notwithstanding.¹⁹⁰ Under GATS, emergency safeguard measures were never developed to provide defined rules for their application to services. Were it done, then there would be elaborate rules governing digitally traded services. The moratorium on the imposition of customs duties on electronic transmissions¹⁹¹ has also been a hindrance to the development of rules on the imposition of safeguard measures on digitally traded goods and services. During the Second Session of the WTO Ministerial Conference in May 1998, a declaration was made to the effect that Members were to continue with the practice of not applying safeguard measures to, specifically, ‘electronic transmissions’.¹⁹² According to the General Council, the scope of the moratorium is limited to the transmissions only and not the contents of the transmissions. The moratorium does not therefore apply to ‘electronically transmitted goods’.¹⁹³ Arising from this, there are proposals that the moratorium applies only to the transmission and, specifically, ‘the bits and bytes’.¹⁹⁴ This is, however, not clear since the negotiations on the scope of the moratorium are ongoing at the WTO.¹⁹⁵ The general understanding is that the moratorium relates to physical goods that have been digitized.¹⁹⁶ This would then mean that customs duties are not applied to digital trade.

There is a correlation between customs duties and safeguard measures. As pointed out earlier in this chapter, safeguard measures take the forms of additional duties to higher than the bound rates, quantitative import restrictions (quotas) or a combination thereof.¹⁹⁷ Additional duties to higher than the bound rates as a form of safeguard

¹⁹⁰ Art 2(2). Note that there is a special and differential treatment provision under which imports from developing countries may be excluded under certain conditions – see Article 9(1) of the AS.

¹⁹¹ The moratorium was introduced at 1998 Ministerial Conference in Geneva, see WTO ‘Declaration of Global Electronic Commerce’ adopted 20 May 1998, WT/MIN(98)/DEC/2 of 25 May 1998.

¹⁹² As above, para 2.

¹⁹³ WTO General Council ‘The Moratorium on Customs Duties on Electronic Transmissions: Need for Clarity on its Scope and Impact’ WT/GC/W/833 (8 November 2021) para 1.3.

¹⁹⁴ As above, para 1.4.

¹⁹⁵ WTO ‘WTO members intensify discussion on e-commerce moratorium’ (18 July 2023) https://www.wto.org/english/news_e/news23_e/ecom_18jul23_e.htm (accessed 1 December 2023).

¹⁹⁶ WTO General Council (WT/GC/W/833) para 1.5. Examples would be e-books, or downloadable versions of computer programmes.

¹⁹⁷ WTO ‘Technical Information on Safeguard Measures’ https://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm (accessed 1 December 2022).

measures impact customs duties. This is because customs duties are tariffs or taxes imposed on imports.¹⁹⁸ During the Uruguay Round negotiations, WTO Members agreed not to increase the rate of duty beyond an agreed level.¹⁹⁹ The agreed bound rates or maximum duties are listed in the Members' schedule of concessions.²⁰⁰ The bound rates cannot be increased without compensating the affected members and are expected to ensure that world trade is transparent, secure and predictable.²⁰¹ There is however an exception in the case of safeguard measures as Members are allowed to increase duties to higher than the bound rates to prevent or remedy a serious injury caused to a domestic industry by increased volumes of imports.²⁰² At present, due to the moratorium on digital trade, no customs duties are being imposed on digital trade, which essentially means that all duties on digital trade are bound at zero. Thus, the only way to impose measures on increased quantities of digital trade would be the imposition of safeguards. As pointed out in the previous chapters of this study, the legal framework for digital trade is underdeveloped.

UNCTAD statistics indicate that due to the moratorium on customs duties on electronic transmissions, developing countries lose more customs revenue relative to developed countries.²⁰³ India and South Africa in a communication to WTO Members highlighted UNCTAD's statistics on the loss of an estimated tariff revenue of about USD 10 billion per annum globally as a result of the moratorium in five areas, i.e. printed matter, music downloads, video downloads, software and video games.²⁰⁴ Developing countries accounted for ninety-five percent of the total revenue loss.²⁰⁵ The WTO Communication

¹⁹⁸ WTO 'Tariffs' [WTO | Tariffs](#) (accessed 1 December 2022).

¹⁹⁹ WTO 'Glossary of Terms: An informal Press Guide to "WTO Speak" https://www.wto.org/english/thewto_e/minist_e/min96_e/glossary.htm (accessed 1 December 2022). "Tariff binding" is construed as "Commitment not to increase a rate of duty beyond an agreed level. Once a rate of duty is bound, it may not be raised without compensating the affected parties."

²⁰⁰ WTO 'Schedule of concessions' https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm (accessed 1 December 2022).

²⁰¹ As above.

²⁰² WTO 'Technical Information on Safeguard Measures' https://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm (accessed 1 December 2022).

²⁰³ WTO General Council (WT/GC/W/833) paras 2.4, 2.5 & 2.6. Developing countries lose customs revenue was about 4.35% while developed countries' losses was at 0.24%.

²⁰⁴ WTO General Council (WT/GC/W/833) para 2.4.

²⁰⁵ As above.

notes that the continued moratorium on the imposition of safeguard measures on electronic transmissions is more likely than not to negatively impact the economies of developing countries compared to developed countries.²⁰⁶ It notes that customs duties have been used by nearly all countries across the world to support infant industries, regulate import surges and facilitate industrialisation and by developed countries to gain a competitive advantage.²⁰⁷ The communication thus recognises the role of customs duties in the regulation of increased volumes of imports. Customs duties further aid the development and international competitiveness of industries. This justifies the need for developing countries to be allowed to impose customs duties on e-commerce.²⁰⁸ It is also necessary to reinvigorate discussions on the moratorium at the WTO for clarity on the scope and terms for application.

While there has been a shift towards regulation of digital trade at the bilateral, regional and domestic levels,²⁰⁹ the rules are not precise, and they do not specifically address the imposition of safeguard measures on digital trade. It therefore follows that, to understand the context in which the existing safeguards rules apply to digital trade, it is necessary to explore the context in which they are currently or have been historically applied to trade in goods and services. These rules are identified and examined further below.

²⁰⁶ WTO General Council (WT/GC/W/833) para 2.10.

²⁰⁷ WTO General Council (WT/GC/W/833) para 2.13.

²⁰⁸ WTO General Council (WT/GC/W/833) para 2.14.

²⁰⁹ Lopez, Condon & Munoz (n 20) 216. They argue that the US-Mexico-Canada FTA and the Comprehensive and Progressive Agreement for Trans-Pacific Agreement contain the most developed norms on digital trade. On the relation between safeguard measures and digital trade, both Agreements call on their Members not to impose customs duties on digitally traded products (art 19.3(1) of USMCA and art 14.3(1) of TPP). While this is the case, both Agreements call for application of rules on investment, cross border trade in services and financial services to services performed or delivered electronically (arts 19.2(4), 14, 15 & 17 of USMCA and arts 14.2(4), 9, 10 & 11 of TPP). The Agreements are available here: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> and <https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf> & <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents> (CPTPP is read together with TPP).

5.3.1 Most-Favoured-Nation Principle

The Most-Favoured Nation²¹⁰ (MFN) principle is one of the most widely applied principles of international trade law. The WTO terms MFN as the ‘cornerstone’ of multilateral trade.²¹¹ MFN requires that WTO Members treat like products or services from other Members equally.²¹² If one Member is to extend a favour to another Member, then it must extend the same favour to other WTO Members trading in like products or services.²¹³ Contextually, MFN provisions under GATT, GATS and AS apply to digitally traded goods and services. These are examined further below.

MFN under GATT

GATT calls on Members to extend to other Members dealing in like products, any favour, advantage, immunity or privilege given to a Member State in the exportation and importation of a product.²¹⁴ This applies to all customs duties and charges imposed, the methods for their application and other rules and formalities for importation and exportation of like products.²¹⁵ Simply, MFN calls for non-discrimination of like products destined for or originating in different countries.²¹⁶ MFN covers charges and customs duties applied to goods at the border and other measures applied to a product that has already crossed the border.²¹⁷ MFN therefore demands equal tariff treatment of exports

²¹⁰ GATT art I; GATS art II.

²¹¹ World Trade Organization ‘Basic Purpose and Concepts: Most-Favoured-Nation Treatment’ https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm (accessed 11 November 2021).

²¹² World Trade Organization ‘Principles of the trading system’ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 11 November 2021). It is important to note that negotiations to reduce a tariff need not be with a WTO Member State but once the tariff is reduced, the reduced tariff should apply to WTO Members, their lack of participation in the negotiations notwithstanding; see also Appellate Body Reports ‘EC – Tariff Preferences’ para 101; ‘Canada – Autos’ para 82; ‘US – Section 211 Appropriations Act’ para 297; ‘EC – Bananas III’ para 190.

²¹³ As above. See also GATT Panel Report ‘US – Customs User Fee’ para 122.

²¹⁴ GATT art I.

²¹⁵ As above.

²¹⁶ Appellate Body Report ‘Canada – Autos’ para 84.

²¹⁷ GATT art 1.1.

and imports destined for and from other countries.²¹⁸ This applies to both bound duties, unbound duties and tariffs that have been set below the bound rate.²¹⁹

MFN apply to both omissions and positive actions that might result in the extension of a benefit to a Member compared to another.²²⁰ The Panel in *US - MFN Footwear* noted that treating one category of a product in one way and treating another category of a product in another way is inconsistent with MFN requirements.²²¹ The US contravened the MFN requirement by granting a non-tariff advantage to beneficiaries of its Generalized System of Preferences programme to the exclusion of others.²²² The Panel in *US - Customs User Fee* noted that an exemption contained in the merchandise processing fee legislation in favour of imports from least developed countries was inconsistent with the MFN obligations.²²³ The panel noted that the exemption should have been extended to all contracting parties unconditionally. The exception was, therefore, discriminatory.²²⁴

MFN further applies to like products, their source or origin notwithstanding.²²⁵ GATT provides that 'any advantage, favour, privilege or immunity granted to any product shall be accorded immediately and unconditionally' to like products from all contracting parties.²²⁶ The Appellate Body in *EC – Seal Products* noted that an allegation of inconsistency with the MFN provision must demonstrate that the imported products in question are 'like' and that an advantage or favour was not extended immediately and unconditionally to 'like products' from all the Members.²²⁷ The Appellate Body has also indicated that 'likeness' 'stretches and squeezes as different provisions of' the different agreements under the WTO are applied.²²⁸ This protects the expectations of all Members

²¹⁸ Appellate Body Report '*EC – Tariff Preferences*' para 101.

²¹⁹ As above.

²²⁰ M Matsushita and others (n 22) 161-162.

²²¹ Panel Report '*US - MFN Footwear*' para 6.11.

²²² Panel Report '*US - MFN Footwear*' para 6.14.

²²³ Panel Report '*US - Customs User Fee*' para 122.

²²⁴ As above.

²²⁵ As above, 166-167.

²²⁶ GATT art 1.1.

²²⁷ Appellate Body Report '*EC – Seal Products*' para 5.86.

²²⁸ Appellate Body Report '*Japan – Alcoholic Beverages II*' para 114.

for equal competitive opportunities for like imported like products.²²⁹ What constitutes ‘like products’ under GATT is explored below.

As pointed out in the second chapter of this study, ‘like’ has been defined generally to mean ‘equal’, ‘identical’ and ‘products with similar qualities’.²³⁰ Since there is no clarity on the use of ‘like products’ under GATT, it is determined on a product-by-product basis.²³¹ As pointed out previously, the WTO Dispute Settlement Body and previously, the GATT Council, have offered up a criterion for establishing likeness of products under GATT. For instance, in *Asbestos*, the Appellate Body indicated that likeness had to be established by resolving questions related to the characteristics or qualities important to determine likeness, the degree to which products must share those characteristics or qualities to be regarded as like products, and from whose perspective likeness must be determined.²³² To understand the context in which ‘like products’ have been construed under MFN, the *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*²³³ (‘Japan - SPF Dimension Lumber’) dispute is explored. This study has in the second chapter examined the Working Party Report on *Border Tax Adjustments* adopted in 1970 by GATT contracting parties.²³⁴

Japan – SPF Dimension Lumber was a dispute involving Canada and Japan concerning how Japan applied tariffs on SPF dimension lumber from Canada. The case is premised on the MFN principle established under Article 1:1 of GATT.²³⁵ Canada sought the Panel’s recommendations on whether or not Japan was giving less favourable treatment to its SPF dimension lumber than it accorded to other like products originating from other countries. Canada was aggrieved by Japan’s tariff classification of dimension lumber. The Panel was therefore tasked with examining what constituted ‘like products’. In its findings, the Panel put forth the following characteristics for ‘like products’: physical

²²⁹ Appellate Body Report ‘*EC – Seal Products*’ para 5.87.

²³⁰ See GATT Panel Report ‘*Spain – Tariff Treatment of Unroasted Coffee*’ para 4.5 See also GATT Panel Report ‘*Japan – Alcoholic Beverages*’ para. 5.5.

²³¹ RE Hudec “‘Like Product’: The Difference in Meaning in GATT Articles I and III’ in T Cottier & P Mavroidis (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2000) 101-123.

²³² Appellate Body Report ‘*EC – Asbestos*’ para 92.

²³³ GATT Panel Report ‘*Japan - SPF Dimension Lumber*’ (DG/188).

²³⁴ Working party Report ‘*Border Tax Adjustments*’ (1970) BISD. 18S/97.

²³⁵ GATT Panel Report ‘*Japan – SPF Dimension Lumber*’ para 1.1.

characteristics of the product; tariff classifications of the product; end use of the product; and consumer's perceptions about the product.²³⁶ Three of these characteristics were discussed earlier in the *Border Tax Adjustments* report. The report called for an analysis of product likeness based on the end-uses of the product in a given market; consumer habits and tastes; and the quality, nature and property of the product.²³⁷ The report emphasized further that for fair assessment purposes, the likeness of a product is to be assessed on a case-by-case basis.²³⁸ The above criteria were accepted by the Appellate Body in *Japan – Alcoholic Beverages II*.²³⁹ It was observed that Border Tax Adjustments Report set the basic approach for interpreting 'like or similar products'.²⁴⁰

Thus, products must have similar physical characteristics. Where the physical characteristics are different, the difference should be minor such that the difference ought not to rule out the finding that the products are like.²⁴¹ The panel established that 'minor differences in physical characteristics were not sufficient reason to allow for different tariff treatment'.²⁴² Like products should have similar tariff classifications.²⁴³ The end-use or intended end-use of the products must be like.²⁴⁴ Moreover, consumers' perception about the product should be similar. The perceptions are characterised by trade patterns, use-habits and price of the product. Such that, if these characteristics are similar then the products are like and if they are different then the products are different.²⁴⁵

Under the MFN principle, two forms of discrimination are prohibited: discrimination against contracting parties and discrimination against like products.²⁴⁶ A contracting party should, therefore, accord similar treatment to other contracting parties and to like products from a contracting party. In *Japan – SPF Dimension Lumber*, it was urged that there had

²³⁶ GATT Panel Report '*Japan – SPF Dimension Lumber*' paras 3.40-3.53.

²³⁷ Report by the Working Party on Border Tax Adjustments, L/3464, 20 November 1970, available at [3464.PDF \(wto.org\)](https://www.wto.org/3464.PDF), para 18.

²³⁸ GATT Panel Report '*US – Border Tax Adjustments*' para. 18.

²³⁹ Appellate Body Report '*Japan-Alcohol Beverages II*', 20-21.

²⁴⁰ Appellate Body Report, *Japan-Alcohol Beverages II*, 20. See also Panel Report '*US – Safeguard Measure on Washers*' para 7.55.

²⁴¹ GATT Panel Report '*Japan – SPF Dimension Lumber*' para 3.44.

²⁴² As above.

²⁴³ GATT Panel Report '*Japan – SPF Dimension Lumber*' paras 3.48 & 3.55.

²⁴⁴ GATT Panel Report '*Japan – SPF Dimension Lumber*' para 3.50.

²⁴⁵ GATT Panel Report '*Japan – SPF Dimension Lumber*' para 3.52.

²⁴⁶ GATT Panel Report '*Japan – SPF Dimension Lumber*' para 3.54.

been no discrimination against Canada, as a contracting party, but rather, there was discrimination against 'like products' from Canada.²⁴⁷ Noteworthy, the Panel did not however establish that the tariff treatment of Canadian dimension lumber by Japan was inconsistent with GATT Article I.1.²⁴⁸ This is because Canada was alleging that Japan should have accorded to SPF dimension lumber the advantage of the zero tariff granted to 'planed and sanded lumber of "other" coniferous trees' as opposed to eight percent tariff duty applied to SPF dimension lumber.²⁴⁹ The Panel established 'dimension lumber' as construed by Canada was distinct from how Japan and the US construed it.²⁵⁰ It did not also belong to any internationally accepted customs classification and could not, therefore, be considered as a category for tariff classification purposes. On this basis, product likeness could not be established.²⁵¹

There are exemptions to the application of the MFN principle under GATT, whereby a Member State who is a member of a Free Trade Area (FTA) is permitted to discriminate against goods from WTO Members who are not Members to the FTA.²⁵² The exemption can therefore only be enjoyed where there is an FTA. Developing countries equally enjoy some exemptions under Special and Differential Treatment (SDT).²⁵³ These exemptions are however subject to limitations. As discussed previously, safeguard measures are applied to all imports of a product irrespective of its source.²⁵⁴ Thus, if an investigation on the cause of serious injury or threat of serious injury is conducted against all exporting countries, once it is established that there has been an import surge warranting an imposition of a safeguard measure, the safeguard measure must be applied to all countries under investigation without exclusion.²⁵⁵ The Appellate Body found the US to have violated the MFN principle *in US – Line Pipe* after it excluded its FTA partners, Canada and Mexico, from the imposition of safeguard measures despite

²⁴⁷ GATT Panel Report '*Japan – SPF Dimension Lumber*' paras 3.54-3.60.

²⁴⁸ GATT Panel Report '*Japan – SPF Dimension Lumber*' para 6.1.

²⁴⁹ GATT Panel Report '*Japan – SPF Dimension Lumber*' paras 5.1 & 5.4.

²⁵⁰ GATT Panel Report '*Japan – SPF Dimension Lumber*' paras 5.14.

²⁵¹ As above.

²⁵² WTO 'Principles of the trading system' https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 11 November 2021).

²⁵³ As above.

²⁵⁴ Agreement on Safeguards art 2.2 (subject to the exception in art 9.1).

²⁵⁵ M Matsushita and others (n 22) 420-421.

conducting the investigation on imports from all countries, Canada and Mexico included.²⁵⁶

Developing countries with a share of 3% or less of imports of the like or directly competitive product into the importing country are excluded from the application of safeguard measures.²⁵⁷ There is however a proviso to this, such that, if the total import share of developing countries each representing less than 3% of total imports combined is more than 9%, safeguard measures would be applied to them.²⁵⁸ WTO Members are permitted to deviate from the MFN principle under GATT on the basis of 'quota modulation' if it is established in the imposition of safeguard measures that there is disproportionately large imports from select countries compared to other importing countries, vis-à-vis the total increased imports.²⁵⁹

MFN under GATS

GATS calls on Members to introduce measures on trade in services in a manner that gives 'no less favourable treatment to services and its supply from a Member State than it accords to like services and its suppliers from another Member State'.²⁶⁰ MFN under GATS extends to both the like service and the provider of the like service. The Panel in *China – Electronic Payment Services* however noted that the likeness of services suppliers as opposed to the like service must be assessed on a case-by-case basis.²⁶¹ The criteria in Border Tax Adjustment have been adapted to assess likeness under GATS. This was the case in *EC – Bananas III* and *China – Electronic Payment Services* where elements such as the 'nature and characteristic of a service', 'classification and description of a service' and 'description of business scope in similar terms' were considered.²⁶²

²⁵⁶ Appellate Body Report '*US – Line Pipe*' para 197.

²⁵⁷ AS art 9.1.

²⁵⁸ AS art 9.1.

²⁵⁹ AS art 5.2(b).

²⁶⁰ GATS art II.1.

²⁶¹ Panel Report '*China- Electronic Payment Services*' para 7.701.

²⁶² Panel Report '*EC – Bananas III (Ecuador)*' paras 7.322 & 7.346; See also Panel Report '*China- Electronic Payment Services*' para 7.706.

MFN under GATS extends to all service sectors and suppliers regardless of whether or not there are specific commitments.²⁶³ MFN treatment must be accorded 'immediately and unconditionally'.²⁶⁴ The Appellate Body in *EC – Seal Products* observed that immediate and unconditional extension of an advantage to like imported products from all Members means that the advantage granted must be made available to all Members without any conditions.²⁶⁵

The MFN under GATS is however not absolute as there are instances where it can be limited. Particularly, the Annex on Article II Exemptions gives instances and durations when a Member may be exempted from complying with the MFN principle.²⁶⁶ The Exemptions were submitted by WTO Members at the time of entry into force of the Agreement Establishing the WTO.²⁶⁷ The exemptions were to be maintained for a maximum period of ten years, subject to negotiation for extension during the trade liberalization rounds.²⁶⁸ The exemptions that were submitted have remained in place indefinitely since the period has been extended continuously at each review, the latest review being in July 2022.²⁶⁹ The application of these exemptions to digital trade will be subject to negotiations.

GATS further allows Members to accord advantages to other adjacent Members 'in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed'.²⁷⁰ MFN under GATS takes the form of the suspension of specific commitments.²⁷¹

²⁶³ See Panel Report '*EC- Bananas III*' para 7.298.

²⁶⁴ GATS art II.1.

²⁶⁵ Appellate Body Report '*EC – Seal Products*' para 5.88.

²⁶⁶ See GATS art II.2 and Annex on art II Exemptions.

²⁶⁷ WTO 'Annex on Article II exemptions' available at https://www.wto.org/english/tratop_e/serv_e/7-iiexem_e.htm.

²⁶⁸ GATS Annex on art II Exemptions, para 6.

²⁶⁹ WTO 'Report of the Meeting Held on 16 June 2017: Note by the Secretariat' S/C//132, para 8.23.

²⁷⁰ GATS art II.3.

²⁷¹ Marconini (n 22) 17.

MFN in Free Trade Agreements

The AfCFTA Agreement calls upon a State Party to accord to another Party no less favourable treatment than those accorded to third parties.²⁷² The AfCFTA Agreement is specific that the treatment must be accorded on a 'reciprocity basis'. Moreover, it calls upon a State Party to give another Party an opportunity to negotiate preferences given to third parties where the preferences were given prior to entry into force of the AfCFTA Agreement. Such negotiations are on a reciprocity basis.²⁷³ This position is reaffirmed under the Protocol on Trade in Goods²⁷⁴ and Protocol on Trade in Services.²⁷⁵

Deriving from the foregoing provisions under the ACFTA is the 'reciprocity basis' which is both a requirement and principle under the AfCFTA Agreement.²⁷⁶ Reciprocity is so vital that it was a guiding principle in the AfCFTA negotiation process.²⁷⁷ While this is the case, the AfCFTA has not offered up a criteria or definition of 'reciprocity basis'. It is, however, evident from the wording of relevant provisions that MFN under the AfCFTA is conditional. Conditional in that, treatment is not accorded to 'all' State Parties automatically. Instead, treatment is accorded only to State Parties that in equal measure offer the same level of treatment.²⁷⁸ Simply put, State Parties that are to benefit from the preferential treatment should be willing to extend the same preferential treatment. The implication of this is that, if a State Party terminates a treatment, then they stop benefitting from a similar treatment extended to it by another State Party.²⁷⁹ As the provisions discussions below will show, this requirement applies not only to State Parties but also third parties, that are not Members to the AfCFTA.

The AfCFTA Protocol on Trade in Goods allows State Parties to enter into Preferential Trade Agreements (PTAs) with third parties provided that they facilitate the

²⁷² AfCFTA Agreement art 18 (1).

²⁷³ As above, art 18(2).

²⁷⁴ Protocol on Trade in Goods art 4.1.

²⁷⁵ Protocol on Trade in Services art 4.1

²⁷⁶ AfCFTA Agreement art 5(i).

²⁷⁷ African Union 'Objectives and Guiding Principles for Negotiating the Continental Free Trade Area (CFTA) Assembly/AU/11(XXV), Annex 1, para 10 (ix).

²⁷⁸ RM Tsorme & J Amoah 'African Continental Free Trade Agreement's Conditional Most Favoured Nation: A Necessary Compromise? 2024 23(1) *World Trade Review* 93-111.

²⁷⁹ As above.

application of the Protocol.²⁸⁰ Any preferences extended to third parties in the PTAs however must be extended to State Parties on a reciprocal basis.²⁸¹ Additionally, two or three State Parties are further permitted to extend preferences to one another and extend the preferences to third parties on a reciprocal basis.²⁸² Interestingly, the Protocol does not oblige a State Party to extend preferences accorded to third parties before entry into force of the AfCFTA Agreement to another State Party but should however allow the Party to negotiate the preferences on a reciprocity basis.²⁸³ The consequence of these provisions is that it is not mandatory to extend to all AfCFTA Parties certain preferences accorded to either select State Parties or third parties.

The AfCFTA Protocol on Trade in Services calls for immediate and unconditional extension of no less favourable treatment to services and service suppliers of other State Parties that it accords to third parties.²⁸⁴ Under this Protocol, a State Party can conclude PTAs with third parties but should extend any preferences accorded to the third parties to State Parties on a non-discriminatory and reciprocal basis.²⁸⁵ This requirement is however not mandatory if the PTAs were concluded prior to the entry into force of the AfCFTA Agreement.²⁸⁶ In such an instance, a State Party may provide opportunities for negotiations on reciprocity.²⁸⁷ The other exemption under this Protocol is that, where a measure is contained in the MFN exemption list, a State Party can maintain the inconsistent measure.²⁸⁸

Separately, in the application of safeguard measures the EU-SADC EPA calls upon Parties to increase the custom duty of the concerned product only to the extent that it does not exceed the MFN rate applicable to the product at the time of imposing the measure.²⁸⁹

²⁸⁰ Protocol on Trade in Goods art 4.2.

²⁸¹ As above.

²⁸² Protocol on Trade in Goods art 4.3.

²⁸³ Protocol on Trade in Goods art 4.4.

²⁸⁴ Protocol on Trade in Services art 4.1.

²⁸⁵ Protocol on Trade in Services art 4.2.

²⁸⁶ Protocol on Trade in Services art 4.4.

²⁸⁷ As above.

²⁸⁸ Protocol on Trade in Services art 4.6.

²⁸⁹ EU-SADC EPA art 34 (3) (b).

In addition to the foregoing, the Trans-Pacific Partnership Agreement (TPP) and the United States-Mexico-Canada Free Trade Agreement (USMCA) provide for non-discrimination of digitally traded products in the following similar terms:

No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.²⁹⁰

The aforementioned provision has also been incorporated in similar terms to the Digital Economy Partnership Agreement (DEPA) entered into between New Zealand, Chile and Singapore.²⁹¹ It then follows from the foregoing discussions that MFN principles must be taken into consideration in the imposition of safeguard measures to goods and emergency safeguard measures to services. Arising from this, the same rules should be replicated for digitally traded goods and services. Hence, with the necessary modifications, safeguard measures should be applied to digital trade on an MFN basis. Exemptions can be made to protect infant domestic industries and agricultural industries as has been done under the EU-SADC EPA and to generally protect African domestic industries as provided for under GATT.²⁹²

5.3.2 National Treatment (NT) Principle

NT under GATT

GATT calls on Members not to accord less favourable treatment to imported products than it accords to like domestic products.²⁹³ NT aims at protecting imported products once they have been introduced into a domestic market of a Member. NT in goods focuses on taxation and regulation in an internal/domestic market whereby all forms of measures that tend to afford greater protection to domestic products over imported products are

²⁹⁰ Art 14.4(1) of TPP, available at: <https://www.dfat.gov.au/sites/default/files/14-electronic-commerce.pdf>; Art 19.4 (1) of USMCA, available at: <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf>.

²⁹¹ DEPA, signed 11 June 2020, available at <https://www.mfat.govt.nz/assets/Trade-agreements/DEPA/DEPA-Signing-Text-11-June-2020-GMT-v3.pdf>, art 3.3.

²⁹² Discussed at length previously in this Chapter.

²⁹³ GATT art III.

construed to be discriminatory and are therefore prohibited.²⁹⁴ *Japan – Alcoholic Beverages II* involved the European Economic Community (EEC) and Japan concerning custom duties, taxes and practices of labelling imposed by Japan on imported wines and alcoholic beverages.²⁹⁵ In this dispute, the Appellate Body noted that NT requirements under GATT are required to avoid protectionism in regulation and internal taxes.²⁹⁶

GATT calls on Members not to impose internal taxes or charges on imported products in a manner that is excessive of the taxes or charges applied to like domestic products once the product has entered the market.²⁹⁷ Thus, in *Italy – Agricultural Machinery* the panel stated that ‘the intention of the drafters ... was clearly to treat imported products in the same way as the like domestic products once they have been cleared through customs...’²⁹⁸ This equally applies to rules, regulations and laws.²⁹⁹ To understand the context in which ‘like products’ are used on NT basis, the *Japan – Alcoholic Beverages II*³⁰⁰ dispute is explored. *Japan – Alcoholic Beverages II* is relevant in examining non-discrimination requirements between domestic and imported products once they have been introduced into a domestic market. The Appellate Body noted that the NT provisions under GATT intended to ensure that imported products were treated similarly to domestic products once they had been introduced into a territory.³⁰¹

The Appellate Body in the *Japan – Alcoholic Beverages II* adopted the criteria for establishing likeness set out in the *Border Tax Adjustment* Report of the Working Party and emphasised that likeness should be assessed on a case-by-case basis.³⁰² The Panel further established that ‘like products’ for purposes of NT connote ‘identical products’ and ‘products that have a substantial identical end use’.³⁰³ The Panel went ahead to point out

²⁹⁴ GATT art III.1.

²⁹⁵ Appellate Body Report ‘*Japan – Alcoholic Beverages II*’ 1-3.

²⁹⁶ Appellate Body Report ‘*Japan – Alcoholic Beverages II*’ 16.

²⁹⁷ GATT art III.1.

²⁹⁸ GATT Panel Report ‘*Italy – Agricultural Machinery*’ para 11.

²⁹⁹ GATT art III.4.

³⁰⁰ Appellate Body Report ‘*Japan – Alcoholic Beverages II*’ 16.

³⁰¹ Appellate Body Report ‘*Japan – Alcoholic Beverages II*’ 16. See also Appellate Body Report ‘*Korea – Alcoholic Beverages*’ para 120.

³⁰² Appellate Body Report ‘*Japan – Alcoholic Beverages II*’ 20. See also RE Hudec (n 230) “‘Like Product’: The Difference in Meaning in GATT Articles I and III” in T Cottier & P Mavroidis (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2000) 101-123.

³⁰³ As above.

the factors that make up ‘like products’: the end-use of the product in the market; tastes and habits of consumers and the properties of a product.³⁰⁴ It should however be observed that ‘like products’ could have a different meaning depending on the context.³⁰⁵ Hence, these characteristics of the Panel are not in themselves a conclusive way for establishing product likeness.

The Appellate Body in *Japan – Alcoholic Beverages II* determined that under NT, it must be established that the product is ‘like’ or ‘directly competitive or substitutable’.³⁰⁶ Additionally, domestic products ought not to be accorded more protection by for instance taxing imported products in excess of like domestic products or by subjecting imported like products to internal taxes.³⁰⁷ Moreover, alongside NT is the MFN requirement that protective taxation of certain imported products from select contracting parties is similarly prohibited.³⁰⁸ The import of these requirements is that a contracting party must refrain from discriminating against imported products in a domestic market on one hand and, on the other hand, it ought not to discriminate or protect select imported products from select contracting parties.

It is evident that likeness of products is determined based on physical characteristics, tariff clarifications, end-uses and consumer perceptions about the products. While it is easier to establish the likeness of physically traded goods based on these characteristics, this is more difficult with digitally traded products. As has been discussed previously, there currently are no tariff classifications for digitally traded goods. The characteristic of ‘tariff classifications of the product’ as used under MFN at present therefore fails in the determination of likeness of digitally traded products on MFN basis. It is however not a requirement under NT analysis. Likeness of digitally traded products

³⁰⁴ Panel Report ‘*Japan – Alcoholic Beverages II*’ para 5.6.

³⁰⁵ See the history of drafting the GATT at United Nations Economic and Social Council ‘Preparatory Committee of the International Conference on Trade and Employment’ Committee II (22 November 1946) available at: <https://docs.wto.org/gattdocs/q/UN/EPCT/CII-65.PDF>. At page 2 it is stated that “like products” “had different meanings in different contexts of the Draft Charter”. “Like products” was therefore used without a precise definition. Based on the League of Nations Report as captured in the Preparatory texts, “like product” referred to “products that were practically identical to another product”.

³⁰⁶ Appellate Body Report ‘*V II*’ 21 & 26.

³⁰⁷ GATT art III:2; Panel Report ‘*Japan – Alcoholic Beverages II*’ paras 6.24 & 6.25.

³⁰⁸ Appellate Body Report ‘*Japan – Alcoholic Beverages II*’ 28-30.

can be assessed based on their digital characteristics, end-uses and consumers' perceptions about them, both under MFN and NT analyses. To understand the context in which safeguard measures are imposed on digitally traded products, a digitally traded product from an importing Member State must be accorded similar treatment as a domestically traded/produced digital product. Similarly, like imported digital products from different countries must be accorded equal treatment.

NT under GATS

In the case of services, GATS calls upon Members to accord no less favourable treatment to a service or service supply from a Member than it accords to domestic like services or service suppliers.³⁰⁹ The treatment can be identical or different provided the different treatment is accorded in similar terms to domestic and other Members' services or services supplies.³¹⁰ Simply put, GATS requires that foreign services or service supplies be accorded equal treatment as domestic like services or service supplies. GATS considers formally identical or different treatment to be discriminatory only if it modifies competition in a manner that accords more favourable treatment to domestic service or service supply in comparison to the treatment given to like services or like service suppliers from a Member.³¹¹ GATS calls on Members to establish a schedule of specific commitments on the qualifications and conditions of NT.³¹² Specific commitments have been used as a basis for assessing likeness of a service or service supply. This has been discussed extensively in this thesis.

NT under AfCFTA

Unlike under the MFN principle which is accorded on a reciprocity basis, the AfCFTA Protocol on Trade in Goods calls upon State Parties to accord no less favourable treatment to imported products in their territories than it accords to like domestic products.³¹³ Equal treatment must be extended to imported products once they have been

³⁰⁹ GATS art XVII.1.

³¹⁰ GATS art XVII.2.

³¹¹ GATS art XVII.3.

³¹² Art XX.1 (b).

³¹³ Protocol on Trade in Goods art 5.

cleared by customs.³¹⁴ The AfCFTA Protocol on Trade in Services calls on a State Party not to accord less favourable treatment to services and service suppliers of other State Parties than it accords like services and service suppliers in their territories.³¹⁵ The treatment can either be formally identical or formally different.³¹⁶ Important to note, as is a requirement under GATS, NT only binds a country to the extent of its commitment to liberalise a particular sector and/or mode of supply, i.e. specific commitment.

5.3.3 Transparency

Transparency is defined by the WTO as the ‘degree to which trade policies and practices, and the process by which they are established, are open and predictable.’³¹⁷ Transparency is characterised by notifications and publications of all measures that are likely to affect trade and putting in place measures to allow for access to trade-related information.³¹⁸ Notifications take three forms: ad hoc, once-off and regular.³¹⁹ Ad hoc notifications are made when a certain action is taken by a Member, while once-off notifications are made at the time a Member is joining the WTO (for instance agreements in force) or when legislation that must be notified is amended, and regular notifications are made annually, semi-annually, biennially and triennially.³²⁰

Transparency requirements are provided for under Article X of GATT. It calls upon Members to promptly publish effective ‘laws, regulations, judicial decisions and administrative rulings of general application’ that are likely to affect terms of trade in any manner.³²¹ Publication allows other Members and traders to be aware of the changes

³¹⁴ As above.

³¹⁵ Protocol on Trade in Services art 20.1.

³¹⁶ As above, art 20.2.

³¹⁷ WTO ‘Glossary of Terms: Transparency’ https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/23glos_e.htm (accessed 16 January 2022).

³¹⁸ A Varyanik ‘Transparency and Notifications Requirements’ WTO OMC (12 February 2019) https://www.wto.org/english/thewto_e/acc_e/transparency_anna_varyanik_12_feb_2019.pdf (accessed 16 January 2022).

³¹⁹ WTO ‘Report of the Working Group on Notification Obligations and Procedures’ G/L/112 (7 October 1996).

³²⁰ WA Reinsch ‘Transparency at the WTO: Why Does Transparency Matter, and Are Members Meeting Their Obligations?’ Center for Strategic & International Studies (22 April 2020).

³²¹ GATT art X.1.

introduced by the measures.³²² Before any such measure that is likely to affect trade is enforced, it must be published.³²³ Disclosure of confidential information is excluded.³²⁴ The measures must be published in a uniform manner.³²⁵

In relation to services, Article III of GATS is on transparency. It calls upon Members to promptly publish any measure of general application that is likely to affect trade in services.³²⁶ Promptness in publication excludes situations of emergency.³²⁷ Where it is impracticable to publish a measure promptly, the measure should be made available publicly.³²⁸ Any alteration to existing rules, laws and regulations must be notified to the Council for Trade in Services.³²⁹ A 1999 Interim Report of the General Council of the WTO observed that the 'application of Article III on transparency to electronic commerce was straightforward'.³³⁰

The Agreement on Safeguards mandates its Members to immediately notify the WTO Committee on Safeguards the moment it begins investigations or finds that serious injury or a threat of serious injury has been caused by increased imports.³³¹ It must also notify the Committee before it decides to apply or extend a safeguard measure,³³² as well as before it imposes a provisional measure.³³³

At the continental level, the AfCFTA Protocol on Trade in Services calls on State Parties to publish, in a transparent manner, all measures of general application that are likely to affect the application of the Protocol.³³⁴ This includes the publication of relevant regional and international instruments that the state is a signatory to. The instruments

³²² As above.

³²³ GATT art X.2

³²⁴ GATT art X.1.

³²⁵ GATT art X.3 (a).

³²⁶ GATS art III.1.

³²⁷ As above.

³²⁸ GATS art III.2.

³²⁹ GATS art III.3.

³³⁰ WTO 'Work Programme on Electronic Commerce: Interim Report of the General Council' S/C/8 (31 March 1999), Annex: Transparency.

³³¹ AS art 12.1(a) and (b).

³³² AS art 12.1(c).

³³³ AS art 12.4.

³³⁴ Protocol on Trade in Services art 5.1.

should also be notified to the AfCFTA Secretariat.³³⁵ The notifications cover both agreements that were in force prior to the entry into force of the AfCFTA Agreement and those that are introduced after its entry into force.³³⁶ The notifications therefore cover any safeguard measures related investigations, findings and decisions to apply or maintain a safeguard measure.

Arising from the foregoing, transparency becomes necessary in the investigation of injury or a threat of injury caused by digital trade to a domestic industry, a finding that injury or threat of injury exists and a decision to either apply or extend a safeguard measure imposed on digitally traded goods and services. It will therefore be necessary for any measure that is likely to affect digital trade to be published promptly and in a uniform manner. A concerned state should also put in place measures that allow for access to information publicly, for instance, points of inquiry.

5.3.4 Technological neutrality

As pointed out previously, e-commerce at the WTO and globally has advanced and continues to do so since they were first discussed in the 1980s and 1990s.³³⁷ The discussions for the regulation of e-commerce at the WTO have, however, never materialised. Hence, there is no clarity as to what rules apply to e-commerce at the WTO. Technological advancement brings with it challenges for regulators anywhere.³³⁸ In reaction to the advancements, states apply rules applicable to offline activities to online activities until rules specific to online activities are developed, unless it is impossible to apply offline rules to online activities.³³⁹ This is in line with the principle of technological neutrality that speaks to non-discrimination between online and offline activities and sees to it that equal rules are extended to different technologies.³⁴⁰

³³⁵ Protocol on Trade in Services art 5.2.

³³⁶ Protocol on Trade in Services art 5.2 & 5.3.

³³⁷ Refer to the First and Second Chapters of this Study.

³³⁸ S Shadikhodjaev 'Technological Neutrality and Regulation of Digital Trade: How Far Can We Go?' (2021) 32(4) *European Journal of International Law* 1221-1248, 1222.

³³⁹ Shadikhodjaev (n 338) 1222.

³⁴⁰ Shadikhodjaev (n 338) 1222.

Technological neutrality is yet to receive a universally accepted definition. Maxwell and Bourreau put forth the following three definitions of technological neutrality:

First, “technical standards designed to limit negative externalities should describe the result to be achieved, but should leave companies free to adopt whatever technology is most appropriate to achieve the result”; secondly, “same regulatory principles should apply regardless of the technology used”; and thirdly, “regulators should refrain from using regulations as a means to push the market toward a particular structure that the regulators consider optimal”.³⁴¹

The above second definition has been proposed by Shadikhodjaev and other scholars for adoption in addressing e-commerce, such that technological neutrality must create a nexus between the old forms of trade in goods and services and the new forms, for instance, digital trade. Whether a law is technologically neutral is determined based on the texts of the law or through interpretation.³⁴² In other instances, legal frameworks have expressly stated that rules are technology-neutral and forward-looking, for instance, a 1985 recommendation by UNCITRAL to incorporate technologies into commercial documentation, a 1997 US Framework for Global E-commerce that included the principle on technological neutrality, a 1997 Declaration of the European Ministerial Conference which stressed for offline rules to be applied online and a 1998 Asia-Pacific Economic Cooperation (APEC) Blueprint that spoke to technological neutrality in addressing electronic commerce.³⁴³ Some of the RTAs currently in force speak expressly to technological neutrality.³⁴⁴ It is, however, not clear whether technological neutrality imply that if a customs duty is payable on a physical product, the same duty rate should apply to the digital version of the like product.

Discussions at the WTO on technological neutrality relate to its application to trade in services. Members in a 1998 meeting agreed that services delivered electronically were within the scope of GATS.³⁴⁵ There was however no consensus on how the principle of technological neutrality would apply to the four modes of trade in services. Proposals

³⁴¹ W Maxwell & M Bourreau ‘Technology Neutrality in Internet, Telecoms and Data Protection Regulation’ (2014) *Computer and Telecommunications Law Review*.

³⁴² Shadikhodjaev (n 338) 1223.

³⁴³ Shadikhodjaev (n 338) 1223-1224.

³⁴⁴ As above, 1225.

³⁴⁵ WTO ‘Work Programme on Electronic Commerce: Interim Report of the General Council’ S/C/8 (31 March 1999), Annex: Scope.

were made that the principle applied only to mode 1, cross-border supply, and not to other modes of trade in services.³⁴⁶ The Members however agreed to deliberate further on the issue. Additionally, Members agreed to discuss the relationship between the principle and 'likeness'.³⁴⁷ This was necessary to understand how MFN and NT are applied to electronic commerce.

Through this principle, GATT and GATS rules may be applied to electronic commerce.³⁴⁸ The WTO has however been reluctant to apply the principle of technological neutrality to electronic commerce.³⁴⁹ It notes that 'old commitments' should be separated from 'new commitments'. Simply, the WTO opines that the instruments negotiated during the Uruguay Round should apply in the context for which they were negotiated. As for new and emerging issues, new terms of trade should be negotiated to factor the issues and to create new commitments by the Members.³⁵⁰

Technology-neutral laws are unpredictable.³⁵¹ Technological neutrality has also been criticised for the reason that it is likely to create uncertainty in the application of laws.³⁵² There is also no clarity on the application to unforeseen technological advancements in addition to putting regulators in a dilemma.³⁵³ This can, however, be addressed by adopting a technologically neutral language in a parent regulation and subsequent elaboration in a subsidiary or secondary regulation.³⁵⁴ For instance, there are proposals that due to the rapid advancement in artificial intelligence, it is best to draft guiding principles in AI frameworks that would be useful now and in the future, instead of

³⁴⁶ As above.

³⁴⁷ WTO 'S/C/8' Annex: MFN.

³⁴⁸ D Kwak 'No More Strategical Neutrality on Technological Neutrality: Technological Neutrality as a Bridge Between the Analogue Trading Regime and Digital Trade' (2021) 21(1) *World Trade Review: Cambridge University Press* 18-32.

³⁴⁹ WTO 'Exploratory Work on Electronic Commerce: Non-paper from Brazil' available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=244463&CurrentCatalogueIdIndex=0.

³⁵⁰ As above.

³⁵¹ Shadikhodjaev (n 338) 1222.

³⁵² G Gagliani 'Cybersecurity, Technological Neutrality, and International Trade Law' (2020) 23(3) *Journal of International Economic Law* 723-745.

³⁵³ Shadikhodjaev (n 338) 1225.

³⁵⁴ Shadikhodjaev (n 338) 1225-1226.

drafting more precise provisions that address current developments but will be overtaken by technological developments.

The approach of drafting futuristic laws is in the spirit of treaty or law interpretation as contained in domestic and international instruments which call for the interpretation of legal provisions in good faith and in a manner that gives meaning and takes into account the context and purpose of the text.³⁵⁵ The Appellate Body has incorporated this method of interpretation, for instance in *US – Shrimp*, where ‘natural resources’ under Article XX(g) of GATT was construed to encompass living and non-living resources, since by definition it was evolutionary and not static.³⁵⁶ In *US – Gambling*, the Panel observed that unless specified in a Member’s Schedule, a market access commitment entailed the right to enjoy service supply through all means of delivery.³⁵⁷ Further, the Appellate Body in *China – Publications and Audiovisual Products* observed that:-

More generally, we consider that the terms used in China’s GATS Schedule (“sound recording” and “distribution”) are sufficiently generic that what they apply to may change over time. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995.³⁵⁸

Arising from the foregoing, therefore, a term’s most recent interpretation or usage is adopted in its interpretation and application.³⁵⁹ It would then mean in the case of digital trade that how terms have been defined or used, influences the construction of terms at the global level. In that, new rules are not necessarily made, instead, an evolutionary approach is adopted in interpreting existing rules. This also speaks to technological neutrality, in that existing trade rules that are evolutionary can applied to digital trade. This is different if a law is static and impossible or impractical to apply to new technologies.

³⁵⁵ See for instance, Article 31(1) of the Vienna Convention on the Law of Treaties, published 23 May 1969, entered into force 27 January 1980.

³⁵⁶ Appellate Body Report ‘*US – Shrimp*’ para 130.

³⁵⁷ Panel Report ‘*US – Gambling*’ para 6.285.

³⁵⁸ Appellate Body Report ‘*China – Publications and Audiovisual Products*’ para 396.

³⁵⁹ Shadikhodjaev (n 338) 1228.

For instance, the Panel in *Mexico – Telecoms* noted that some of the provisions were technology-specific and could not ‘reflect prevailing industry practices’.³⁶⁰

This thesis is largely dependent on this principle of technological neutrality. This is because there are currently no comprehensive legal instruments at the WTO or elsewhere that provide a framework for the application of safeguard measures to electronically traded goods and services. Evident from the discussions herein and in the previous chapters, lessons are drawn from the existing structure for applying and maintaining safeguard measures and emergency safeguard measures to goods and services under GATT, GATS, AS, RTAs and relevant domestic legislation. Hence, without this principle, the hypothesis of this paper would not be proved sufficiently. This paper therefore urges for universal recognition of the principle of technological neutrality, more so, in relation to digital trade.

5.3.5 Injury and causation

Safeguard measures can only be applied when it is investigated and found that due to increased volumes of imports serious injury or a threat of serious injury is being caused to a domestic industry producing like or directly competitive products or like services/like service providers.³⁶¹ The elements that are subject to discussion in this section are ‘injury’ and ‘causation’. Causation relates to the link between the increased volumes of imports and the ‘serious injury’, or ‘threat of serious injury’ experienced by the domestic industry.³⁶²

Under the AS, ‘serious injury’ to a domestic industry is one of the conditions that must be satisfied before a safeguard measure can be applied.³⁶³ The AS defines ‘serious injury’ as ‘a significant overall impairment in the position of a domestic industry’,³⁶⁴ while a ‘threat of serious injury’ is defined as ‘serious injury that is clearly imminent’.³⁶⁵ The Panel in *US – Lamb* noted that a threat of serious injury is concerned with ‘serious injury’

³⁶⁰ Panel Report ‘*Mexico – Telecoms*’ para 7.2.

³⁶¹ AS art 2.

³⁶² E Vermulst ‘The Challenge of Safeguards in the WTO’ (2015) 14(2) *World Trade Review* 385-387.

³⁶³ AS art 2.1.

³⁶⁴ AS art 4.1 (a).

³⁶⁵ As art 4.1. (b).

which has not yet occurred, but remains a future event whose actual materialisation cannot, as a matter of fact, be assured with certainty but must be on the verge of happening.³⁶⁶ The Appellate Body in *US – Lamb* noted that the standard for establishing ‘serious injury’ is very high,³⁶⁷ while the Appellate Body in *US – Wheat Gluten* remarked that the standard is ‘exacting’.³⁶⁸ Moreover, the standard of ‘serious injury’ under AS is higher than the standard of ‘material injury’ used under GATT, the Subsidies and Countervailing Measures Agreement and the Anti-Dumping Agreement.³⁶⁹

‘Serious injury’ must be ascertained based on ‘positive evidence’ and an ‘objective examination’ of such evidence.³⁷⁰ There have been ambiguities in proving serious injury since the obligation to determine ‘serious injury’ rests on the affected Member. It is only the Member who can ascertain that serious injury has been caused to its domestic industry. This decision is discretionary. The Panel in *EU – Safeguard Measures on Steel (Turkey)* established that a finding of imminent serious injury is factually determined on a case-by-case basis and is dependent on the facts and quality of explanation of the investigating authority.³⁷¹

In determining serious injury, an authority is required to investigate all relevant economic factors, including those factors specifically listed in Article 4.2(a) of the AS. These are ‘the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.’³⁷²

³⁶⁶ Appellate Body Report ‘*US – Lamb*’ para 125.

³⁶⁷ Appellate Body Report ‘*US – Lamb*’ paras 124 and 126.

³⁶⁸ Appellate Body Report ‘*US – Wheat Gluten*’ para 149.

³⁶⁹ Appellate Body Report ‘*US – Lamb*’ para 124; Appellate Body Report ‘*Argentina – Footwear Safeguard*’ para 94.

³⁷⁰ AS art 4.1. See also JS Mah ‘Injury and Causation in the WTO Agreement on Safeguards’ (2001) 4(3) *Journal of World Intellectual Property* 373-382, 374.

³⁷¹ Panel Report ‘*EU – Safeguard Measures on Steel (Turkey)*’ para 7.206.

³⁷² See also Appellate Body Reports ‘*US – Lamb*’ para 141; ‘*Argentina – Footwear (EC)*’, para 139; ‘*US – Wheat Gluten*’ paras 72 and 74; and Panel Reports ‘*US – Safeguard Measure on Washers*’ para 7.102; ‘*Korea – Dairy*’ para 7.55; ‘*Argentina – Footwear (EC)*’ para 8.123.

In terms of causation, the AS calls upon the relevant authorities to satisfy the following threshold set out under the Agreement:

....the investigation must demonstrate, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.³⁷³

A safeguard measure can therefore only be applied after a link between the increase in imports and the serious injury is established.³⁷⁴ When serious injury is caused by factors other than an increase in imports, the link between 'injury' and 'causation' would not have been proved³⁷⁵ and subsequently, a safeguard measure ought not to be applied on such grounds. Thus, factors causing injury must be clearly distinguished from other factors not causing injury.³⁷⁶ The Appellate Body in *US – Line Pipe*,³⁷⁷ observed that cause or threat to cause serious injury by increased volumes of imports is established if it is specifically shown that the increase in imports has contributed to producing, bringing about and/or inducing the serious injury or threat to serious injury.³⁷⁸ In this regard, the Appellate Body and panels have required a coincidence in time between the increased imports and the industry's deteriorating performance.³⁷⁹

The unavailability of data is considered not to be an excuse in the determination of causation. Where this is the case, the state is called upon to use its 'proxy variables' to evaluate the cause and injury.³⁸⁰ This was determined in *US – Wool Shirts and*

³⁷³ AS art 4.2 (b).

³⁷⁴ AS art 4.2 (b).

³⁷⁵ As above. See also M Matsushita and others (n 22) 418; Appellate Body Report '*US – Wheat Gluten*' paras 67-69; Panel Reports '*Korea – Dairy*' paras 7.89-7.90; '*US – Steel Safeguards*' paras 10.290 and 10.293; '*US – Safeguard Measure on PV Products*' paras 7.69-7.77.

³⁷⁶ M Matsushita and others (n 22) 418; Appellate Body Reports, '*US – Wheat Gluten*', paras 68 and 70; '*US – Steel Safeguards*' para 490; '*US – Lamb*' paras 179-180; '*US – Line Pipe*' paras 216-217; Panel Reports, '*Argentina – Footwear (EC)*' para 8.267; '*Ukraine – Passenger Cars*' para 7.334; '*US – Safeguard Measure on Washers*' para 7.187; '*US – Safeguard Measure on PV Products*' para 7.194.

³⁷⁷ Appellate Body Report '*US - Line Pipe*' para 209.

³⁷⁸ M Matsushita and others (n 22) 418-419.

³⁷⁹ Panel Reports '*Argentina – Footwear (EC)*' paras 8.237-8.238; '*US – Steel Safeguards*' paras 10.301-10.302 and 10.310-10.311; '*US – Wheat Gluten*' para 8.101; '*Ukraine – Passenger Cars*' para 7.298.

³⁸⁰ Mah (n 370) 377.

Blouses,³⁸¹ where it was observed that lack of data or inaccurate data cannot be an excuse by a state not to assess the impacts of increased volumes of imports.³⁸²

It then follows that for safeguard measures to be applied to digitally traded data and services, it must be shown that due to increased volumes of imports injury is caused to either a domestic industry or an industry providing like services. The investigating authority therefore must indicate in its report that having taken into account all relevant economic factors and upon objective examination of positive evidence, the increase in imports of a particular digital data or service is causing serious injury or threatens to cause serious injury to a domestic industry or like service provider.³⁸³

5.4 Conclusion

In conclusion, this chapter has extensively examined the WTO rules relevant to the application of safeguard measures and emergency safeguard measures to goods and services. It began by examining the context in which safeguard measures are applied to goods under GATT, the Agreement on Safeguards, African RECs and domestically by African states. It then proceeded to explore the context in which emergency safeguard measures are applied to services. GATS provisions under the WTO were examined and in Africa, the provisions under the Investment Agreement for the COMESA Common Investment Area and the AfCFTA Protocol on Investment were explored. This chapter observed that the structure in which safeguard measures are applied to goods is similar to the structure for applying emergency safeguard measures to services. This is because there are no comprehensive rules for applying emergency safeguard measures on services. Safeguard measures under the AfCFTA Protocol on Investment are, however, distinct as they relate to transfer of funds or balance of payments.

Subsequently, this chapter has examined WTO rules of MFN, NT, likeness of products and services, transparency, technological neutrality, injury and causation. It has pointed out that under the principle of technological neutrality, old/subsisting WTO and other rules on safeguard measures can be applied to goods and services traded in

³⁸¹ WT/DS33/AB/R, (25 April 1997).

³⁸² Mah (n 370) 377.

³⁸³ See Mah (n 370) 377.

electronic form. It notes that the use of technological neutrality has however not yet received universal application. This thesis however relies heavily on this principle in response to its research questions and hypothesis of the research. There is currently no framework for applying safeguard measures to digital trade, hence, reliance is placed on the existing framework for physical goods and services.

As in physically traded goods and services, analysis of ‘like products’ and ‘like services’ and industries dealing in ‘directly competitive products’ for goods and ‘like service providers’ for services must be examined. Thus, to establish that serious injury or threat of serious injury has been caused to a domestic industry or domestic service provider, the likeness between the imported goods and services must be examined. In the context of digital trade, there must be likeness between a domestic and imported digital data and service. In addition to this, it must be shown that a digital data or service is being imported in such increased quantities that it has caused serious injury or threatens to cause injury to a domestic industry or service provider dealing in like or directly competing digital data or services. Injury and causation therefore must be justified, based on an objective evaluation of positive evidence. This threshold appears too high to be met at present considering the infrastructural challenges that exist within the continent. It might also be difficult to demonstrate likeness of digital data and services.

In addition to the foregoing, once it is established that a digital data or service is being imported in increased quantities and as a result, serious injury or a threat of serious injury is being caused to a domestic industry providing like or directly competitive data or like service providers, any decision to apply a safeguard measure must be published in a transparent manner on the same basis as is required in respect of safeguard measures on goods. The measures also must be applied and maintained on MFN and NT basis.

The next chapter builds on the above discussions by analysing the prospects and practical challenges for applying safeguard measures to electronic commerce and digital trade. Specifically, the strategies that have been put in place under the WTO, AfCFTA, and bilateral agreements in Africa shall be explored.

CHAPTER SIX

THE PROBLEMS AND PROSPECTS FOR APPLYING SAFEGUARD MEASURES TO DIGITAL TRADE

6.1 Introduction

The previous chapters of this study have examined the status and rules relevant to the application of safeguard measures to digital trade at the multilateral and African regional levels. As discussed, minimal progress has been made in developing digital trade rules, thus, regulation of digital trade is a work in progress. Nonetheless, the upsurge in digital trade in the past years points to the need to develop rules to regulate e-commerce. Building on the arguments put forth in the previous chapters, this chapter examines the problems and prospects for applying safeguard measures to digital trade. This chapter objectifies discussing the protection offered to African domestic industries that are likely to be affected by increased imports of digital data and services. Noteworthy, compared to other parts of the world, Africa is in a peculiar position in technological development. As a result, the development of digital trade in Africa is minimal in comparison to other parts of the world.¹ This presents both opportunities and challenges for African domestic industries and platforms.

At the multilateral level, the major problem affecting the growth and application of safeguard measures to digital trade is the absence of a multilateral legal instrument on digital trade.² Existing legal frameworks have not adapted to changes brought about by the evolving digital trade environment, for instance, the absence of physical borders in digital trade as is the case with physically delivered goods and services.³ While there is increasing regulation of digital trade in regional trade agreements and domestic laws,

¹ WTO Work Programme on E-commerce 'The E-commerce Moratorium: Scope and Impact – Communication from India and South Africa' WT/GC/W/798 (11 March 2020), para 2.8. The Communications observed that there was a massive gap in digital goods exports between developed and developing economies that accounted for 91% and 9% of the imports respectively. United States, China and the European Union accounted for 80% of imported digital goods.

² Organisation for Economic Co-operation and Development (OECD) 'Digital Trade and Market Openness' Working Party of the Trade Committee Report, TAD/TC/WP(2018)3/FINAL (9 August 2018), 12.

³ OECD (n 2) 12.

none of the existing laws speaks to the application of safeguard measures to digital trade. Instead, digital trade is regulated in a broad sense and to the extent of providing an overall regulation of the concerned digital trade environment.⁴ Significantly, the existing e-commerce laws are more inclined towards promoting e-commerce and building a secure digital environment in terms of consumer and personal information protection and building trust.⁵ There is also diversity in the nature and extent of the regulations, hence, there is a need for harmonisation of existing laws. Additionally and as will be pointed out later in this chapter, there are not much statistics on the amounts of goods and services traded digitally to understand the relevance and extent of their regulation to allow for application of safeguard measures in the event that imports take place in increased quantities to the extent of causing or threatening to cause serious injury to a domestic industry dealing in a like good or service.⁶ These challenges also exist in Africa's digital trade environment.⁷

It is against this backdrop that this chapter explores the problems and prospects for applying safeguard measures to digital trade. To do so, this chapter is structured as follows: the next section will explore the practices and statistics of safeguard measures on goods and services applied or maintained and related complaints and disputes lodged at the WTO and at the African levels. This will give a synopsis of how safeguard measures could be applied to digital trade. The chapter will then examine the problems and prospects for applying safeguard measures to physical trade in goods and services. The research in the next section will contextualise the application of safeguard measures to digital trade. The challenges and benefits faced by African countries in doing so will be examined in detail. Before concluding, this chapter will analyse the prospects for applying safeguard measures to digital trade that affects African domestic industries.

⁴ OECD (n 2) 15. OECD notes that most of the issues regulated in digital trade agreements related to e-authentication, protection of data, non-discrimination treatment, paperless trading and moratorium on the application of custom duties to electronic transmissions.

⁵ JA Monteiro & R Teh 'Provisions on Electronic Commerce in Regional Trade Agreements' (June 2017) WTO Staff Working Paper No. ERSD-2017-11, 14-15.

⁶ OECD (n 2) 5. OECD notes that measuring a digital trade is problematic.

⁷ See for instance United Nations Conference on Trade and Development (UNCTAD) 'Digital trade: Opportunities and actions for developing countries' Policy Brief No 92 of 2022, available at https://unctad.org/system/files/official-document/presspb2021d10_en.pdf.

6.2 A contextual examination of safeguard measures applied to physically traded goods and services

To understand the potential problems and challenges of applying safeguard measures to digital trade, it is necessary to first paint a picture and give a context of the current statistics of safeguard measures applied to physical goods and services at the multilateral and African levels. In particular, this section analyses the statistics of safeguard measures notifications, complaints and/or disputes at the WTO and African regional economic communities. This chapter will also selectively examine safeguard measures that have been applied and/or maintained. This is necessary to understand the impact safeguard measures have on multilateral and regional trade in goods and services. As will be discussed, compared to the rest of the world, African countries have applied few safeguard measures and/or lodged safeguard measures complaints and/or disputes.⁸ Notably, out of the 424 safeguard investigations initiated between 1995 and 2023 by WTO Members, only 57 were initiated by only six African countries.⁹ Of these, 28 investigations conducted by four countries resulted in the imposition of safeguard measures, out of 213 such measures imposed worldwide.¹⁰ The following subsections, therefore, examine the status of applying safeguard measures to trade in goods and services at the multilateral and African levels.

6.2.1 Application of safeguard measures at the multilateral level

As discussed in the previous chapters, the rules on the application of safeguard measures were first introduced into the WTO's trade rules under the General Agreement on Tariffs and Trade (GATT) 1947¹¹ and later, the Agreement on Safeguards, following successful

⁸ WTO 'Safeguards Initiations by Reporting Member: 01/01/1995 to 31/12/2023' available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf. See also WTO 'Disputes by Agreement: Safeguards' https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (accessed 5 February 2024).

⁹ WTO 'Safeguards Initiations by Reporting Member: January 1995- December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

¹⁰ WTO 'Safeguards Measures by Reporting Member: January 1995-December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_MeasuresByRepMember.pdf. Safeguard measures were imposed by Egypt (8 safeguards), Madagascar (6 safeguards), Morocco (8 safeguards) and South Africa (6 safeguards).

¹¹ GATT 1947 art XIX.

negotiations at the Uruguay Round.¹² These Agreements anticipated that as a result of international trade, there would be increased importation of goods and services in quantities that are likely to cause or threaten to cause serious injury to domestic industries producing the like or directly competitive products or services, in a manner that necessitates the application of safeguard measures to protect the domestic industries.¹³

While in the years before and after 1994, WTO Members hardly applied safeguard measures,¹⁴ the trend in recent years shows an increase in the application of safeguard measures by WTO Members. For instance, during the October 2021 review of safeguard measures actions at the WTO, it was pointed out that there had been an increased application of safeguard measures by WTO Members.¹⁵ Concerns were raised on the impact the increase in safeguard measures application has on international trade and global supply chains.¹⁶ While the volumes of safeguard measures applied might have slightly reduced in 2022, the volumes of applied and maintained safeguard measures are still high.¹⁷ The volumes of safeguard measures applied and maintained at the WTO over the years and safeguard measures complaints and disputes are assessed further below.

Volumes of safeguard measures applied, maintained and disputed at the WTO from January 1995 to December 2023

As highlighted before, most of the safeguard measures applied and maintained at the multilateral trade level, have occurred at the WTO level by its Members. While safeguard measures, compared to anti-dumping duties and countervailing measures, have less application and little development, the impact of safeguard measures on multilateral trade cannot be overlooked.¹⁸ The WTO has set rules for applying, notifying Members, and

¹² WTO 'Technical Information on Safeguard Measures' https://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm (accessed 26 October 2022).
¹³ See generally Art 2.1 of the Agreement on Safeguards & GATT 1994, art XIX.
¹⁴ WTO 'Safeguard measures' https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (accessed 26 October 2022).
¹⁵ WTO 'Members review safeguard actions, address increased use of measures' (25 October 2021) https://www.wto.org/english/news_e/news21_e/safe_25oct21_e.htm (accessed 26 October 2022).
¹⁶ As above.
¹⁷ WTO 'Members review safeguard actions on 19 products at committee meeting' (24 October 2022) https://www.wto.org/english/news_e/news22_e/safe_24oct22_e.htm (accessed 29 October 2022).
¹⁸ WTO 'Dispute settlement activity – some figures' https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 26 October 2022). As of

resolving complaints/disputes arising from the application of safeguard measures. To date, all of the safeguard measures have been applied to trade in goods and none to trade in services. The subsequent paragraphs of this subsection examine at length safeguard measures that have been imposed and maintained, communications, requests for consultations and disputes ultimately resolved by the WTO Dispute Settlement Body (DSB).

Between 1 January 1995 and 31 December 2023, a total of 424 safeguard investigations were initiated by WTO Members and notified to the WTO under the Agreement on Safeguards.¹⁹ A significant number of these investigations were initiated in 2002 (thirty-four), and 2019 (thirty).²⁰ In 2022, only four (4) safeguard investigations were initiated and in 2023, twelve (12) safeguard investigations were initiated.²¹ According to the WTO statistics most of the safeguard investigations have been initiated by India – 48; Indonesia – 43; and Turkey – 29.²² Between 1995 and 2023, six African countries initiated a total of 57 safeguard investigations: fifteen by Egypt, thirteen by Morocco, twelve by Madagascar, nine by South Africa,²³ seven by Tunisia, and one by Zambia.²⁴ In terms of sectors, the largest number of safeguard investigations relates to base metals and articles of base metals (103) investigations and products of the chemical or allied industries (61) investigations.²⁵

December 2021, One Hundred and Thirty-Seven (137) disputes on anti-dumping and One Hundred and Thirty (130) disputes on subsidies had been raised at the WTO. There were only Sixty (60) disputes on safeguards during this period, with several of those disputes relating to the same safeguard measure.

¹⁹ WTO 'Safeguards Initiations by Reporting Member: January 1995- December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

²⁰ As above.

²¹ As above. See also, WTO 'Report (2022) of the Committee on Safeguards to the Council for Trade in Goods' (adopted 24 October 2022) G/L/1435; G/SG/274, 25 October 2022, Annex 2.

²² WTO 'Safeguards Initiations by Reporting Member: January 1995- December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

²³ This statistic also represents safeguard measures initiated by Southern African Customs Union (SACU) Members; see WTO 'Safeguards Initiations by Reporting Member: January 1995- December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf, footnote 4.

²⁴ WTO 'Safeguards Initiations by Reporting Member: January 1995-December 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

²⁵ WTO 'Safeguard Initiations by Sector: January 1995- December 2023' https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsBySector.pdf.

Immediately a provisional safeguard measure is taken, consultations are to be initiated immediately by the imposing WTO Member.²⁶ The Agreement on Safeguards provides further that WTO Members with substantial interest have an opportunity to request for consultations with a Member who proposes to apply or extend a safeguard measure or who intends to impose or maintain a definitive safeguard measure on a good under the Agreement on Safeguards.²⁷

Consultations as a prelude to dispute settlement, including on safeguard measures, are regulated by the Dispute Settlement Understanding (DSU)²⁸ and Articles XXII and XXIII of GATT.²⁹ The requests for consultations are made in the form of official communications to the WTO and the affected Member, which are then circulated to other WTO Members.³⁰ Since the establishment of the WTO dispute settlement system and entry into force of the Agreement on Safeguards, 62 cases have been notified to the WTO for consultations under the Agreement on Safeguards and the DSU.³¹ The first request for consultations was made on 28 April 1997 by Colombia with the US in the *United States — Safeguard Measure Against Imports of Broom Corn Brooms*.³² Colombia argued that the US had violated the Agreement on Safeguards through its application of safeguard measures on broom and corn brooms imports pursuant to the US Presidential Proclamation 6961 of 28 November 1996.³³ As a result, Colombia's benefits had been impaired and/or nullified. The last update of the WTO shows that this case is still under 'consultations'.³⁴ As of 2024, the WTO reported that the latest request for consultations was made on 13 March 2020 by Turkey with the European Union in the *EU — Safeguard*

²⁶ Agreement on Safeguards art 12.4.

²⁷ Agreement on Safeguards art 12.3, read with art 8.1.

²⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes art 4.

²⁹ GATT 1994 arts XXII and XXIII.

³⁰ See for instance the request for consultation by Brazil with China – WTO 'China – Certain Measures Concerning Imports of Sugar: Request for Consultations by Brazil' WT/DS568/1, G/L/1263; G/SG/D62/1, G/LIC/D/53; G/AG/GEN/146 (22 October 2018).

³¹ WTO 'Disputes by Agreement: Safeguards' https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A18 (accessed 2 November 2022).

³² WTO 'United States - Safeguard Measure Against Imports of Broom Corn Brooms: Request for Consultations by Colombia' WT/DS78/1; G/SG/D1/1, 1 May 1997.

³³ WTO 'WT/DS78/1; G/SG/D1/1' (n 32); See also WTO 'DS78: United States — Safeguard Measure Against Imports of Broom Corn Brooms' https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds78_e.htm (accessed 2 November 2022).

³⁴ As above.

Measures on Steel (Turkey).³⁵ Turkey sought consultations over definitive and provisional safeguard measures applied by the EU on imports of certain steel products and the preceding safeguard measures investigations.³⁶ A panel report was adopted on 31 May 2022 with a condition to bring measures into conformity.³⁷ The EU agreed to implement the ruling and recommendation of bringing its measures in conformity with the WTO rules on safeguards.³⁸ To reaffirm this, the EU and Turkey through a communication to the WTO dated 5 August 2022 informed that they had agreed on an expiry date of 6 January 2023 for the implementation of the report.³⁹ Subsequently, the EU on 16 January 2023 notified the Chairperson of the DSB that it had adopted the measure necessary to comply with the DSB recommendations and rulings in the dispute.⁴⁰

Between 1995 and 2022, three formal communications of mutually agreed solutions following requests for consultations have been made to the WTO.⁴¹ The first notification was made in 2002 in relation to *Slovakia – Safeguard Measure on Imports on Sugar* wherein the Republic of Poland and Slovak Republic informed the WTO DSB that they had reached a mutually satisfactory solution in relation to safeguard measures applied on imports of sugar by Slovakia.⁴² The second notification was made in May 2019 in relation to the *United States – Certain Measures on Steel and Aluminium Products (Canada)* wherein the US and Canada informed the WTO DSB that they had reached a

³⁵ See WTO ‘Disputes by Agreement: Safeguards’ https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A18#selected_agreement (accessed 29 June 2024); See also Panel Report ‘*European Union – Safeguard Measures on Certain Steel Products*’ WT/DS595/R and Add.1, adopted 31 May 2022.

³⁶ WTO ‘European Union – Safeguard Measures on Certain Steel Products: Request for Consultations by Turkey’ WT/DS595/1; G/L/1355; G/SG/D64/1 (19 March 2022).

³⁷ See WTO ‘DS595: European Union — Safeguard Measures on Certain Steel Products’ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds595_e.htm (accessed

³⁸ European Commission ‘Notice concerning the implementation of the ruling of the Dispute Settlement Body of the World Trade Organization regarding the safeguard measure applicable to imports into the Union of certain steel products’ (24 August 2022) *Official Journal of the European Union* 1-2.

³⁹ WTO ‘European Union – Safeguard Measures on Certain Steel Products: Agreement under Article 21.3(B) of the DSU’ WT/DS595/13, 9 August 2022.

⁴⁰ WTO ‘European Union – Safeguard Measures on Certain Steel Products: Status Report Regarding Implementation of the DSB Recommendations and Rulings by the European Union’ WT/DS595/14, 17 January 2023.

⁴¹ WTO ‘Disputes Involving Safeguards Committee’ https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (accessed 2 December 2022).

⁴² WTO ‘Slovakia – Safeguard Measure on Imports on Sugar: Notification of Mutually Agreed Solution’ WT/DS235/2; G/L/456/Add.1; G/SG/D18/1/Add.1 (16 January 2002).

settlement and the US had eliminated the particular measures applied on Canadian steel and aluminium products.⁴³ The third notification was similarly made in May 2019 in relation to the *United States – Certain Measures on Steel and Aluminium Products (Mexico)* wherein the US and Mexico informed that they had reached a settlement and the US had eliminated the particular measures applied on Mexican steel and aluminium products.⁴⁴

Other requests for consultations under the Agreement on Safeguards are in different stages of the dispute resolution process. They are either in consultations; panels composed; panels established and yet to be composed; lapse of panels authority; panel reports adopted; panel reports adopted with the recommendation to bring measures into conformity; panel reports under appeal; panel reports circulated; compliance proceedings completed with findings of non-compliance; settled; terminated; implemented; implementations notified to the respondent; or mutually acceptable solution on implementation notified.⁴⁵

Where parties cannot reach a settlement during consultations, the complainant can request the DSB to constitute a panel in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)⁴⁶ and the Agreement on Safeguards.⁴⁷ Out of the 621 disputes that had been lodged at the WTO Dispute Settlement Body (DSB) as of 31 December 2023 from 1 January 1995,⁴⁸ 62 cases alleged violation of the Agreement on Safeguards.⁴⁹ Forty-five (45) of the 62 cases sought for the

⁴³ WTO 'United States – Certain Measures on Steel and Aluminium Products: Notification of Mutually Agreed Solution' WT/DS550/13; G/L/1245/Add.1; G/SG/D55/1/Add.1 (27 May 2019).

⁴⁴ WTO 'United States – Certain Measures on Steel and Aluminium Products: Notification of a Mutually Agreed Solution' WT/DS551/13; G/L/1246/Add.1; G/SG/D56/1/Add.1 (3 June 2019).

⁴⁵ As above. See also WTO 'Current Status of Disputes' https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm (accessed 2 November 2022).

⁴⁶ Article 6.

⁴⁷ Article 14; see WTO 'Dispute settlement activity – some figures' https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 5 November 2022). See for instance the request made by Turkey in WTO 'European Union – Safeguard Measures on Certain Steel Products: Request for Establishment of a Panel by Turkey' WT/DS595/3 (17 July 2020).

⁴⁸ WTO 'Dispute settlement activity – some figures' https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 5 February 2023).

⁴⁹ As above.

establishment of panels.⁵⁰ Out of the 62 cases; six (6) panel reports are under appeal, ten (10) panel reports have been adopted, twenty-one (21) cases have notified implementations by respondents, panels were established by not constituted in four (4) cases, authority of panels lapsed in three (3) cases, one (1) case has a panel composed, thirteen (13) cases are in consultations while four (4) cases were terminated.⁵¹ All these cases involve the application of safeguard measures on various imported goods and not services by WTO Members. The panel reports and other disputes outcomes have set precedent for the resolution of similar disputes at the WTO and by regional economic communities. This presents both opportunities and challenges to the multilateral trading system as shall be espoused later in this chapter.

In the case of emergency safeguard measures applied to trade in services, little to no development has been witnessed at the WTO.⁵² As discussed in the previous chapter, WTO Members were to negotiate on emergency safeguard measures in line with the GATS,⁵³ but no substantive negotiations have ever been held.⁵⁴ This is in spite of the constitution of the Working Party on 30 March 1995 to spearhead negotiations on emergency safeguard measures.⁵⁵ The last action on emergency safeguard measures on services was on 18 December 2005 during the sixth WTO Ministerial Conference in Hong Kong during which it was agreed to intensify efforts to conclude negotiations on emergency safeguard measures.⁵⁶ As a result, there is currently no framework for notifying the WTO or applying emergency safeguard measures on services.⁵⁷ All disputes

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- ⁵⁰ WTO 'Disputes by agreement: Safeguards' https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (accessed 5 February 2023).
- ⁵¹ WTO 'Disputes by Agreement: Safeguards' https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (accessed 5 November 2022).
- ⁵² WTO 'WTO Analytical Index: GATS – Article X (Practice)' available at https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art10_oth.pdf.
- ⁵³ Annex 1B of the Marrakesh Agreement Establishing the WTO, art X.
- ⁵⁴ WTO 'WTO Negotiations on GATS Rules' https://www.wto.org/english/tratop_e/serv_e/gats_rules_negs_e.htm (accessed 3 December 2022).
- ⁵⁵ WTO 'WTO Analytical Index: GATS – Article X (Practice)' available at https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art10_oth.pdf.
- ⁵⁶ WTO 'Doha Work Programme: Ministerial Declaration' (adopted 18 December 2005) WT/MIN(05)/DEC, 22 December 2005.
- ⁵⁷ SY Peng 'Emergency safeguard measures for trade in services: a case study of intradisciplinary fragmentation' in CL Lim & B Mercurio (eds) *International Economic Law after the Global Crisis*

under GATS are, however, resolved under the DSU.⁵⁸ No statistics on disputes relating to emergency safeguard measures currently exist.

The foregoing statistics show the increase in the application of safeguard measures to goods by WTO Members at the multilateral level. Compared to the total disputes at the WTO DSB, however, it is evident that there have been less disputes on safeguards measures, which account for only 62 of the 614 disputes to date.⁵⁹ This is despite the clear existing framework and jurisprudence for resolving safeguard measures-related disputes.

Notwithstanding the clear process that exists regarding safeguards on goods, including related dispute settlement, the stalemate in negotiations of emergency safeguard measures means that there is no framework for the application of safeguard measures to services under GATS. This by extension impacts the application of safeguard measures to digital services since some of the trade in services under GATS, as discussed previously, constitute digital trade for the purposes of this study.⁶⁰ These, therefore, are some of the challenges that impact the application of safeguard measures to digital trade, as discussed at length later in this chapter.

6.2.2 Statistics of safeguard measures applied, maintained and disputed at the African level between 1995 and 2023

As pointed out in the previous chapters, the basis for applying, maintaining and resolving safeguard measures disputes at the African level are drawn from the practices at the WTO. This is because African regional economic communities (RECs) were founded under the auspices of the WTO trade rules.⁶¹ Further, most African WTO Members opt to act more on safeguard measures at the WTO level as opposed to the regional level. Hence, a lot of African safeguard measures developments are found at the WTO.

(Cambridge University Press 2015) 237.

⁵⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes art 1.1.

⁵⁹ WTO 'Dispute settlement activity – some figures' https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 5 November 2022).

⁶⁰ M Hart and R Chaitoo 'Electronic Commerce and International Trade Rules' (1999) 2(6) *Journal of World Intellectual Property* 911-938, 917.

⁶¹ Refer to Chapter Three of this Study.

African RECs do not have clear reporting structures and/or statistics for notifications of safeguard measures initiated and maintained despite incorporating rules on notifications and consultations in regional instruments. For instance, while the COMESA Regulations on Trade Remedy Measures contains a provision on notifications and consultations,⁶² COMESA does not have a framework for updating Members and other interested parties on safeguard measures notifications and requests for consultations made, besides given them as news items. It is therefore difficult to tell how many safeguard measures have been notified, applied and maintained at the REC level since relevant regional instruments took effect. This notwithstanding, there are a few statistics of safeguard measures applied, maintained and/or disputed under the African RECs and bilateral agreements frameworks. The statistics are explored further below.

Under the Common Market for Eastern and Southern Africa (COMESA) safeguard measures regime, several safeguard measures have been initiated and maintained. Particularly, Kenya has in place a safeguard measure on duty free sugar imported from other COMESA Members.⁶³ In February 2002, Kenya received permission from COMESA to apply safeguard measures on its sugar sector to primarily re-organise it to become profitable and competitive in the region.⁶⁴ According to the COMESA Treaty a safeguard measure is initially maintained for one year and thereafter extended subject to the decision of the COMESA Council of Ministers.⁶⁵ Subsequently, Kenya's safeguard measure on sugar has been extended several times, for instance, it was extended until March 2023⁶⁶ and later further extended in December 2022 from March to December

⁶² COMESA Regulations on Trade Remedy Measures, regulation 15.

⁶³ COMESA 'Administration of the Kenya Sugar Safeguards in Focus' <https://www.comesa.int/administration-of-the-kenya-sugar-safeguard-in-focus/> (accessed 6 December 2022).

⁶⁴ Agritrade 'Kenya to seek further extension of COMESA sugar safeguards' (19 January 2014) <https://agritrade.cta.int/Agriculture/Commodities/Sugar/Kenya-to-seek-further-extension-of-COMESA-sugar-safeguards.html> (accessed 6 December 2022). See also YN Okubo 'Safeguard Measures (The Escape Clause) under the COMESA Treaty: The Case of the Kenya Sugar Industry' unpublished Master of Law Project Paper, University of Nairobi Faculty of Law, 2005, 1-5.

⁶⁵ Treaty Establishing COMESA, art 61(2).

⁶⁶ COMESA 'Kenya Gets Sugar Safeguard for Two More Years' <https://www.comesa.int/comesa-extends-kenya-sugar-safeguard-for-two-years/> (accessed 6 December 2022).

2023.⁶⁷ The latest extension was in November 2023 for a two-year period.⁶⁸ The measure will therefore be in force at least until November 2025, a total of more than 23 years.

In 2002, Kenya also sought and was allowed to apply safeguard measures on wheat flour as it was uncompetitive and was experiencing other challenges in COMESA.⁶⁹ The safeguard limited imports of wheat flour from Mauritius and Egypt.⁷⁰ The measure was initially in force until 30 May 2005 but was later extended to December 2009.⁷¹ Like the sugar safeguards, the wheat flour safeguard was applied pursuant to Article 61 of the COMESA Treaty.

In November 2018, Mauritius wrote to the COMESA Secretary General of its intention to impose a safeguard measure against the importation of edible oil from COMESA.⁷² The guiding legal provisions was Article 61 of the COMESA Treaty which calls on Member States to inform the Secretary General of its intention to impose a safeguard measure.⁷³ In the Letter, Mauritius indicated its intention to use tariff and quantitative restrictions on the importation of edible oil (soyabean, sunflower and blended oil) by setting the tariff quotas at 3000 tonnes for COMESA Member states at zero duty and beyond the Tariff Rate Quota, a customs duty of 10% on all imports of edible oil. Aggrieved by this decision, Agiliss Limited filed a Reference with the COMESA Court of Justice seeking an order prohibiting Mauritius from imposing the safeguard measures.⁷⁴ In a judgment delivered in August 2023, that is, nearly 5 years later, the Appellate Division

⁶⁷ COMESA 'Adopted Report of the Sixth Meeting of Kenya Sugar Safeguard Sub-Committee' 19-20 September 2023, available at https://www.comesa.int/wp-content/uploads/2023/10/6.-Adopted-Report-of-6th-Sugar-meeting_EN.pdf.

⁶⁸ Nation 'Kenya secures more time to control cheap sugar imports' (26 November 2023) <https://nation.africa/kenya/business/kenya-secures-more-time-to-control-cheap-sugar-imports-4445548> (accessed 1 December 2023).

⁶⁹ R Gitau, S Mburu, MK Mathenge & M Smal 'Trade and Agricultural Competitiveness for Growth, Food Security and Poverty Reduction: A Case of Wheat and Rice Production in Kenya' Working Paper 45 of 2011 (Tegemeo Institute of Agricultural Policy and Development, Egerton University) 11.

⁷⁰ F Mangeri 'Customised trade remedies in Africa – the case of the COMESA-EAC-SADC Tripartite Free Trade Area' <https://www.tralac.org/news/article/12001-customized-trade-remedies-in-africa-the-case-of-the-comesa-eac-sadc-tripartite-free-trade-area.html> (accessed 10 November 2023).

⁷¹ As above, 11. See also P Khandelwal 'COMESA and SADC: Prospects and Challenges for Regional Trade Integration' IMF Working Paper WP/O4/227, December 2004, 38.

⁷² *Agiliss Limited versus The Republic of Mauritius*, COMESA Court of Justice Reference 1 of 2019, para 10.

⁷³ COMESA Treaty, art 61.1.

⁷⁴ *Agiliss Limited versus The Republic of Mauritius*, COMESA Court of Justice Reference 1 of 2019.

of the COMESA Court of Justice sent the matter to the First Instance Division to determine the reference on merit as it had earlier dismissed it on the basis that Agiliss Limited had not exhausted local remedies.⁷⁵ The Appellate Division noted that there were exceptional circumstances in Mauritius that relieved the aggrieved party from exhausting local remedies.⁷⁶ The resolution of the dispute is ongoing at the Court. Nonetheless, Mauritius had in force the safeguard measure on edible oil going by the Cabinet decision of 5 February 2021.⁷⁷

In addition to the foregoing, there has been a dispute by the European Union concerning safeguard measures applied in the poultry sector by the Southern Africa Customs Union (SACU).⁷⁸ The European Union cited Article 77 of the European Union – Southern African Development Community Economic Partnership Agreement (EU-SADC EPA)⁷⁹ in its formal request on 14 June 2019 for consultations on safeguard measures applied by SACU on imports of frozen bone-in chicken portions from the EU.⁸⁰ SACU alleged that the increase in volumes of frozen bone-in chicken portions imports from the EU caused or threatened to cause serious injury.⁸¹ Following unproductive consultations held in September 2019, the EU requested for the establishment of a panel to resolve the dispute.⁸² An arbitration panel was constituted on 8 December 2021 to hear the dispute,⁸³

⁷⁵ *Agiliss Limited versus The Republic of Mauritius*, COMESA Court of Justice Appeal 1 of 2022 arising from Reference 1 of 2019.

⁷⁶ As above, para 126.

⁷⁷ Cabinet Decisions - 05 February 2021, available at https://pmo.govmu.org/CabinetDecision/2021/Cabinet%20Decisions_taken_on_05%20February%202021.pdf, para 5.

⁷⁸ EPA Monitoring 'EU Formally Challenges Application of SACU Safeguard Duties in the Poultry Sector' (27 June 2019) <https://epamonitoring.net/eu-formally-challenges-application-of-sacu-safeguard-duties-in-the-poultry-sector/> (accessed 5 December 2022).

⁷⁹ Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0916\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0916(01)&from=EN).

⁸⁰ European Union 'Note Verbale' available at; https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157928.pdf.

⁸¹ As above.

⁸² European Commission 'Panel rules in favour of EU on Southern African Customs Union's safeguard on EU poultry cuts' (3 August 2022) https://policy.trade.ec.europa.eu/news/panel-rules-favour-eu-southern-african-customs-unions-safeguard-eu-poultry-cuts-2022-08-03_en (accessed 10 December 2022).

⁸³ European Commission 'Arbitration panel established in the dispute concerning the safeguard measure imposed by SACU on imports of poultry from the EU' (8 December 2021), available at https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159966.pdf.

rendered its ruling on 3 August 2022 in favour of the EU on account that the safeguard measure was not proportionate to the injury alleged to have been caused.⁸⁴ There was also excessive delay in the investigation process and adoption of the safeguard measure by SACU and the action was therefore in contravention of the EU-SADC EPA.⁸⁵ There was however no action to be taken by SACU considering that the safeguard measure lapsed in March 2022, prior to the issuance of the ruling by the arbitration panel.⁸⁶ However, the EU continued to push for the arbitration verdict, as SACU could otherwise have been in a position to renew the safeguard for another 4 years. The arbitration verdict meant that there was no possibility of an extension.

In 2017, Mauritius imposed a fifteen percent safeguard duty on spreads and margarine under the SADC safeguard measures regime.⁸⁷ The measure was imposed by Mauritius under the SADC Protocol on Trade.⁸⁸ The safeguard measure was in place until 2020 but the Cabinet resolved in December 2020 to seek an extension from the SADC Secretariat from January 2021 to January 2024.⁸⁹ The Mauritius Customs Tariff (Amendment of Schedule) Regulations 2022 provided a reduction in the customs duty on imports of margarine and spread to eleven percent in the SADC region.⁹⁰

Aside from the foregoing, no other safeguard measures have been applied by other African states either under African RECs or bilateral agreements. This is in spite of the existence of safeguard measures laws in other African RECs and bilaterally, as

⁸⁴ European Commission 'Panel Ruling – Final Report of the Arbitration Panel' (3 August 2022), available at: <https://circabc.europa.eu/ui/#>.

⁸⁵ As above.

⁸⁶ European Commission 'Panel rules in favour of EU on Southern African Customs Union's safeguard on EU poultry cuts' (3 August 2022) https://policy.trade.ec.europa.eu/news/panel-rules-favour-eu-southern-african-customs-unions-safeguard-eu-poultry-cuts-2022-08-03_en (accessed 10 December 2022).

⁸⁷ NE Mxi 'Trade in the Southern African Development Community' Eastern Cape Export Symposium 28 March 2019.

⁸⁸ SADC Protocol on Trade, art 20. It allows SADC Members to apply safeguard measures if necessary for a four-year period which could be extended for a maximum of eight years in total.

⁸⁹ Cabinet Decisions - 30 December 2022, available at https://pmo.govmu.org/CabinetDecision/2020/Cabinet%20Decisions_taken_on_30%20December%202020.pdf.

⁹⁰ Customs Tariff (Amendment of Schedule) Regulations 2022, Annex 1-Margarine, available at <https://www.mra.mu/download/Annex1Margarine240122.pdf>. See also Le Matinal 'Highlights Of Cabinet Meeting – Friday 14 January 2022' <https://english.lematinal.media/highlights-of-cabinet-meeting-friday-14-january-2022/> (accessed 10 November 2023), para 11.

highlighted in the third chapter of this study. This demonstrates the infrequent application of safeguard measures by African states at the continental level. Additionally, no African state has applied safeguard measures on trade in services. The statistics on safeguard measures applied at the African level are therefore very limited. This backdrop gives an overview of the unlikelihood of African states to apply safeguard measures to digitally traded data and services at the African level unless the current trend changes. This trend is further impacted by the challenges espoused further below.

6.3 The problems arising from the application of safeguard measures at the Multilateral and African levels

Based on the foregoing discussions on the statistics of safeguard measures applied at the WTO and African levels, it is evident that, on one hand, there has been a general increase in the volumes of safeguard measures applied over the years at the multilateral level. On the other hand, it is evident that African states seldom apply safeguard measures to goods and services both multilaterally and at the regional level. While this is the case, the application of safeguard measures at the multilateral and regional levels is impacted by various factors as examined further below.

As is the case at the continental level and as discussed earlier, there have been few safeguards applied by African Members at the WTO. An attempt by Zambia to impose safeguard measures in 2015 was terminated due to its failure to follow procedures. On 5 October 2015, Zambia notified the WTO Committee on Safeguards that it had initiated investigations with an aim of applying safeguard measures to the importation of flat-rolled products of iron, non-alloy steel and trailers.⁹¹ It also had imposed a provisional measure for 180 days which was to lapse on 10 January 2016.⁹² The affected Countries were South Africa, Kenya, Tanzania, United Kingdom and China.⁹³ Zambia failed to adhere to

⁹¹ WTO Committee on Safeguards 'Notification under Article 12.1 (A) of the Agreement on Safeguards on the Initiation of an Investigation and Reasons for it; Notification under Article 12.4 of the Agreement on Safeguards' G/SG/N/6/ZMB/1, G/SG/N/7/ZMB/1, 5 October 2015.

⁹² As above, para 1.

⁹³ Global Trade Alert 'Zambia: Provisional safeguard duty on imports of flat-rolled products of iron non-alloy steel trailers and semi-trailers' <https://www.globaltradealert.org/intervention/12778/safeguard/zambia-provisional-safeguard-duty-on-imports-of-flat-rolled-products-of-iron-non-alloy-steel-trailers-and-semi-trailers> (accessed 15 November 2023).

the requirements under the Agreement on Safeguards such that it failed to specify the amount of tariff increase made, it did not spell out what critical circumstances led to the imposition of the provisional safeguard measure, it did not also fully demonstrate how the measure met the requirements for determination of serious injury or threat thereof under the Agreement on Safeguards, Zambia did not publish its report resulting in the application of the provisional measures, did not immediately notify WTO Members of the initiation of the safeguards investigations, did not notify the imposition of the provisional measure before it was imposed, and failed to comply with the legal requirements and timelines for consultations.⁹⁴ These errors and omissions by Zambia demonstrate a lack of expertise from their technical team on safeguard investigations and imposition. Since then, Zambia has not initiated another safeguard investigation.

At the WTO, Mauritius questioned the tariff rate quota imposed by Madagascar on imports of pasta. Madagascar notified the WTO Committee on Safeguards on its safeguard measure on imports of pasta in the form of spaghetti, macaroni or noodles or in any other form.⁹⁵ Mauritius at a Committee on Safeguards semi-annual meeting held on 25 April 2022 noted that the measure was not in line with WTO rules, such that Mauritius was paying a higher safeguard duty, at thirty-six percent, contrary to what Madagascar had identified as thirty percent subject to one percent reduction annually.⁹⁶ Quota was also allocated based on importers by Madagascar. It was therefore difficult for Mauritius to fulfil the quota. It urged Madagascar to review its administrative procedures which Madagascar promised to do.⁹⁷ This shows some of the challenges that African countries face in the application of safeguard measures.

⁹⁴ WTO Committee on Safeguards 'Notification under Article 12.1 (A) of the Agreement on Safeguards on the Initiation of an Investigation and Reasons for it; Notification under Article 12.4 of the Agreement on Safeguards before Taking a Provisional Safeguard Measure Referred to in Article 6' G/SG/Q2/ZMB/3, 28 June 2016.

⁹⁵ WTO Council for Trade in Goods & Committee on Safeguards 'Notification under Article 12.5 of the Agreement on Safeguards of the Results of a Mid-Term Review Referred to in Article 7.4: Madagascar' G/L/1423, G/SG/N/13/MDG/3, 7 January 2022.

⁹⁶ WTO Committee on Safeguards 'Minutes of the Regular Meeting on 25 April 2022' G/SG/M/60, 16 September 2022, item 3.8, para 60.

⁹⁷ As above, item 3.8, paras 60 & 61.

In the past Malawi and Zambia did not succeed to invoke Article 61 of the COMESA Treaty on safeguard measures for the wheat flour sector.⁹⁸ On investigation, the COMESA Secretariat established that there was no justification for the intended application of safeguard measures.⁹⁹

The above factors and others identified and examined in this section are analysed in the context of the impacts they have on the application of safeguard measures to digital trade. These factors are explored at length below.

6.3.1 Factors impacting the application of safeguard measures at the multilateral level

While the safeguard measures framework at the WTO is termed as robust and has been emulated regionally, bilaterally and domestically by WTO Members, it is faced with a myriad of challenges that generally negatively influence multilateral trade in goods. This subsection shall in particular examine the challenges relating to increased volumes of safeguard measures applied, numerous extensions of safeguard measures, and the doctrine of precedent.

Increased application of safeguard measures

Going by the statistics discussed earlier in this chapter, it is evident that there has been an upward trajectory over the years in the application of safeguard measures at the WTO.¹⁰⁰ Between 2010 and 2021 alone a total of 210 safeguard investigations were initiated compared to 198 initiated in the first fifteen years from 1995 to 2009.¹⁰¹ A country such as Ukraine, for instance, that initiated only five investigations from 1995 to 2009, initiated five out of the nine safeguard investigations initiated in 2021.¹⁰² Owing to this, some of the WTO Members, for instance, China, Japan and Australia, have expressed

⁹⁸ Mangeni (n 70).

⁹⁹ As above.

¹⁰⁰ WTO 'Safeguards Initiations by Reporting Member: 1995-2021', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

¹⁰¹ As above.

¹⁰² WTO 'Safeguards Notifications by Ukraine' https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=@Symbol=%20g/sg/n/*%20and%20%20@Symbol=%20ukr&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true# (accessed 26 November 2022)

their concerns over the increased application of safeguard measures.¹⁰³ As discussed earlier, the WTO noted in 2021 that there was an increased application of safeguard measures by its Members.¹⁰⁴ It called on its Members to reduce the application and extension of safeguards measures due to the effects safeguard measures have on multilateral trade.¹⁰⁵ Taking into account the safeguard investigations initiated by WTO Members in 2021 (9 initiations),¹⁰⁶ 2022 (4 initiations),¹⁰⁷ and 2023 (12 initiations)¹⁰⁸, there appears to be a general reduction in the initiation of safeguard investigations but the volumes are still however high.¹⁰⁹

For the purposes of this study, it is important to note that many African countries, individually, are hardly directly affected by the increased application of safeguard measures at the WTO as the safeguard measures initiated mostly target products originating from developed or large developing countries. This is because African countries enjoy exemptions under the special and differential treatment accorded to WTO developing country Members.¹¹⁰ The Agreement on Safeguards excludes developing country members whose individual share of total imports into the country imposing a safeguard measure does not exceed three per cent, unless such developing countries collectively represent more than nine per cent of such imports, from the application of safeguard measures.¹¹¹ However, some African countries such as South Africa and Egypt

¹⁰³ WTO 'Members review safeguard actions, address increased use of measures' (25 October 2021) https://www.wto.org/english/news_e/news21_e/safe_25oct21_e.htm (accessed 26 October 2022).

¹⁰⁴ As above. The same concerns were raised in 2019, see WTO 'WTO committee reviews record number of safeguard actions' (18 November 2019) https://www.wto.org/english/news_e/news19_e/safe_18nov19_e.htm (accessed 26 October 2022).

¹⁰⁵ As above.

¹⁰⁶ WTO 'Safeguards Initiations by Reporting Member: 1995-2021', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

¹⁰⁷ WTO 'Report (2022) of the Committee on Safeguards to the Council for Trade in Goods' (adopted 24 October 2022) G/L/1435; G/SG/274, 25 October 2022, Annex 2.

¹⁰⁸ WTO 'Safeguards Initiations by Reporting Member: 1995- 2023', available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

¹⁰⁹ WTO 'Members review safeguard actions on 19 products at committee meeting' (24 October 2022) https://www.wto.org/english/news_e/news22_e/safe_24oct22_e.htm (accessed 26 October 2022).

¹¹⁰ Agreement on Safeguard art 9.1.

¹¹¹ Agreement on Safeguards art 9.1. For instance, South Africa notified the WTO Committee on Safeguards that it had excluded several developing African countries from safeguard measures applied on bolts with hexagon heads of iron or steel; see WTO Committee on Safeguards' Notification of a Proposal to Introduce a Measure' G/SG/N/8/ZAF/9; G/SG/N/10/ZAF/7; G/SG/N/11/ZAF/7/Suppl.1, 9 November 2021.

have been affected by safeguards imposed by WTO Members, for instance, on steel products.¹¹²

Numerous extensions of safeguard measures

Pursuant to the Agreement on Safeguards, safeguard measures can be applied for a maximum initial period of four years,¹¹³ and can be extended to a total period of eight years.¹¹⁴ Developing country members have a right to extend safeguard measures for two years beyond the eight years period; a total of ten years.¹¹⁵ Important to note is that safeguard measures can only be applied and extended when necessary to prevent or remedy serious injury caused by significantly increased imports and to allow for the adjustment of an industry.¹¹⁶ Any decision to extend the application of a safeguard measure is made by a competent authority of the importing state in accordance with the Agreement on Safeguards, and it must be shown that the continued application of the safeguard measure is necessary to allow the industry an additional period to adjust.¹¹⁷ All notifications and consultations requirements that apply in an original investigation must be applied in each extension review.¹¹⁸ The safeguard measure in place must continue to be liberalised if it is extended.¹¹⁹

Owing to the foregoing, the specific circumstances for the extension of safeguard measures are determined by the imposing state and are guided by safeguard rules and the necessity of the measure. There have been numerous extensions of safeguards measures by WTO Members. As of October 2022, 21 applied safeguard measures were under extension and proposal for extension.¹²⁰ In 2022 alone, 8 safeguard measures

¹¹² S Njobeni 'Duty to protect SA steel industry' (9 May 2017) <https://www.tralac.org/news/article/11593-duty-to-protect-sa-steel-industry.html> (accessed 10 November 2023).

¹¹³ Agreement on Safeguards art 7.1.

¹¹⁴ Agreement on Safeguards arts 7.2 & 7.3.

¹¹⁵ Agreement on Safeguards art 9.2.

¹¹⁶ Agreement on Safeguards art 7.2.

¹¹⁷ Agreement on Safeguards art 7.2.

¹¹⁸ Agreement on Safeguards arts 8 and 12.

¹¹⁹ Agreement on Safeguards art 7.4.

¹²⁰ WTO 'Report (2022) of the Committee on Safeguards to the Council for Trade in Goods' (adopted 24 October 2022) G/L/1435; G/SG/274, 25 October 2022, Annex 3.

extensions were made and communicated to the WTO Committee on Safeguards.¹²¹ These are distinct from safeguard measures initiated during these periods.

According to the current WTO statistics, Morocco's safeguard measure on wire rods and reinforcing bars had been in place the longest, having been first imposed on 30 May 2013.¹²² Morocco's safeguard measure was extended several times and was last extended from 31 December 2021 until 15 October 2023.¹²³ It was then terminated on 16 October 2023.¹²⁴ This safeguard measure was in place for a cumulative period of ten years, four months and fifteen days. This means that the measure was in force beyond the stipulated maximum duration of ten years by a developing country, under the Agreement on Safeguards.¹²⁵

Other safeguard measures that have been in place the longest are Indonesian safeguard measures on I and H sections of other alloy steel were initiated on 12 February 2014 and imposed on 21 January 2015; Morocco's safeguard measures on cold rolled sheets and plated or coated sheets first initiated on 11 June 2014 and imposed in May 2015; and Türkiye's safeguards measures on wallpaper and similar wall coverings were first initiated on 12 December 2014 and imposed in June 2015.¹²⁶

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- ¹²¹ WTO 'Extensions: Safeguard Measures' [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%40Symbol%3d+g%2fs%2f*+\)+and+\(+%40DocumentDate+%3e%3d+2022%2f01%2f01+00%3a00%3a00+\)+and+\(+%40DocumentDate+%3c%3d+2022%2f12%2f31+23%3a59%3a59+\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3d+g%2fs%2f*+)+and+(+%40DocumentDate+%3e%3d+2022%2f01%2f01+00%3a00%3a00+)+and+(+%40DocumentDate+%3c%3d+2022%2f12%2f31+23%3a59%3a59+)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true) (accessed 20 December 2022).
- ¹²² WTO 'Report (2022) of the Committee on Safeguards to the Council for Trade in Goods' (adopted 24 October 2022) G/L/1435; G/SG/274, 25 October 2022, Annex 3.
- ¹²³ WTO Committee on Safeguards 'Notification under Article 12.1(c) of the Agreement on Safeguards (Extension of the Existing Measure): Morocco – Wire Rods and Reinforcing Bars' G/SG/N/10/MAR/3/Suppl.5; G/SG/N/11/MAR/2/Suppl.5, 22 December 2021, para 8.
- ¹²⁴ WTO Committee on Safeguards 'Notification under Articles 7.2 and 12.1(c) of the Agreement on Safeguards (Termination of the Measures' G/SG/N/10/MAR/3/Suppl.6; G/SG/N/11/MAR/2/Suppl.6, 30 November 2023.
- ¹²⁵ Agreement on Safeguards arts 7.3 & 9.2. Read together, these provisions indicate that a developing country can apply and extend a safeguard measure for a maximum period of ten years.
- ¹²⁶ WTO 'Report (2022) of the Committee on Safeguards to the Council for Trade in Goods' (adopted 24 October 2022) G/L/1435; G/SG/274, 25 October 2022, Annex 3.

Doctrine of precedent

The doctrine of precedent is a common law doctrine which is derived from the principle of *stare decisis*.¹²⁷ According to this doctrine, courts rely on decisions of past cases to decide a case before them with similar circumstances.¹²⁸ While precedents are of a persuasive value, judges are mandated to obey them. It can however only be applied where courts are hierarchical since decisions of a higher court binds similar decisions by a lower court.¹²⁹ Lower courts therefore abide by the ratio of similar decisions of superior courts.¹³⁰ In common law jurisdictions, precedents are often followed owing to their great authority as they are considered a source of law.¹³¹ The doctrine of precedent has also been heavily relied on since it allows for predictability and coherence in the decision making process.¹³² Precise case reports are therefore essential in the application of precedents.¹³³

Noteworthy, the rule of precedent does not officially apply in the WTO and any decisions made in dispute settlement bind only the parties to the dispute and not other parties.¹³⁴ The Appellate Body has indicated that adopted GATT reports and WTO Panel and Appellate Body reports 'create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.'¹³⁵

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- ¹²⁷ S Rai 'Doctrine of Precedent in WTO' (2007) ResearchGate, https://www.researchgate.net/publication/23778477_Doctrine_of_Precedent_in_WTO (accessed 4 November 2022), 1.
- ¹²⁸ Rai (n 127) 1; see also T Meyer, 'How to Treat the WTO's Problem with Precedent' (2021) 54(3) *Vanderbilt Journal of Transnational Law* 587-610, 587
- ¹²⁹ Rai (n 127) 2.
- ¹³⁰ Rai (n 127) 1-2; see also Meyer (n 128) 600.
- ¹³¹ WV Schaefer 'Precedent and Policy' (1996) 34(1) *The University of Chicago Law Review* 3-25; see also J Komárek 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' 61 (1) (2013) *The American Journal of Comparative Law* 149-172
- ¹³² Rai (n 127) 2; see also Meyer (n 128) 587.
- ¹³³ ATL Chua 'Precedent and Principles of WTO Panel Jurisprudence' (1998) 16(2) *Berkeley Journal of International Law* 171-196, 174.
- ¹³⁴ E Gubbins 'Precedent in the WTO: Advantages of De Jure Stare Decesis' (2006) 9 *Trinity College Law Review* 70-90, 73.
- ¹³⁵ Appellate Body Report 'Japan – Alcoholic Beverages' 14-15. See also Appellate Body Report 'US – Shrimp (Article 21.5 – Malaysia)' para. 109.

The dispute settlement process at the WTO appears distinct but hierarchical. An aggrieved party starts the process by lodging a request for consultations with the WTO DSB.¹³⁶ In the event that consultations fail, the complainant can request the DSB for the establishment of a panel to hear the dispute.¹³⁷ The panel would then give recommendations in the form of a report which is adopted by the DSB.¹³⁸ A party who is not satisfied with the panel report can appeal to the DSB Appellate Body.¹³⁹ The Appellate Body will similarly give recommendations which are then adopted by the DSB.¹⁴⁰ At present, the Appellate Body is not functional, which means that any appeal will be into the void and the panel's decision will not be implemented. However, several Members have agreed to the Multi Party Interim Appeal Mechanism (MPIA), in which they agree that if either party disagrees with the panel decision, the matter can be 'appealed' to arbitration.¹⁴¹

Important to note, the Panel and Appellate Body's dispute outcomes are in the form of recommendations that are non-binding in nature.¹⁴² The DSB may also decline to adopt the recommendations, if reverse-consensus is reached, that is if *all* Members (including the applicant) vote against adoption of a report.¹⁴³ This is a major distinguishing feature with the decisions of common law courts that have a binding nature. Nonetheless, the hierarchical nature of the WTO dispute settlement process creates room for the application of the doctrine of precedent.¹⁴⁴

Although in theory precedent does not apply at the WTO, panels tend to follow decisions handed down by earlier panels and by the Appellate Body. This is made

¹³⁶ Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement (WTO DSU), art 4.1 - 4.4; see World Trade Organisation Secretariat *A Handbook on the WTO Dispute Settlement System* (Cambridge University Press 2017); R Yerxa and B Wilson *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005); D Palmeter *et al Dispute Settlement in the World Trade Organization* (Cambridge University Press 2022).

¹³⁷ WTO DSU, arts 4.7 & 6.

¹³⁸ WTO DSU, art 12.7.

¹³⁹ WTO DSU, art 16.4.

¹⁴⁰ WTO DSU, art 17.14.

¹⁴¹ See WTO 'Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum' JOB/DSB/1/Add.12, 30 April 2020

¹⁴² WTO DSU, art 19. Note, however, that if recommendations are not implemented, the aggrieved party can request arbitration and, finally, may request the right to retaliate.

¹⁴³ WTO DSU, arts 16.4 & 17.14.

¹⁴⁴ Rai (n 127) 8.

possible by the precise panel and Appellate Body reports that are published and circulated. As discussed, the doctrine of precedent is relevant only where the judicial system is hierarchical and where the court's decisions are published with precision.¹⁴⁵

The doctrine of precedent does not in a strict sense apply to the WTO DSB since the panels and Appellate Body are not bound by similar past decisions. The practice is, however, that they do not ordinarily deviate from giving similar interpretations to WTO agreements in the analysis of any dispute before them unless it is necessary to do so.¹⁴⁶ The panels have the option to adopt recommendations of the Appellate Body but are not bound by them.¹⁴⁷ As a gateway to providing predictability and security in multilateral trade, some decisions have been adopted several times by panels and the Appellate Body to the point that they have become *locus classicus*. For instance, decisions on the characteristics of 'product likeness', 'unforeseen development' and others.¹⁴⁸

In some instances, however, the Appellate Body has pronounced itself that panels are to abide by decisions of the Appellate Body.¹⁴⁹ Thus, once the Appellate Body makes a determination, the panels are mandated to abide by them. This issue was raised in *US - Stainless Steel (Mexico)*,¹⁵⁰ where the Appellate Body held in relation to a refusal by the panel to rely on a previous decision by the Appellate Body that: -

Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article

¹⁴⁵ Rai (n 127) 3; see also Chua (n 133) 174.

¹⁴⁶ WTO DSU, art 3.5. See also Rai (n 127) 9.

¹⁴⁷ Rai (n 127) 5.

¹⁴⁸ Relevant cases have been discussed a length in the Chapters Two and Five of this study.

¹⁴⁹ WTO DSU art 3.2.

¹⁵⁰ Appellate Body Report '*United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*' WT/DS344/AB/R, 30 April 2008.

3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.¹⁵¹

In the case of safeguard measures, the doctrine of precedents has been applied in the WTO DSB finding on unforeseen developments.¹⁵² The findings of the Appellate Body in *Argentina – Footwear (EC)* in relation to unforeseen developments vis-à-vis the finding of the panel is a notable case of the use of precedents in the resolution of safeguard measures complaints. According to the panel, following the omission of Article XIX of GATT in the Agreement of Safeguard, unforeseen developments were no longer significant in the application of safeguards. The Appellate Body however arrived at a different conclusion and found that both Article XIX of GATT and the Agreement on Safeguards applied, that is, the Agreement did not replace Article XIX.¹⁵³ It considered unforeseen developments to be relevant in the application of safeguard measures, its omission from the Agreement on Safeguards notwithstanding.¹⁵⁴ Subsequent panels agreed with the findings, which is why they subsequently applied the same rationale.¹⁵⁵

The challenge of the doctrine of precedent in the WTO DSU is the danger of replicating a wrong inference or interpretation by the Appellate Body of a WTO agreement provision to subsequent similar decisions by the panels.¹⁵⁶ This argument did not however go well with the Appellate Body in *US – Stainless Steel (Mexico)* who observed in their report that the panels need not challenge the findings of the Appellate Body on an issue since by so doing they would be ‘undermining the development of a coherent and predictable body of jurisprudence clarifying Members’ rights and obligations under the covered agreements’.¹⁵⁷ The above notwithstanding, the use of precedents at the WTO has been criticised more especially by the United States who questioned the value of

¹⁵¹ *US - Stainless Steel (Mexico)*, para 160.

¹⁵² Appellate Body Report ‘*Argentina – Footwear (EC)*’ para 91.

¹⁵³ Appellate Body Report ‘*Argentina – Footwear (EC)*’ paras 79, 81 & 82.

¹⁵⁴ As above.

¹⁵⁵ See for instance Panel Report ‘*US – Lamb*’ para 7.11.

¹⁵⁶ OpinJuris ‘The Role of Precedent at the WTO’ <https://opiniojuris.org/2008/05/02/the-role-of-precedent-at-the-wto/> (accessed 20 December 2022).

¹⁵⁷ *US - Stainless Steel (Mexico)*, para 161.

precedents in the Appellate Body decisions.¹⁵⁸ Subsequently, the operations of the WTO Appellate Body have been paralysed for this and other reasons.¹⁵⁹

Most African RECs' disputes settlement institutions have been structured in the form of courts, for instance, the COMESA Court of Justice,¹⁶⁰ EAC Court of Justice¹⁶¹ and ECOWAS Court of Justice.¹⁶² The SADC Administrative Tribunal is the decision-making body in that region.¹⁶³ These institutions have first instance divisions and appellate body divisions, which means that the structure is hierarchical. The decisions of the appellate bodies are binding on the first instance divisions. This means that they are bound by the doctrine of precedent. In this regard, decisions on e-commerce by the appellate body binds lower divisions. In addition, decisions of the regional courts are binding on Member States and national courts.¹⁶⁴

Building on the foregoing arguments and although precedent does not officially apply in the WTO, decisions of the DSB are likely to shape the applicability of safeguard measures to digital trade. For instance, the current rules and practice on unforeseen developments, as established by the DSB, would most likely influence future decisions relating to safeguard measures in digital trade, where a Member could claim that it was unforeseen that trade in a particular service would evolve the way it did when it agreed to open access to that service in its schedule of commitments. In addition, 'likeness' is cross cutting in the application of safeguard measures. If the DSB would in future have to deal with a case raising a similar issue for digital trade, there is a probability that the DSB would rely on the existing precedent, subject to necessary modifications to suit the circumstances of the digital trade environment. Thus, though precedent is not binding

¹⁵⁸ MC Andrade 'Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism' (2020) 11(2) *Journal of International Dispute Settlement* 262-277.

¹⁵⁹ As above; see also PV Bossche 'The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?' WTI Working Paper 02/2021, 4.

¹⁶⁰ COMESA Treaty art 19.

¹⁶¹ EAC Treaty art 9.

¹⁶² ECOWAS Revised Treaty art 15.

¹⁶³ SADC arts 9(2) & 10(6).

¹⁶⁴ See for instance the mandate of COMESA under COMESA 'About Us' <https://comesacourt.org/> (accessed 1 December 2023). See also East African Court of Justice Law Report 2012-2015, available at <http://repository.eac.int/bitstream/handle/11671/24326/Law%20reports%20EACJ%202012%20-2015%20EACJLR.pdf?sequence=1>, 155 & 161.

under the WTO, *locus classicus* decisions would likely influence future decisions by the DSB and decisions on safeguard measures in digital trade are not exempt.

6.3.2 Factors impacting the application of safeguard measures at the African level

As highlighted above, statistics show that African countries hardly apply safeguard measures. As discussed previously, only six out of forty-four African countries that are WTO Members initiated safeguard investigations, and only four African countries – Egypt, Madagascar, Morocco and South Africa – have applied WTO safeguard measures.¹⁶⁵

At the continental level, safeguard measures are hardly applied. The limited application of safeguard measures by African countries suggests that African countries are grappling with numerous challenges that limit them from initiating safeguard investigations and imposing safeguard measures. Both the Agreement on Safeguards and the General Agreement on Tariffs and Trade take cognisance of the need to support African Members as developing countries in their application of safeguard measures.¹⁶⁶ Thus, Africa enjoys special and differential treatment in the form of ‘de minimis import volume exemption’, application of its own safeguard measures, re-application of safeguard measures and the time-frame for extension of safeguard measures application.¹⁶⁷

The limited volumes of safeguard measures applied by African countries since 1995 however show a general laxity and/or inability to apply safeguard measures in Africa. This is attributed to several factors such as financial constraints, lack of technical expertise, availability of alternative remedies, low levels of industrialisation, low levels of trade, low levels of WTO bound rates, high cost of pursuing safeguard measures and lack of awareness of the importance of safeguard measures in trade.¹⁶⁸ Explained briefly, finance is a constraint due to the costs associated with developing relevant legal and

¹⁶⁵ WTO ‘Safeguards Measures by Reporting Member: 1995-2021’, available at https://www.wto.org/english/tratop_e/safeg_e/SG_MeasuresByRepMember.pdf.

¹⁶⁶ Agreement on Safeguards art 9; GATT art XIX.

¹⁶⁷ WTO ‘Technical Information on Safeguard Measures’ https://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm (accessed 10 October 2022).

¹⁶⁸ D Achach ‘Study on the Application and Impacts of Trade Remedies in the COMESA Region’ COMESA Study Report 2023, 77-79.

institutional frameworks, for instance, resourcing investigation authorities. Pursuing safeguard measures is also costly. There are also few experts on trade remedies, including safeguard measures, in the continent. Optional remedies such as import bans and quantitative restrictions also limit the application of safeguard measures. The levels of industrialisation and trade in Africa are also generally low. Lastly, there is a limited understanding on the procedures for and the importance of safeguard measures in promoting development and trade.¹⁶⁹

This section focuses on two main challenges that impact the application of safeguard measures by African countries, first, lack of technical capacity and, secondly, lack of relevant institutions and policies to investigate and apply safeguard measures.¹⁷⁰ These challenges are explored further below.

Lack of technical capacity

Like other aspects of world trade, lack of technical capacity is a major impediment to the application of safeguard measures by African countries. There is a general lack of technical capacity to participate in the multilateral trading system by African states.¹⁷¹ For instance, several African states lack technical experts on trade remedies.¹⁷² Few countries such as Egypt in a study commissioned under COMESA indicated that trade remedies investigators are sent to big law firms in the EU and US for specialised training hence, its increased involvement in trade remedies investigations.¹⁷³ Many African countries do not have resources to do this. Experts are lacking from both the private sector and within already established investigating authorities. Hence, the inability to lodge complaints or investigate trade remedies.¹⁷⁴

¹⁶⁹ As above, 77-79. See also, G Erasmus 'Trade Remedies in the African Trade Governance Context' (23 November 2021) <https://www.tralac.org/blog/article/15440-trade-remedies-in-the-african-trade-governance-context.html> (accessed 10 November 2023).

¹⁷⁰ G Erasmus 'Trade Remedies in the African Trade Governance Context' (23 November 2021) <https://www.tralac.org/blog/article/15440-trade-remedies-in-the-african-trade-governance-context.html> (accessed 10 October 2022).

¹⁷¹ WTO *Strengthening Africa's capacity to trade* (World Trade Organization 2021), 2.

¹⁷² Achach (n 168 above) 78.

¹⁷³ Achach (n 168 above) 78.

¹⁷⁴ Achach (n 168 above) 78.

The current African share of world trade is about three percent.¹⁷⁵ This is in spite of several measures put in place to boost Africa's participation in world trade. At the WTO, forty-four African Members through the African Group receive support from the WTO Development Division to achieve their obligations under the WTO.¹⁷⁶ The Aid for Trade initiative of the WTO has also supported Africa's infrastructural and trade capacity since 2006.¹⁷⁷ Several other initiatives are also in place to support Africa Members' capacity to meet their obligations under the respective WTO agreements.¹⁷⁸ These notwithstanding, most African countries still lack the necessary capacity to actively participate in the multilateral trading system.

Lack of relevant institutions and laws on safeguard measures

The application of safeguard measures can only be realised when there is a relevant institution mandated to initiate and investigate the application of safeguard measures.¹⁷⁹ The Agreement on Safeguards necessitates that investigations be conducted by 'competent authorities'.¹⁸⁰ This stems from the presence of relevant laws to allow for the creation of the respective safeguard measures investigation agencies.¹⁸¹

As discussed in detail in the fifth chapter of this study, very few African states have domesticated multilateral rules on safeguard measures. According to the WTO, thirty-seven (35) African countries have notified the Committee on Safeguards of their laws, regulations and administrative procedures on safeguard measures, namely, Angola, Botswana, Burkina Faso, Burundi, Cabo Verde, Cameroon, Chad, Congo, Cote D'Ivoire, Djibouti, Egypt, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia,¹⁸² Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Senegal, Seychelles, Sierra Leone, South Africa, Togo, Tunisia, Uganda, Zambia, and

¹⁷⁵ WTO (n 171) 3.

¹⁷⁶ WTO (n 171) 2.

¹⁷⁷ WTO (n 171) 3.

¹⁷⁸ See generally WTO (n 171).

¹⁷⁹ RS Ratna & RK Gupta *A Handbook on Safeguard Rules for Least Developed Countries* (ESCAP 2018).

¹⁸⁰ Agreement on Safeguards art 3.1.

¹⁸¹ As above.

¹⁸² WTO Committee on Safeguards 'Notification of Laws and Regulations under Article 12.6 of the Relevant Agreement' G/SG/N/1/LBR/1 (1 December 2017).

Zimbabwe.¹⁸³ Of these countries, twelve (12) notified that they have domestic legislations on safeguard measures, namely, Cameroon, Egypt, Ghana, Kenya, Liberia, Madagascar, Mauritius, Morocco, South Africa, Tunisia, Zambia and Zimbabwe.¹⁸⁴

Most of these countries, despite having national legislations, have not developed investigation authorities. The countries with investigation authorities are Cameroon: Ministry of Trade; Egypt: Trade Remedies Sector under the Ministry of Trade and Industry;¹⁸⁵ Ghana: International Trade Commission;¹⁸⁶ Kenya: Kenya Trade Remedies Agency;¹⁸⁷ Madagascar: National Authority for Trade Remedies termed the *Autorités nationales chargées des Mesures Correctives Commerciales*;¹⁸⁸ Mauritius: Trade Remedies Investigation Authority under the Ministry of Foreign Affairs, Regional Integration and International Trade; South Africa: Trade Remedies Directorates of the International Trade Administration Commission;¹⁸⁹ Tunisia: Ministry of Trade; and Zimbabwe: the Competition and Tariff Commission.¹⁹⁰ Not all established investigation authorities have, however, conducted investigations. For instance, despite being constituted in 2020, the Kenya Trade Remedies Agency is yet to conduct any safeguards investigations.¹⁹¹

Arising from the foregoing it is evident that few African countries have national legislations on safeguard measures, fewer countries have competent investigation authorities and some of the established authorities have not conducted any safeguard

¹⁸³ WTO 'Notifications on Safeguards Legislations' <https://notifications.wto.org/en/notification-status/safeguards> (accessed 10 May 2024).

¹⁸⁴ As above.

¹⁸⁵ Ministry of Trade and Industry 'Home' <http://www.mti.gov.eg/English/Pages/default.aspx> (accessed 20 November 2023).

¹⁸⁶ International Trade Commission 'Our services: Safeguard Measures' <https://www.gitc.gov.gh/service/safeguard> (accessed 20 November 2023).

¹⁸⁷ Kenya Trade Remedies Agency 'Home' <https://www.ketra.go.ke/home> (accessed 20 November 2023).

¹⁸⁸ WTO Committee on Anti-dumping Practices 'Notification Under Article 16.5 of the Agreement: Notification of the National Authority for Trade Remedies (ANMCC) G/ADP/N/193/MDG/Rev.1, 11 April 2017.

¹⁸⁹ International Trade Administration Commission 'Home' <http://www.itac.org.za/> (accessed 20 November 2023).

¹⁹⁰ Competition and Tariff Commission 'Home' <https://www.competition.co.zw/> (accessed 20 November 2023).

¹⁹¹ Kenya Trade Remedies Agency 'Trade Remedies Investigations And Evaluation Breadcrumb' <https://www.ketra.go.ke/trade-remedies-investigations-and-evaluation> (accessed 20 November 2023).

investigations. At the RECs level, while most of them have laws on safeguard measures, not all of them have investigation authorities in place, for instance the East African Community (EAC) Trade Remedies Agency is yet to be established.¹⁹²

6.4 Contextual analysis of the growth and application of safeguard measures to digital trade

The above sections have examined statistics and factors impacting the application of safeguard measures to physically traded goods and services at the international and African levels. To give an overview of the physical goods traded by the biggest traders in Africa, this paragraph briefly highlights net imports and exports by South Africa, Egypt and Morocco. According to the International Trade Centre statistics on trade, South Africa is a net importer of mineral fuels, oils and products; electrical machinery and equipment; nuclear reactors and machinery; pharmaceutical products; fertilisers; and articles of iron and steel, while it is a net exporter of vehicles; basic iron and steel; pearls and precious stones; and cereals.¹⁹³ Egypt is a net importer of nuclear reactors and machinery; organic chemicals; iron and steel; cereals; plastics and articles; electrical machinery; pharmaceutical products and others, while it is a net exporter of mineral fuels, oils and products, mineral waxes and bituminous substances.¹⁹⁴ Morocco on the other hand is a net importer of mineral fuels, oils and products, mineral waxes and bituminous substances; electrical machinery and equipment; nuclear reactors and machinery; cereals; salt; sugar; and aircraft and spacecraft, while it is a net exporter of vehicles.¹⁹⁵ Accordingly, the products for which these countries are net importers are the products

¹⁹² NC Rotich 'Institutional Mechanisms for the Resolution of Trade Remedies Disputes under the East African Community Customs Union and by Member States' (2020/2021) 1(1) *East African Community Law Journal* 219-243, 241.

¹⁹³ ITC Trade Map 'Bubble graph on South Africa import growth versus world export growth' https://www.trademap.org/Product_SelProductCountry_Graph.aspx?nvpm=1%7c710%7c%7c%7c%7cTOTAL%7c%7c%7c2%7c1%7c1%7c1%7c1%7c1%7c1%7c1%7c1%7c1%7c2 (accessed 1 December 2023).

¹⁹⁴ ITC Trade Map 'Bubble graph on Egypt import growth versus world export growth' https://www.trademap.org/Product_SelProductCountry_Graph.aspx?nvpm=1%7c818%7c%7c%7c%7cTOTAL%7c%7c%7c2%7c1%7c1%7c1%7c1%7c1%7c1%7c1%7c1%7c1%7c2 (accessed 1 December 2023).

¹⁹⁵ ITC Trade Map 'Bubble graph on Morocco import growth versus world export growth' https://www.trademap.org/Product_SelProductCountry_Graph.aspx?nvpm=1%7c504%7c%7c%7c%7cTOTAL%7c%7c%7c2%7c1%7c1%7c1%7c1%7c1%7c1%7c1%7c1%7c1%7c2 (accessed 1 December 2023).

most likely to be subject to safeguard investigations, while the products for which these countries are net exporters are the projects on which they are most likely to face safeguard measures.

As discussed, there currently are no substantive rules on digital trade and on the application of trade rules such as safeguard measures to digital trade. Further, no safeguard measure has yet been applied to digital trade. This study is therefore undertaken to identify the potential challenges and benefits and to provide an outlook of the framework for applying safeguard measures to digital trade. The main aim is to identify ways for protecting African domestic industries in the event that they are impacted by surges in imported digitally traded data and services. The world is currently witnessing the growth of digital trade, but the overall growth of the digital platform development is impacted by different factors. For the purposes of this study, the following sections examine the factors that impact the growth of African digital trade.

The subsequent sections of this chapter proceed to analyse the prospects for and problems of applying safeguard measures to digital trade.

6.5 Issues affecting the growth of African digital trade

Digital trade arguably has the potential of transforming African businesses. While this is the case, there are issues affecting the growth of African digital trade. The International Trade Centre (ITC) and World Economic Forum (WEF) highlighted the challenges of low internet penetration in most African states, unprofitable start-ups, low trust levels by consumers, low internet skills, fragmented markets, and cross-border e-payments related barriers.¹⁹⁶ Because of these challenges, African digital trade remains relatively small.¹⁹⁷ Further, the share of African digital trade in global digital trade is relatively low. UNCTAD, for instance, notes that while there was an annual increase by twelve percent of global

¹⁹⁶ International Trade Centre & World Economic Forum 'Africa E-commerce Agenda: Roadmap for Action' (September 2019), available at https://www3.weforum.org/docs/WEF_Africa_EComm_EN.pdf, 4.

¹⁹⁷ As above, 5; see also F Sucker 'Navigating Economic Inequalities Alongside African Digital Market Integration: The Role of the AfCFTA Competition Protocol' 2025) 52(1) *Legal Issues of Economic Integration* 5–44, 10.

digitally delivered services between 2005 and 2019, Africa's share was less than twenty percent.¹⁹⁸

The next section will explore in detail the following issues affecting the growth of African digital trade: inadequate digital trade policies, infrastructure and internet connectivity, inadequate digital data, taxation, digital skills divide, multiple currencies, digital protectionism, concentration of digital markets in developed countries, consumer protection, cybersecurity and Covid-19 and African digital trade.

6.5.1 Inadequate digital trade policies

While there has been a continuous evolution of digital trade, African digital trade policies have not kept up with it.¹⁹⁹ Africa falls behind in formulating and adopting vital regulations that will keep them up to speed with global digital trade trends.²⁰⁰ This is notwithstanding the existence of some e-commerce policies and strategies. According to 2021 Statistics by UNCTAD, out of 54 African countries, 33 countries had e-transactions legislation in place; 33 countries (increased to 38 in 2024) had data protection and privacy legislation; 39 countries had cybercrime legislation; and 28 countries had online consumer protection legislation.²⁰¹ According to the statistics, other African countries either had draft legislation, did not have any legislation or lacked data on the existence of e-commerce legislation.²⁰² Additionally and as highlighted in the fourth chapter of this study, only four African RECs i.e. EAC, COMESA, ECOWAS and SADC, have existing e-commerce policies and strategies in place.²⁰³ At the continental law, the AfCFTA in February 2024 adopted the Protocol to the AfCFTA on Digital Trade.²⁰⁴

¹⁹⁸ UNCTAD 'Digital trade: Opportunities and actions for developing countries' Policy Brief No 92 of 2022, 2.

¹⁹⁹ International Trade Centre & World Economic Forum (n 196) 5.

²⁰⁰ International Trade Centre & World Economic Forum (n 196) 8.

²⁰¹ UNCTAD 'Summary of Adoption of E-commerce Legislation Worldwide' (14 December 2021) <https://unctad.org/topic/ecommerce-and-digital-economy/ecommerce-law-reform/summary-adoption-e-commerce-legislation-worldwide> (accessed 2 November 2022).

²⁰² As above.

²⁰³ Chapter Four of this study, section 4.3.

²⁰⁴ Chapter Four of this study, section 4.2.2.

Important to note is that there is no inclusivity in the existing African laws and policies on e-commerce.²⁰⁵ UNECA, AU, AfDB and UNCTAD note in their report that the existing African e-commerce laws are largely inconsistent.²⁰⁶ There is therefore a need for harmonisation of existing e-commerce laws and policies. UNCTAD observes for instance that a common digital trade legal instrument will provide Africa with a common position and opportunity to support African digital trade initiatives and support the positioning and boost Africa's contribution to global digital trade.²⁰⁷ The legal instrument will also strengthen Africa's collaboration efforts and contribute to e-commerce debates at the multilateral level.²⁰⁸ The AfCFTA Protocol on Digital Trade has proposed to resolve these challenges by, in particular, harmonising existing African digital trade and e-commerce laws and policies, creating a single digital trade law and platform for African digital trade and providing a guide for formulating digital trade policies.²⁰⁹

As a result of the challenge of inadequate digital trade policies in Africa, international companies have dominated global e-commerce value chains.²¹⁰ India and South Africa in their 2020 Communication to the WTO Work Programme on E-commerce observed that the ability of developing countries to regulate their digital space and participate in global e-commerce value chains has been affected by market composition and the power of firms in developed countries to set prices.²¹¹ The Communication further notes that the digital divide that currently exists between developed and developing countries could be bridged by allowing developing countries to develop policies that allow them to derive benefits, for instance, through the use of tariff policies in digital trade.²¹²

²⁰⁵ International Trade Centre & World Economic Forum (n 196) 9.

²⁰⁶ UNECA, AU, AfDB and UNCTAD 'Assessing Regional Integration in Africa: Next Steps for the African Continental Free Trade Area' (ECA 2019), 229.

²⁰⁷ UNCTAD 'Reaping the Potential Benefits of the African Continental Free Trade Area for Inclusive Growth' Economic Development in Africa Report 2021, available at <https://unctad.org/webflyer/economic-development-africa-report-2021>, 155.

²⁰⁸ UNCTAD 'Economic Development in Africa Report 2021' (n 207) 180.

²⁰⁹ See AfCFTA Protocol on Digital Trade art 2; see also A Lemma, M Mendez-Parra & L Naliaka 'The AfCFTA: unlocking the potential of the digital economy in Africa' (Overseas Development Institute Report 2022), 21.

²¹⁰ UNCTAD 'Economic Development in Africa Report 2021' (n 207) 155.

²¹¹ WTO Work Programme on E-commerce 'The E-commerce Moratorium: Scope and Impact – Communication from India and South Africa' WT/GC/W/798 (11 March 2020), para 2.9.

²¹² WTO Work Programme on E-commerce 'WT/GC/W/798' para 2.10.

Thus, while a continental legal instrument on digital trade currently exists, it is yet to be enforced as negotiations are ongoing to develop annexes that are crucial for the enforcement of the Digital Trade Protocol.²¹³ Therefore, the lack of an operation continental legal instrument on digital trade coupled with fragmented regional and domestic laws inhibit the growth of African digital trade as there is no infrastructure to regulate and oversee the creation and performance of African digital platforms. It also results in diversity in digital trade processes thus weakening the efforts and initiatives of intra-African digital trade. Subsequently, there is no framework to protect African domestic industries in the likely event of increased volumes of digital trade from outside Africa. There is therefore a need to implement the continental digital trade law to regulate Africa's digital trade environment and to provide a framework for monitoring and collecting African digital trade data.

6.5.2 Infrastructure and internet connectivity

The growth of internet connectivity has impacted multilateral trade in goods and services by creating digital platforms and markets.²¹⁴ As a result, there has been increased cross-border e-commerce owing to the continued shift from the conventional forms of trade in goods and services to the digital platform.²¹⁵ The trends of the shifts vary across the world and while the shift is more advanced in other parts of the world, Africa is lagging behind.²¹⁶ Poor internet connectivity and infrastructure are major challenges affecting the growth of Africa's digital trade. Anie discusses that the development of the internet is characterised by the numbers of host computers, internet service providers and internet users.²¹⁷ The growth of Africa's internet connectivity is therefore assessed by examining these factors alongside their corresponding growth at the global levels.

²¹³ Chapter Four of this study, section 4.2.2.

²¹⁴ E Bekkers, R Koopman, G Sabbadini & R Teh 'The impact of digital technologies on developing countries' trade' in M Smeets (eds) *Adapting to the Digital trade era: challenges and opportunities* (World Trade Organization 2021) 38.

²¹⁵ Bekkers et al (n 214) 38.

²¹⁶ Tralac 'Trade in the Digital Economy' (Tralac Guide 2019), 6.

²¹⁷ SO Anie 'Internet Accessibility: Challenges before the African Nations' (2015) 6(2) *Journal of Information and Knowledge Management* 207-211, 207.

There is a big digital divide in Africa and a majority of the people in remote parts of Africa have limited access to and literacy on technology.²¹⁸ This is despite an increase in internet connectivity across Africa over the years,²¹⁹ where internet access by Africans rose from 16% in 2013 to 25% in 2018.²²⁰ Significantly, Africa's internet access in 2019 was at the rate of 40% in comparison to 60% in other parts of the world.²²¹ According to the UNECA, AU, AfDB and UNCTAD 2019 Report, Morocco, Seychelles and Cabo Verde were the three most internet connected countries in Africa with connection rates of 61.76%, 58.77% and 57.16% respectively.²²² On the other hand, Eritrea, Somalia and Guinea-Bissau were the three least internet connected African countries at the connection rates of 1.31%, 2% and 3.93% respectively.²²³

Additionally, compared to high-income countries that had 98% mobile penetration, Sub-Saharan Africa had the least mobile penetration at 73% in 2014.²²⁴ The latest trends however show that Africa's mobile connections have grown significantly and Africa is currently the second-largest most mobile connected global region. In particular, by 2016 420 million Africans had subscribed to mobile phones.²²⁵ The subscribers increased to about half a billion in 2020. Statistics also show that women are less likely to use digital technologies than men.²²⁶ This is also the case with the older population versus the youth, whereby the youth use the internet significantly more.²²⁷

There has been increased usage of 4G technology in Africa and projections indicate that by 2025, there will be 21% usage of 4G technology compared to 5% in 2019.²²⁸ The increased usage of 4G technology is expected to bridge the digital divide

²¹⁸ UNECA, AU, AfDB and UNCTAD (n 205) 238.

²¹⁹ C Igue, A Alinsato & T Agadjouede 'E-commerce in Africa: Issues and Challenges' in M Smeets (eds) *Adapting to the Digital trade era: challenges and opportunities* (World Trade Organization 2021) 118.

²²⁰ As above, 118.

²²¹ Tralac 'Trade in the Digital Economy' (Tralac Guide 2019), 6.

²²² UNECA, AU, AfDB and UNCTAD (n 206) 239.

²²³ UNECA, AU, AfDB and UNCTAD (n 206) 239.

²²⁴ World Bank Group 'Digital Dividends Overview' (2016) *World Development Report*, 6.

²²⁵ GSMA 'The Mobile Economy: Sub-Saharan Africa 2017' (GSMA Association 2017) 2-3.

²²⁶ As above.

²²⁷ World Bank Group 'Digital Dividends Overview' (2016) *World Development Report*, 7-8. See also GSMA 'The Mobile Economy: Sub-Saharan Africa 2017' (GSMA Association 2017) 3.

²²⁸ C Igue, A Alinsato & T Agadjouede 'E-commerce in Africa: Issues and Challenges' in M Smeets (eds) *Adapting to the Digital trade era: challenges and opportunities* (WTO 2021) 119.

between Africa and the rest of the world. While this is the case, the development of 5G – fifth generation of mobile technologies – exerts pressure on Africa to ‘catch-up’ with the rest of the world in its usage.²²⁹ The US and China in 2021 had the highest 5G adoption rates in the world.²³⁰ This evidences the lack of information communication technology (ICT) in Africa as it largely, and belatedly, adopts sophisticated technologies from other parts of the world.²³¹

Thus, while there has been a general growth in Africa’s internet connectivity and infrastructure, it is still lagging behind the rest of the world. Arising from this, the volume of African digital trade is impacted since Africa is unable to effectively trade digitally with the rest of the world and amongst itself. This also impacts digital data collection since there are no existing robust frameworks on data collection as is discussed further below. Significantly, Africa’s poor internet connectivity and infrastructure impede the analysis of digital trade volumes and particularly digital imports into Africa and across Africa, which impacts the analysis of the relevance of the application of safeguard measures.

6.5.3 Digital skills divide

In addition to digital connectivity and infrastructural divide, the digital skills divide is a big hindrance to the growth of Africa’s digital trade. Compared to the rest of the world, there is a huge digital skills divide in Africa.²³² For instance, a significant percentage of Africans lack basic skills on computer and internet usage.²³³ Ndonga observes that the African digital skills divide has been caused by lack of ICT education and training and a general cultural attitude by Africans which are characterised by a preference for face-to-face

²²⁹ International Telecommunication Union (ITU) ‘5G - Fifth generation of mobile technologies’ <https://www.itu.int/en/mediacentre/backgrounders/Pages/5G-fifth-generation-of-mobile-technologies.aspx#:~:text=5G%20technologies%20support%20applications%20such,machine%20communications%20for%20industry%20automation>. (accessed 10 December 2022).

²³⁰ UNCTAD ‘Cross-border data flows and development: For whom the data flow’ (Digital Economy Report 2021) 2.

²³¹ D Ndonga ‘E-commerce in Africa: Challenges and Solutions’ (2012) 5 *African Journal of Legal Studies* 243 –268, 252.

²³² Africa Trade Policy Centre ‘Brief on E-commerce in Africa’ (UNECA 2018), available at <https://hdl.handle.net/10855/41720>, 11-12.

²³³ Ndonga (n 231) 252.

transactions over electronic-enabled transactions which are viewed to be unfriendly and rude.²³⁴

The lack of digital skills is witnessed at the levels of both the consumers and businesses/vendors who oftentimes would not understand how to improve their digital platforms to reach a bigger consumer base and adapt it to the frequent changes in technology.²³⁵ The urban-rural digital skills divide is also a significant impediment to the growth of digital literacy and inclusivity in Africa.²³⁶ There is therefore a need to bridge Africa's digital skills divide.

6.5.4 Inadequate digital data

There is a general scarcity of digital trade data worldwide.²³⁷ This is in spite of the continuous growth of the digital trade environment. UNECA and others note that there is inadequate data on the exact estimates of digital trade contribution to international trade since existing estimates hardly differentiate between domestic and cross-border digital trade.²³⁸ Further, Africa's e-commerce platforms such as Jumia, Kilimall, Konga, Bidorbuy and takealot focus on domestic e-commerce and only insignificantly on cross-border e-commerce.²³⁹ It therefore is difficult to estimate the amounts of cross-border e-commerce taking place in these African platforms.

While digital transformation has been instrumental in boosting cross-border e-commerce, it has brought with it the risk of data locations due to the flow of data across borders in the course of trade.²⁴⁰ The presence of limited African servers impedes data

²³⁴ Ndonga (n 231) 253-254.

²³⁵ Boston Consulting Group 'How Online Market Places Can Power Employment in Africa' <https://www.bcg.com/publications/2019/how-online-marketplaces-can-power-employment-africa> (accessed 4 December 2022).

²³⁶ Afr-ix Telecom 'The challenges of connectivity in Africa at Digital Infra Africa 2022' <https://afr-ix.com/the-challenges-of-connectivity-in-africa-at-digital-infra-africa-2022/> (accessed 4 December 2022).

²³⁷ UNCTAD 'Digital trade: Opportunities and actions for developing countries' Policy Brief No 92 of 2022, 2; See also N Mishra *International Trade Law and Global Data Governance* (Hart Publishing 2024), chapter 5.

²³⁸ UNECA, AU, AfDB & UNCTAD (n 206) 229.

²³⁹ UNECA, AU, AfDB & UNCTAD (n 206) 231.

²⁴⁰ AF Lemma 'E-Commerce: The Implications of Current WTO Negotiations for Economic Transformation in Developing Countries' (2017) *Supporting Economic Transformation* 14.

collection since the low number of servers limits Africa's capacity to store its data locally. Instead, it has to rely on foreign servers which are often curtailed by data privacy laws and foreign presence.²⁴¹ The data from foreign digital platforms are not always readily available and may be costly to access.²⁴² This results from data localisation and policies associated with it.²⁴³ Beyleveld and Sucker discuss that there are only six data collection centres in Africa of which five are located in Kenya and one in Tanzania.²⁴⁴ As a result, most African countries rely on data from foreign digital platforms.

While it is easier to collect data on physically traded goods and services, since it is easy to identify three elements; nature, value and location of the good or service, these three elements cannot be easily established in the case of digital trade, hence, statistics on digital trade are not easily available.²⁴⁵ Conventional rules of trade, for instance, rules of origin, cannot be applied to digital trade. There is also uncertainty as to what constitutes digital trade data, hence, the assessment of digital trade data becomes more complex.²⁴⁶ UNCTAD observes that 'cross-border data flows' should not be treated as e-commerce or digital trade.²⁴⁷

Adequate digital trade data is vital in assessing whether or not it is necessary to impose safeguard measures since any safeguard measure application is preceded by investigations to ascertain that there has been increased importation of digital trade in quantities that cause or threaten to cause serious injury to a domestic industry.²⁴⁸ The foregoing challenges on collecting Africa-specific digital trade data is a great impediment to possible safeguard investigations and measures by African countries. This is because, without data, African countries cannot assess the extent to which digital trade volumes impact the performance of domestic industries dealing in like digital data or services.

²⁴¹ A Lemma, M Mendez-Parra and L Naliaka 'The AfCFTA: unlocking the potential of the digital economy in Africa' (Overseas Development Institute Report 2022) 18-19.

²⁴² UNCTAD 'Cross-border data flows and development: For whom the data flow' (Digital Economy Report 2021) 3.

²⁴³ A Beyleveld & F Sucker 'Cross-border Data Flows in Africa: Policy Considerations for the AfCFTA Protocol on Digital Trade' (2022) ResearchGate.

²⁴⁴ As above, 65.

²⁴⁵ UNCTAD Digital Economy Report 2021 (n 242) 5.

²⁴⁶ UNCTAD Digital Economy Report 2021 (n 242) 5.

²⁴⁷ UNCTAD Digital Economy Report 2021 (n 242) 5.

²⁴⁸ UNCTAD Digital Economy Report 2021 (n 242) 5.

Thus, assessing the exact data and availability for purposes of safeguard measures investigations is a big challenge.

6.5.5 Taxation

As discussed previously, there is a moratorium on the imposition of customs duties on electronic transmissions. Hence, taxes are currently not imposed on digital trade/e-commerce. Even if the moratorium did not exist, discussions on the application or reduction of tariffs on e-commerce would not be meaningful owing to the lack of accurate data on e-commerce making it impossible to assess tariffs on e-commerce in goods and services.²⁴⁹ There is also no law regulating the application of tariffs on e-commerce in goods at the multilateral and regional levels. Lemma discusses that the closest legal instrument regulating tariff application and removal in e-commerce goods is the plurilateral WTO Information Technology Agreement.²⁵⁰ Very few African WTO Members have signed this Agreement, hence, its impact on taxing African e-commerce is insignificant.²⁵¹ Discussions on tariff applications and reductions on digital trade are however important owing to the continuous increase in digital trade. Lemma observes that high technology worldwide imports rose from USD 12.09 billion in 1988 to USD 124.4 billion in 2016.²⁵²

In addition to the absence of substantive data and lack of policies on taxation of cross-border e-commerce at the African level and as highlighted above, the WTO moratorium on the imposition of customs duties on electronic transmissions has also derailed initiatives to regulate taxation of digital trade.²⁵³ As a result, there is loss of tariffs

²⁴⁹ AF Lemma 'E-Commerce: The Implications of Current WTO Negotiations for Economic Transformation in Developing Countries' (2017) *Supporting Economic Transformation* 9-10.

²⁵⁰ As above, 10.

²⁵¹ Four African countries have signed the ITA; Egypt, Mauritius, Morocco, Seychelles. See WTO 'Schedule of Concessions' https://www.wto.org/english/tratop_e/inftec_e/itscheds_e.htm (accessed 26 November 2022).

²⁵² AF Lemma 'E-Commerce: The Implications of Current WTO Negotiations for Economic Transformation in Developing Countries' (2017) *Supporting Economic Transformation* 10-11.

²⁵³ WTO General Council 'The Moratorium on Customs Duties on Electronic Transmissions: Need for Clarity on its Scope and Impact' WT/GC/W/833 (8 November 2021).

and other charges that could have otherwise been imposed, most especially, by developing countries.²⁵⁴

6.5.6 Multiple currencies

There is currently no single currency for trade at the continental level. The idea to introduce a single African currency at the continental level was conceived in 1991 by the African Union pursuant to the Treaty Establishing the African Economic Community.²⁵⁵ It was agreed to establish a single African currency alongside the African monetary union and an African central bank.²⁵⁶ Some progress has however been made in realising this as there is a single initiative currently in place for harmonising African multiple currencies in continental trade, the Pan African Payment and Settlement System (PAPSS) which aims to secure money flows across Africa.²⁵⁷ PAPSS also aims to reduce high costs associated with exchange of currencies and make payments instant.²⁵⁸ PAPSS was launched in January 2022 and as of July 2024, thirteen central banks, fifty-one commercial banks and five switches had joined PAPSS network.²⁵⁹ It is projected that all central banks will have signed their membership by end of 2024, and commercial banks by end of 2025.²⁶⁰

At the RECs level, the CFA franc single currency has since 1945 brought together francophone countries within the Western African region under the West African Economic and Monetary Union.²⁶¹ Further, the Economic Community of West African

²⁵⁴ WTO Work Programme on E-commerce 'WT/GC/W/798' (n 1) para 2.6.

²⁵⁵ Treaty Establishing the African Economic Community, adopted 3 June 1991, entered into force 12 May 1994, art 6 (2) (f) (iii).

²⁵⁶ As above.

²⁵⁷ The Pan-African Payments and Settlement System 'About PAPSS' <https://papss.com/about-us/> (accessed 5 December 2022).

²⁵⁸ As above.

²⁵⁹ The Pan-African Payments and Settlement System 'Network' <https://papss.com/network/> (accessed 5 July 2024).

²⁶⁰ African Union 'The Pan-African Payments and Settlement System' <https://au-afcfta.org/operational-instruments/papss/#:~:text=The%20Pan-African%20Payment%20and%20Settlement%20System%20%E2%80%93%20PAPSS,and%20contributes%20to%20financial%20integration%20across%20the%20regions> (accessed 5 December 2022).

²⁶¹ See ECOWAS 'History' https://ecowas.int/?page_id=61669 (accessed 6 December 2022). See also FD Constant 'The CFA Franc Devaluation and Output Growth in the Franc Zone' (2012) 3(1) *International Journal of Financial Research* 40-48.

States (ECOWAS) in 2003 conceived the idea to adopt 'eco' as a single currency but it is yet to be launched. Eco was expected to be launched in 2020 but this has since been moved to 2027.²⁶² In the SADC region, it was expected that a single currency would be developed by 2018 but this deadline was missed.²⁶³ Plans are underway for the development of a single currency. Noteworthy, the use of South African Rand has been adopted in several countries within the SADC region.²⁶⁴ In the EAC it was hoped that a single currency would be adopted by 2024 in line with the Protocol on the establishment of EAC Monetary Union²⁶⁵ but this projection period was considered in December 2022 to be too soon, hence, a new deadline of 2031 has been set.²⁶⁶

In addition to multiple currencies, payment on delivery compared to electronic payments are adopted by business-to-consumers e-commerce in Africa.²⁶⁷ A majority of Africans also prefer cash payments over online payments as a majority of them do not own a bank account.²⁶⁸ For instance, a 2021 statistics by the United States' International Trade Administration showed that only 10% and 2% of Africans owned debit cards and credit cards respectively.²⁶⁹ Further, 40% of individuals in Africa owned a financial institution or mobile money account.²⁷⁰ The rest of Africa's population prefers cash payments. Consequently, companies have been forced to set up offices in various

²⁶² ECOWAS 'ECOWAS Commission Organises Technical Committee Meeting On Ecowas Single Currency Programme' <https://ecowas.int/?p=52560> (accessed 5 December 2022).

²⁶³ Southern African Development Community 'Single Currency' <https://www.sadc.int/integration-milestones/single-currency#:~:text=The%20final%20step%20in%20the,the%20attainment%20of%20this%20milest one> (accessed 6 December 2022).

²⁶⁴ Jy Wang, I Masha, K Shirono, & L Harris 'The Common Monetary Area in Southern Africa: Shocks, Adjustment, and Policy Challenges' (2007) IMF Working Paper, WP/07/158.

²⁶⁵ EAC 'Plans to put in place East African single currency by 2024 well underway' (28 January 2020) <https://www.eac.int/press-releases/1657-plans-to-put-in-place-east-african-single-currency-by-2024-well-underway> (accessed 6 December 2022). See also EAC Monetary Union Protocol, arts 2(4)(h) & 18(1).

²⁶⁶ The East African 'EAC member states not ready yet for single currency rollout' (3 December 2022) <https://www.theeastafrican.co.ke/tea/business/eac-to-wait-longer-for-monetary-union-4042080> (accessed 7 December 2022).

²⁶⁷ UNECA, AU, AfDB & UNCTAD (n 206) 242.

²⁶⁸ International Trade Administration 'The Rise of E-commerce in Africa' <https://www.trade.gov/rise-ecommerce-africa> (accessed 10 December 2022).

²⁶⁹ As above. In terms of populations owning bank accounts, Kenya leads with 88% of its population, followed by South Africa at 82% and Nigeria 51% of its population.

²⁷⁰ A Lemma, M Mendez-Parra & L Naliaka 'The AfCFTA: unlocking the potential of the digital economy in Africa' (Overseas Development Institute Report 2022) 20.

jurisdictions to provide for cash payments.²⁷¹ This has to a large extent inhibited the growth of Africa's digital trade.²⁷² It also shows that there is minimal trust in Africa's e-commerce. The lack of a single payment platform, multiple currencies and exchange rates costs have also contributed to the preference for 'payments on delivery'.²⁷³

6.6.7 Digital protectionism

Owing to the lack of a multilateral law or framework for regulating digital trade, states have significant discretion in regulating their digital environment.²⁷⁴ This is further buttressed by the lack of clarity on whether or not trade rules on physical goods and services apply to digital trade.²⁷⁵ As a result, there have been increased cases of digital protections.²⁷⁶ Digital protectionism is characterised by barriers applied to e-commerce and cross-border flow of data.²⁷⁷ The barriers are country-specific and depend on what the country wants to protect or develop, for instance, to grow the domestic digital environment.²⁷⁸ Protectionist measures alter the conditions of trade in the market in a manner that favour domestic over foreign producers. Digital protection measures would take the following forms: -

.....localisation requirements; restrictions on cross-border data flow; system of national protection of intellectual property rights; discriminatory, unique standards or burdensome testing; filtering or blocking; restrictions on electronic payment systems or the use of encryption; cybersecurity threats and forced technology transfer.²⁷⁹

China and the US have been cited severally for imposing digital protectionist measures.²⁸⁰ China's law on cybersecurity is considered protectionist owing to its

²⁷¹ Ndonga (n 231) 254.

²⁷² UNECA, AU, AfDB & UNCTAD (n 206) 242.

²⁷³ UNECA, AU, AfDB & UNCTAD (n 206) 242.

²⁷⁴ SA Aaronson 'What Are We Talking about When We Talk about Digital Protectionism?' (2018) 18(4) *World Trade Review* 1-37, 27.

²⁷⁵ Aaronson (n 274) 28

²⁷⁶ Aaronson (n 274) 7.

²⁷⁷ Aaronson (n 274) 3.

²⁷⁸ Aaronson (n 274) 28.

²⁷⁹ N Topornin, D Pyatkina, & Y Bokov 'Government regulation of the Internet as instrument of digital protectionism in case of developing countries' (2021) *Journal of Information Science* 1-14, 1.

²⁸⁰ Z Fan & AK Gupta 'The Dangers of Digital Protectionism' (2018) *Harvard Business Review*. See also Aaronson (n 274).

requirement to locally store data.²⁸¹ Further, China's 2018 standardisation law sought to favour its local firms and products over international firms and products.²⁸² Its intention to protect 'indigenous innovation' was considered discriminatory and protectionist.²⁸³ Other notable digital protectionist measures are; India in 2018 changed its foreign direct investment policy in a manner that discriminated against foreign e-commerce firms; Italy in 2018 enacted a law that protects cinemas and discriminates against video-on-demand services; and in Africa, Kenya was in 2018 cited for including a requirement for local storage of sensitive personal data under its data protection law.²⁸⁴ These are some of the manifestations of digital protectionism in e-commerce and related regulations.

Aaronson observes that without shared norms and definitions, it would be difficult to regulate digital protectionism.²⁸⁵ There is therefore a need to develop a universal law to provide for shared norms and definitions of key digital trade terminologies. In the alternative, non-binding norms and principles could be developed for states to implement.²⁸⁶ The resulting effects of digital protectionism are instability of the internet, limitation to access essential information, threats to cybersecurity and increased costs of essential capital goods, limited global value chain participation, economic inefficiencies, damage to a country's reputation and reciprocal protectionist measures.²⁸⁷ Digital protectionism further distorts both domestic and international trade by for instance creating data islands.²⁸⁸

6.5.8 Concentration of digital markets in developed economies

There is a concentration of digital markets in developed economies and more particularly, in the US and East Asia whose combined market capitalisation in 2019 was 90% of the world's 70% biggest digital platforms.²⁸⁹ In 2021, 90% of the biggest digital platforms had

²⁸¹ N Cory 'The Ten Worst Digital Protectionism and Innovation Mercantilist Policies of 2018' (2019) *Information Technology & Innovation Foundation*, available at <https://www2.itif.org/2019-worst-mercantilist-policies.pdf>.

²⁸² Cory (n 281) 5.

²⁸³ Cory (n 281) 5.

²⁸⁴ Cory (n 281) 13-26.

²⁸⁵ Aaronson (n 274) 3.

²⁸⁶ Fan & Gupta (n 280).

²⁸⁷ Cory (n 281) 4.

²⁸⁸ Aaronson (n 274) 3-4. See also Fan & Gupta (n 280).

²⁸⁹ WTO Work Programme on E-commerce 'The E-commerce Moratorium: Scope and Impact –

their markets established in the US and China.²⁹⁰ Africa's share was less than one percent.²⁹¹ While the world's biggest marketplaces such as Microsoft, Google, Amazon, Apple, Facebook, Alibaba and Tencent are well established outside Africa, they have but a small presence in Africa.²⁹²

Africa's digital trade infrastructure has been impacted by the lack of a single-continental marketplace.²⁹³ As highlighted, almost all of the digital trade in Africa takes place through domestic marketplaces i.e. digital platforms situated in specific countries. The International Trade Centre (ITC) observes that 1% of Africa's marketplaces account for 60% of Africa's e-commerce volume.²⁹⁴ Significantly, existing African e-commerce marketplaces are concentrated in select African countries, particularly, South Africa, Egypt, Kenya, Nigeria, Ghana, Algeria, Tunisia, Morocco and Senegal.²⁹⁵ There was no comprehensive data on marketplaces in other African countries.²⁹⁶ Africa is also dominated by start-ups and small and medium-sized enterprises whose growth and competitiveness have been derailed by existing challenges such as poor internet connectivity and inadequate policies.²⁹⁷ The non-profitability of many African start-ups is a big challenge to the growth of Africa's e-commerce.²⁹⁸

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- 290 Communication from India and South Africa' WT/GC/W/798 (11 March 2020), para 3.4.
UNCTAD 'Cross-border data flows and development: For whom the data flow' (Digital Economy Report 2021), 2.
- 291 As above.
- 292 ITC 'New Africa Marketplace Explorer enables small businesses to understand Africa's nascent e-commerce sites' <https://intracen.org/news-and-events/news/New-Africa-Marketplace-Explorer-enables-small-businesses-to-understand-Africas?pageid=47244640256&id=47244679735> (accessed 5 November 2022).
- 293 International Trade Administration 'The Rise of E-commerce in Africa' <https://www.trade.gov/rise-e-commerce-africa> (accessed 10 December 2022).
- 294 ITC 'New Africa Marketplace Explorer enables small businesses to understand Africa's nascent e-commerce sites' <https://intracen.org/news-and-events/news/New-Africa-Marketplace-Explorer-enables-small-businesses-to-understand-Africas?pageid=47244640256&id=47244679735> (accessed 5 November 2022).
- 295 A Lemma, M Mendez-Parra & L Naliaka 'The AfCFTA: unlocking the potential of the digital economy in Africa' (Overseas Development Institute Report 2022), 14.
- 296 ITC 'African Market Places Explorer' <https://ecomconnect.org/page/african-marketplace-explorer> (accessed 5 November 2022).
- 297 UNCTAD 'Economic Development in Africa Report 2021' (n 206) 155.
- 298 World Economic Forum & International Trade Centre 'Africa E-Commerce Agenda Roadmap for Action' (September 2019), available at https://www3.weforum.org/docs/WEF_Africa_EComm_EN.pdf.

As discussed previously, the African Union Digital Transformation Strategy (2020-2030) aims to create a single African digital market by 2030.²⁹⁹ It therefore calls for harmonisation of national and regional laws to enhance cooperation in developing a single digital market.³⁰⁰

6.5.9 Consumer protection

In the midst of the growing digital trade environment, protection of consumers cannot be overlooked.³⁰¹ In fact, digital trade can only be realised in a digital place where consumers feel safe and protected.³⁰² It is also necessary in building consumer trust in online trade.³⁰³ Banga and others notes that consumer protection has been a major hindrance to the growth of Africa's e-commerce due to low levels of trust in online trade over their data privacy, cybersecurity and the absence of an online dispute resolution mechanism.³⁰⁴ Key elements that characterise consumer protection laws are access and inclusion; effective protection; informed choice; data protection; product safety; transparent and inclusive negotiations; and international cooperation.³⁰⁵

Consumer protection has been regulated in regional trade agreements and in stand-alone consumer protection laws and policies. As of September 2021, 80 WTO Members had agreed to include provisions on consumer protection in their digital trade laws.³⁰⁶ As highlighted before, only 28 African countries had consumer protection laws in

²⁹⁹ Africa Union 'The Digital Transformation Strategy for Africa (2020 – 2030)', available at <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>.

³⁰⁰ As above, 52.

³⁰¹ E Agibalova, I Ilovaysky, Y Kayl & V Usanova 'Consumer protection in the digital environment' (2021) 01002 *SHS Web of Conferences* 109.

³⁰² Asia-Pacific Economic Cooperation 'Promoting Consumer Protection in Digital Trade: Challenges and Opportunities' (2020) APEC Electronic Commerce Steering Group Summary Report, 6.

³⁰³ Monteiro and Teh (n 5) 46.

³⁰⁴ K Banga, J Macleod & M Mendez-Parra 'Digital trade provisions in the AfCFTA: What can we learn from South–South trade agreements?' (Overseas Development Institute 2021), 22.

³⁰⁵ Consumers International 'The consumer checklist for an international e-commerce deal' <https://www.consumersinternational.org/media/155222/consumerchecklistforinternationale-commercedeal.pdf> (accessed 10 December 2022). See OECD *Consumer Protection in E-commerce: OECD Recommendation* (OECD 2016). See also UNCTAD *United Nations Guidelines for Consumer Protection* (UNCTAD 2016).

³⁰⁶ Consumers International 'Over 80 countries have agreed to include consumer protection principles in trade rules for online shopping' <https://www.consumersinternational.org/news-resources/news/releases/over-80-countries-have-agreed-to-include-consumer-protection-principles-in-trade-rules-for-online-shopping/> (accessed 10 December 2022).

2021.³⁰⁷ The statistics on African consumer protection laws further showed that three countries had draft legislation, eight countries had no legislation and fifteen countries had no data on data protection laws.³⁰⁸ The existing laws regulate the domestic e-commerce environment. The framework for protecting consumers in cross-border digital trade is therefore not well established. It is evident from the foregoing statistics that there is a need to enhance cooperation amongst African states in protecting cross-border digital trade consumers. There is also a need for a harmonised law on consumer protection at the continental level.

6.5.10 Cybersecurity and cybercrime

While there have been efforts at the continental and domestic levels to boost cybersecurity in Africa, the threats to cybersecurity are significant enough to impact the growth of Africa's digital trade.³⁰⁹ Interpol observes that weak security and the internet makes Africa the most vulnerable to cybercrimes.³¹⁰ Interpol notes that online scams, digital extortion, business email compromise, ransomware and botnets are the most prevalent forms of cybercrimes in Africa.³¹¹ As a result of cybersecurity, many Africans have lost trust in e-commerce and therefore opt for physical trade in goods and services. For instance, online fraud and attacks have reduced trust levels in online purchases.³¹² The African Union notes that digital trust services are a key enabler of cross-border digital trade and a single African market.³¹³

Africa's commitment to cybersecurity is however low in comparison to other parts of the world. As of December 2021, 39 African countries (72%) had regulations on

³⁰⁷ UNCTAD 'Online Consumer Protection Legislation Worldwide: Africa' <https://unctad.org/page/online-consumer-protection-legislation-worldwide> (accessed 10 December 2022).

³⁰⁸ As above.

³⁰⁹ Ndonga (n 231) 254.

³¹⁰ INTERPOL 'INTERPOL report identifies top cyberthreats in Africa' (21 October 2021) <https://www.interpol.int/en/News-and-Events/News/2021/INTERPOL-report-identifies-top-cyberthreats-in-Africa#:~:text=Cybercrimes%20affect%20all%20countries%2C%20but,leaving%20huge%20potential%20for%20growth> (accessed 11 December 2022).

³¹¹ As above.

³¹² Africa Union 'The Digital Transformation Strategy for Africa (2020 – 2030), available at <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>, 41.

³¹³ As above, 41.

cybercrime, two had draft legislation, twelve had no legislation and one had no data on cybercrime law.³¹⁴ In comparison to 86% in the Americas, 77% in Asia Pacific and 91% in Europe that had cybersecurity legislation, it is evident that there is low commitment by African states to fight cybercrimes.³¹⁵ There is also a lack of mutual cooperation to fight cybercrimes at the African level going by the slow pace in which the African Union Convention on Cybersecurity and Personal Data Protection was ratified as it only received the necessary ratifications on 9 May 2023 although it was adopted on 27 June 2014.³¹⁶

6.5.11 Covid 19 and African digital trade

While Covid-19 has been the worst health pandemic that has hit the world in the recent past, it had a positive effect on e-commerce as it propelled more people and entities to leverage technology for trade, services and other activities.³¹⁷ During the pandemic, there was increased usage of the internet due to health measures, such as lockdowns, introduced to gap the spread of Covid-19.³¹⁸ As a result, the volume of digital trade increased significantly. UNCTAD in its Economic Development in Africa Report of 2021 observed that trade was shaped by e-commerce during the pandemic.³¹⁹ This was also the observation of the WTO which noted that Covid-19 resulted in a surge in e-commerce.³²⁰ The Overseas Development Institute in a 2022 Report observes that because of Covid-19, the growth of digital trade was accelerated.³²¹ In addition to the increase in digital trade, Covid-19 also drew attention to the need to develop robust digital trade laws.³²²

³¹⁴ UNCTAD 'Cybercrime Legislation Worldwide' <https://unctad.org/page/cybercrime-legislation-worldwide> (accessed 10 December 2022).

³¹⁵ As above.

³¹⁶ African Union 'List of countries which have signed, ratified/acceded to the African Union Convention on Cyber Security and Personal Data Protection, available at https://au.int/sites/default/files/treaties/29560-sl-AFRICAN_UNION_CONVENTION_ON_CYBER_SECURITY_AND_PERSONAL_DATA_PROTECTION.pdf.

³¹⁷ WTO 'E-Commerce, Trade and the COVID-19 Pandemic' Information Note of 4 May 2020, Point 1.

³¹⁸ As above.

³¹⁹ UNCTAD 'Economic Development in Africa Report 2021' (n 206) 155.

³²⁰ WTO Information Note (n 317).

³²¹ A Lemma, M Mendez-Parra & L Naliaka 'The AfCFTA: unlocking the potential of the digital economy in Africa' (Overseas Development Institute Report 2022), 6.

³²² P Agarwal & M Chonzi 'Impact of COVID-19 on International Trade: Lessons for African LDCs' (2020) SSRN, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693901.

A Report by the United Nations Economic Commission for Africa showed that in the first half of 2020, following the global outbreak of Covid-19, the percentage of consumers shopping online grew by 30.4%.³²³ The growth was witnessed in various areas i.e. food-tech ventures, online payments and data consumption.³²⁴ A survey conducted in 2020 and 2021 showed that 81% of consumers in Nigeria, 79% in Kenya, 79% in Ghana, 72% in Egypt, 72% in Tanzania, 68% in South African and 68% in Ivory Coast shopped online.³²⁵ The most purchased items were groceries and clothes.³²⁶

6.6 The prospects arising from the application of safeguard measures to digital trade

While there currently are no rules on the application of safeguard measures to digital trade, it is more likely than not to take the same structure as safeguard measures on goods under the Agreement on Safeguards. As is the case with safeguard measures applied to trade in goods, it is expected that safeguard measures applied to digital trade will help to remedy and/or repair serious injury that has been caused or is threatened to a domestic industry or platform dealing in a like digital data or service and assist the industry or platform in adapting.

Peculiar to African domestic industries and taking into account the technological challenges faced by Africans, allowing for taxation and the application of safeguard measures will be more suitable to them. As discussed, there has been infiltration of foreign start-up companies and platforms in Africa, which in the long run impedes the development and growth of African start-ups and e-commerce platforms.³²⁷ Safeguard measures would therefore help to regulate the volumes of digital trade and, more particularly, through digital safeguard measures applications, it would be ascertained

³²³ United Nations Economic Commission for Africa 'Covid-19 Impact on E-Commerce: Africa' (2021) available at <https://repository.uneca.org/bitstream/handle/10855/43939/b11990296.pdf>, 9.

³²⁴ As above, 10-13.

³²⁵ Statista 'Share of consumers shopping more online since the beginning of the coronavirus (COVID-19) pandemic in selected African countries in 2021' <https://www.statista.com/statistics/1233745/share-of-consumers-shopping-more-online-due-to-covid-19-in-selected-african-countries/> (accessed 23 November 2023).

³²⁶ As above.

³²⁷ Sucker (n 197) 5.

whether the serious injury caused or threatened to African domestic industries is by virtue of increased quantities of imported digital trade.

While individual African states may not have the capacity to investigate and apply safeguard measures on digital trade, continental efforts, for instance, the AfCFTA safeguard measures investigation agency, may be instrumental in facilitating the application of safeguard measures to protect African domestic industries. It may however take years before this can be realised considering the challenges African states currently face in the digital economy and in the application of safeguard measures. This study acknowledges that this might be difficult to achieve but with cooperation amongst all states and assistance by African states that are current active users of safeguard measures, continental efforts will be achieved. Countries such as Egypt, Morocco, Madagascar, south Africa and Tunisia that are currently active users of safeguard measures, as discussed previously, could contribute their expertise to grow the understanding and application of safeguard measures across the continent, through the AfCFTA. The AfCFTA could also train its own experts who will then at a later stage transfer the expertise to experts within individual African states. This way, African states will be empowered collectively and selectively. These initiatives do not in any way imply that African states should stop empowering their own experts and trade remedies institutions through own means and resources. After all, the AfCFTA builds on the best practices from its members.

6.7 Conclusion

In conclusion, this chapter has examined the problems and prospects for applying safeguard measures to digital trade. It began by exploring the statistics of safeguard investigations initiated, safeguard measures imposed and maintained, safeguard disputes lodged at the WTO and the African level. This chapter pointed out that there has been a general upsurge in the application of safeguard measures to trade in goods at the WTO. There has however been very limited application of safeguard measures by African countries both multilaterally and continentally, and by very few African countries.

As discussed, based on the most recent statistics available from the WTO, by December 2023 African countries have initiated a total of 57 safeguard investigations, and imposed 28 safeguard measures at the WTO and a few safeguard measures under the African RECs and trade agreements. There has been no application of emergency safeguard measures on trade in services. This chapter has further discussed that the application of safeguard measures is impacted at the multilateral level by increased application of safeguard measures, numerous extensions of safeguard measures and the doctrine of precedents in the resolution of safeguard measures disputes. At the African level, lack of technical capacity, lack of resources and lack of laws and institutions to conduct safeguard investigations affect Africa's ability to apply safeguard measures. As discussed, there is a need for a mutual institution to investigate safeguard measures on digital trade in Africa.

This chapter has further discussed that factors such as inadequate digital trade policies, infrastructure and internet connectivity, inadequate digital data, taxation, the digital skills divide, multiple currencies, digital protectionism, concentration of digital markets in developed countries, consumer protection, cybersecurity and Covid-19 impacted the growth of African digital trade. It pointed out that compared to other parts of the world, Africa is lagging behind in its digital trade growth. Most of the data collection centres are situated outside Africa, thus, African countries are hindered by data policies and data localisation rules in their collection of relevant digital data. Africa is also overly dependent on digital technologies developed in other countries. Generally, the digital trade environment in Africa is not well-developed. As pointed out, there is a need for harmonised laws on digital trade laws in Africa.

Lastly, this chapter has discussed that while there are currently no rules on the application of safeguard measures to digital trade, they are likely to take the form of safeguard measures on goods applied under the Agreement on Safeguards, but without the application of the additional requirements under Article XIX of GATT 1994, which have not been carried forward to emergency safeguards in GATS. As discussed, there is a need for continental efforts in the investigation and application of safeguard measures to

digital trade since individual African states may lack technical capacity to do so. An AfCFTA safeguard measures investigation agency may be a game changer.

The next chapter of this study concludes and gives recommendations on the issues identified throughout the research. It also gives a summary of major findings of this study.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

7.1 Conclusions

Notable from the previous chapters is that this study has examined the existing legal architecture for imposing safeguard measures to digital trade. This study has explored the context in which digital trade is used in this study. It has also examined the growth of digital trade at the global and African levels. The study has explored the history and current framework for imposing safeguard measures on goods and services. The rules surrounding and the challenges impacting the application of safeguard measures to digital trade have also been examined in detail.

This chapter will begin by summarising chapters one to six of this study. In doing so, it will identify key points and arguments put forth in each of the chapters. Thereafter, this chapter will give recommendations for reforming the digital trade environment and regulating the application of safeguard measures to digitally traded data and services. More particularly, it will explore how the recommendations could protect African domestic industries from the likely effects brought about by a potential surge in digital trade imports. The areas for reforms at the continental, regional and national levels will be proffered. The subsequent section of this chapter proceeds to summarise the previous chapters of this study.

7.1.1 Chapter one

The introductory chapter set the basis for further discussions in this study. The chapter laid the foundation for the doctoral thesis. It gave a background to the study, discussed the research problem, identified the research objectives and questions, set out the thesis statement, described the research methodology, discussed the literature review and finally, set out a synopsis of the subsequent chapters.

As pointed out, unlike conventional rules on trade in goods and services that are well established, digital trade rules are yet to be developed at the multilateral level, are under development at the continental and regional levels and fairly established at the

domestic levels, as several countries in Africa currently have laws that regulate certain aspects of e-commerce. Similarly, there is no existing framework for the application of safeguard measures to digital trade at the multilateral level, nor at the continental and domestic levels. Nonetheless and as established, the growing trends in digital trade point to a potential need for the regulation of the application of safeguard measures to digital trade.

As discussed, the increase in digital trade points to a potential spike in digital trade volumes in a manner that is likely to cause or threaten to cause serious injury to African domestic industries dealing in like or directly competitive data or services. This would then necessitate the application of safeguard measures.

7.1.2 Chapter two

This chapter examined key terms and concepts applicable to digital trade and safeguard measures. In the first part, digital trade concepts were explored. In particular, this chapter extensively examined the existing definitions of e-commerce and digital trade. It noted that, while these terms co-relate, the focus of this study is digital trade as it relates to goods and services that are ordered, paid for, and delivered digitally. This part also examined concepts relevant to or used interchangeably with digital trade. It noted that electronic transactions have in some instances been defined to connote e-commerce and, in other instances, contain digital trade aspects of trade taking place wholly digitally.

The first part of this chapter also compared digital data and digital content. This study noted their correlation and similar uses. Other terms that were explored are digital product versus electronic product; digital service versus electronic service; cross-border data flows and electronic transmissions. The chapter discussed that there is no inconsistency as to what constitutes cross-border data flows, instead, the conditions for the transfer of data across borders differ. The chapter noted that there is no precise definition of electronic transmission, but it is under consideration in ongoing discussions on e-commerce at the WTO.

The second part of this chapter explored key concepts relevant to safeguard measures. It noted that there is no specific definition of a safeguard measure, instead, a

definition has been developed out of the conditions that allow for the application and the forms of safeguard measures. This part explored the interpretation and use of conditions that must be met before the application of a safeguard measure. In particular, like and directly competitive goods and services were examined. Under this, product likeness, directly competitive or substitutable products, service likeness, and the definition of a domestic industry were examined. In addition, this part assessed the definitions of serious injury or threat thereof and increased quantities of imports. As noted, these concepts have either been defined under the Agreement on Safeguards or the General Agreement on Tariffs and Trade (GATT) and explained by the World Trade Organization (WTO) dispute settlement system in numerous disputes that have interpreted the provisions and given the context for their use. These concepts as pointed out were contextualised to safeguard measures applicable to digital trade in this study.

7.1.3 Chapter three

This chapter examined the growth of digital trade at the WTO in terms of how it came about and the ongoing developments. As pointed out, since e-commerce was formally introduced into the WTO in 1998, minimal progress has been made in outlining the governing framework, setting out the definition of essential terminologies and in the discussions and other efforts on e-commerce. Specific discussions that have been put forth in this chapter relate to the growth at the WTO, herein, the mandates of the Work Programme on E-commerce and Joint Statement Initiative (JSI) on E-commerce are notable. This section pointed out that since the establishment of the Work Programme on E-commerce in 1998, it has not lived up to its mandate as it has unsuccessfully overseen discussions on digital trade and related aspects at the WTO. Its mandate has been reaffirmed by Ministers during Ministerial Conferences, but the contribution it is making to digital trade at the WTO is yet to be seen.

This chapter also examined the role of the JSI in re-igniting discussions on digital trade at the WTO. While the status of the JSI has been challenged on account that not all WTO Members are participating, the JSI has insisted that it has opened its discussions to all WTO Members to participate and highlights 'inclusion' as its core principle. Further, the JSI's findings can only be adopted at the WTO by consensus of the Members. It is

therefore instrumental that the JSI must adopt a technique different from what has been witnessed at the WTO since 1998 to give life to the discussions on digital trade at the WTO. Hopefully, the discussions will culminate in a multilateral agreement on digital trade.

This chapter has also assessed the moratorium on the application of customs duties on electronic transmissions. It has been identified that there currently is no consensus on what constitutes ‘electronic transmissions’ and, similarly, the scope of the moratorium remains unclear, such that there is inconsistency as to whether the moratorium should apply to the ‘transmissions’ or the ‘contents of the transmissions’. Nevertheless, the moratorium has been continuously extended in all WTO Ministerial Conferences after the Second Ministerial Conference, to date, including at MC13 in Doha in February 2024. This study has highlighted the concerns of developing countries on the economic impacts that the moratorium has on their economies. As discussed, statistics by the Organisation for Economic Co-operation and Development (OECD) have pointed out that the moratorium results in huge tariff revenue losses by developing countries and amounts to giving free access to developed countries to the digital economies of developing countries.

In addition, this chapter has explored the applicability of GATT, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Technical Barriers to Trade (TBT Agreement), the Trade Facilitation Agreement and the Information Technology Agreement and Expansion Agreement to e-commerce. It has been discussed that the principle of ‘technological neutrality’ allows for the application of these instruments that were concluded before e-commerce advanced, to e-commerce as it continues to evolve. For instance, it has been discussed that GATT applies to e-commerce which results in the physical delivery of a product. TRIPS and TBT apply to all forms of trade regardless of the medium of trade. GATS also contains elements of e-commerce under mode 1 of service supply.

The chapter proceeded to examine digital trade in Regional Trade Agreements (RTAs) and digital trade agreements. It pointed out that while most states have

incorporated e-commerce provisions in RTAs, there has been a new trend in the recent past where WTO Members are now signing digital economy agreements. Examples are the Digital Economy Partnership Agreement signed between New Zealand, Chile and Singapore; and the United Kingdom-Singapore Digital Economy Agreement signed between the UK and Singapore. The discussions on the Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP), United States-Mexico-Canada Agreement (USMCA), Regional Comprehensive Economic Partnership (RCEP) and the United States-Japan Digital Trade Agreement have justified the great length at which digital trade has been regulated in free trade agreements. It has been discussed that countries are resorting to these agreements due to the lack of a multilateral framework for digital trade.

Lastly, this chapter pointed out and briefly discussed e-commerce development in other global institutions such as the United Nations Commission on International Trade Law (UNCITRAL), United Nations Conference on Trade and Development (UNCTAD) and the OECD. It has been discussed that these institutions in one way or another contribute to e-commerce either through the formulation of model laws, as done by UNCITRAL; monitoring and support of e-commerce initiatives globally, the case for UNCTAD; and support of e-commerce initiatives at the WTO and amongst its members, the case for OECD.

7.1.4 Chapter four

This chapter examined digital trade rules under African regional law. It has in particular analysed the contributions made to digital trade by the African Union, African Continental Free Trade Area (AfCFTA), regional economic communities (RECs), trade agreements and domestically by African states. Key contributions made by the African Union are the adoption of the AU Convention on Cybersecurity and Personal Data Protection, incorporation of e-commerce under Agenda 2063, adoption of the AU Data Policy Framework, development of the African Union Digital Transformation Strategy (2020-2030) and Policy and Regulation Initiative for Digital Africa, establishment of the Centre for Excellence for Digital Identity and Digital Trade and Digital Economy and development

of the Digital Earth Africa Programme. All these initiatives contribute to and influence the growth of e-commerce at the continental level.

This chapter discussed that though the AfCFTA did not incorporate digital trade in the negotiations of the AfCFTA Agreement and annexed Protocols, the AfCFTA has since negotiated and adopted the AfCFTA Digital Trade Protocol. The AfCFTA is also in the process of adopting annexes to the Digital Trade Protocol. It discussed further that the East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC) are the only African RECs that have rolled out initiatives that promote digital trade. As discussed, digital trade in Africa is further regulated by trade agreements entered into between African countries and other partners.

Lastly, this chapter discussed that African states have in their domestic set-ups established legislations to regulate e-commerce and create an environment that enables both domestic and cross-border digital trade. This study has identified e-commerce practices in Mauritius, Kenya and South Africa as some of the countries that have made progress in terms of recognition and facilitation of e-commerce in Africa. However, majority of African states are still grappling with an underdeveloped digital infrastructure.

7.1.5 Chapter five

This chapter extensively examined the WTO rules relevant to the application of safeguard measures and emergency safeguard measures to goods and services. It began by examining the context in which safeguard measures are applied to goods under GATT, the Agreement on Safeguards, African RECs and domestically by African states. It then explored the context in which emergency safeguard measures are applied to services. GATS provisions under the WTO were examined and, in Africa, the provisions under the Investment Agreement for the COMESA Common Investment Area and the AfCFTA Protocol on Investment were explored. This chapter observed that the structure in which safeguard measures are applied to goods is similar to the structure for applying emergency safeguard measures to services. This is because there are no comprehensive

rules for applying emergency safeguard measures. Safeguard measures under the AfCFTA Protocol on Investment are, however, distinct as they relate to transfer of funds.

Subsequently, this chapter examined WTO rules of Most Favoured Nation (MFN), National Treatment (NT), likeness of products and services, transparency, technological neutrality, injury and causation. It pointed out that under the principle of technological neutrality, old/subsisting WTO and other rules on safeguard measures can be applied to goods and services traded in electronic form. It noted that the use of technological neutrality has not yet received universal application. This thesis however relied heavily on this principle in response to its research questions and hypothesis of the research. As discussed, there is currently no framework for applying safeguard measures to digital trade, hence, reliance is placed on the existing framework for physical goods and services.

This chapter discussed that as is the case with physically traded goods and services, analysis of 'like products' and 'like services' and industries dealing in 'directly competitive products' for goods and 'like service providers' for services must be examined. Thus, to establish that serious injury or threat of serious injury has been caused to a domestic industry or domestic service provider, the likeness between the imported goods and services must be examined. In the context of digital trade, there must be likeness between domestic and imported digital data and service. In addition to this, it must be shown that a digital data or service is being imported in such increased quantities that it has caused serious injury or threatens to cause injury to a domestic industry or service provider dealing in like digital data or services. Injury and causation therefore must be justified, based on an objective evaluation of positive evidence. This threshold appears too high to be met at present considering the infrastructural challenges that exist within the continent. It might also be difficult to demonstrate likeness of digital data and services.

In addition to the foregoing, it was shown that once it is established that a digital data or service is being imported in increased quantities and as a result, serious injury or a threat of serious injury is being caused to a domestic industry or platform dealing in like or directly competitive data or like service providers, any decision to apply a safeguard measure must be published in a transparent manner on the same basis as is required in

respect of safeguard measures on goods. The measures also must be applied and maintained on an MFN and NT basis.

7.1.6 Chapter six

This chapter examined the problems and prospects for applying safeguard measures to digital trade. It began by exploring the statistics of safeguard investigations initiated, safeguard measures imposed and maintained, and safeguard disputes lodged at the WTO and the African level. This chapter pointed out that there has been a general upsurge in the application of safeguard measures to trade in goods at the WTO. There has however been very limited application of safeguard measures by African countries both multilaterally and continentally, and by very few African countries.

As discussed, based on the most recent statistics available from the WTO, by December 2023 African countries had initiated a total of 57 safeguard investigations, and imposed 28 safeguard measures at the WTO and a few safeguard measures under the African RECs and trade agreements. There has been no application of emergency safeguard measures on trade in services. This chapter further discussed that the application of safeguard measures is impacted at the multilateral level by increased application of safeguard measures, numerous extensions of safeguard measures and the doctrine of precedents in the resolution of safeguard measures disputes. At the African level, lack of technical capacity, lack of resources and lack of laws and institutions to conduct safeguard investigations affect Africa's ability to apply safeguard measures. As discussed, there is a need for a mutual institution to investigate safeguard measures on digital trade in Africa.

This chapter further discussed that factors such as inadequate digital trade policies, infrastructure and internet connectivity, inadequate digital data, taxation, the digital skills divide, multiple currencies, digital protectionism, concentration of digital markets in developed countries, consumer protection, cybersecurity and Covid-19 impact the growth of African digital trade. It pointed out that compared to other parts of the world, Africa is lagging behind in its digital trade growth. Most of the data collection centres are situated outside Africa, thus, African countries are hindered by data policies and data

localisation rules in their collection of relevant digital data. Africa is also overly dependent on digital technologies developed in other countries. Generally, the digital trade environment in Africa is not well-developed. As pointed out, there is a need for harmonised laws on digital trade laws in Africa.

Lastly, this chapter discussed that while there are currently no rules on the application of safeguard measures to digital trade, they are likely to take the form of safeguard measures on goods applied under the Agreement on Safeguards, but without the application of the additional requirements under Article XIX of GATT 1994, which have not been carried forward to emergency safeguards in GATS. As discussed, there is a need for continental efforts in the investigation and application of safeguard measures to digital trade since individual African states may lack technical capacity to do so. An AfCFTA safeguard investigation agency may be a game changer.

The subsequent section of this chapter gives recommendations for reform at the global, continental and national levels. It builds on the foregoing summaries of key points made in the previous chapters. The recommendations are discussed at length below.

7.2 Recommendations

The previous chapters of this study sought to demonstrate that the increase in digital trade points to the need to put in place strategies for imposing safeguard measures to avert surges in digital trade imports that may cause or threaten to cause serious injury to African domestic industries and platforms. It is evident from the findings in the previous chapters that indeed there is an upsurge in digital trade globally. There is, however, no clear framework for the application of safeguard measures to digital trade. This brings into perspective various issues and gaps that exist in the current framework for safeguard measures application as well as the growth of digital trade. It was evident that these issues and gaps should be addressed at the international, continental and national levels to reform the framework for imposing safeguard measures to digital trade. The subsequent sections identify and explore in detail aspects of the existing frameworks that should be reformed.

7.2.1 Cross-cutting necessary reforms at the international level

Provide a clear definition of digital trade

As explored in the second chapter of this study, there is no universally accepted definition of what constitutes 'digital trade'. It was evident that various multilateral institutions, such as the WTO and OECD, and countries, in domestic setups, have adopted different definitions of digital trade and/or e-commerce. The context and usage also differ. For instance, e-commerce has on one hand been construed to mean trade that takes place wholly online, and on the other hand, it means trade that takes place partially online and partially physically, such that orders are made online while payment and delivery are offline.¹ It was further discussed in the second chapter of this study that digital trade has been used interchangeably in most instances with 'electronic commerce' and 'electronic transactions' and in other instances with 'cross-border data flows', 'digital content' and 'digital data'.² There are also suggestions that digital trade takes place wholly online while e-commerce takes place partially online and partially physical.³ The foregoing shows that there is no uniformity in the definition of digital trade.

In addition to the above, there is no clarity as to what makes up 'trade taking place online', i.e. whether it is goods, products, services, or data/content. The WTO and OECD definitions of e-commerce refer to 'goods and services' traded digitally.⁴ The International Monetary Fund, the OECD, the United Nations and the WTO in their handbook on measuring digital trade observe that data flows constitute digital trade.⁵ They also note that only services are digitally delivered.⁶ Following the establishment of the WTO Work

¹ See for instance the OECD definition at OECD 'Unpacking E-commerce: Business Models, Trends and Policies' <https://www.oecd-ilibrary.org/sites/1885800a-en/index.html?itemId=/content/component/1885800a-en#n-ch01-2> (accessed 5 June 2022); and the WTO definition at World Trade Organization 'Work Programme on Electronic Commerce' Adopted by the General Council on 25 September 1998, 'WT/L/274' (20 September 1998), para 1.3.

² Refer to chapter Two of this Study, sections 2.2 & 2.3.

³ The International Monetary Fund, the Organisation for Economic Co-operation and Development, the United Nations and the World Trade Organization *Handbook on Measuring Digital Trade* (2023) 23.

⁴ OECD (n 1); WTO 'WT/L/274' (n 1) para 1.3.

⁵ IMF and others (n 3) 18.

⁶ IMF and others (n 3) 24.

Programme on E-commerce in 1998, it was mandated to assess the applicability of trade in services, intellectual property, trade in goods and development to e-commerce.⁷ The Work Programme has not concluded discussions in this regard. The lack of clarity on what is traded digitally contributes to the ambiguity in understanding digital trade.

In addition to cross-border trade, digital trade takes place within the domestic setups.⁸ A distinction ought to be made in this regard since the rules on the application of safeguard measures only apply where there is cross-border trade. As is the case with safeguards applied to trade in goods under the WTO Agreement on Safeguards and other similar agreements/laws, the applicability of safeguards is assessed based on the volumes of imports vis-à-vis the volumes of directly competitive domestic products.⁹ Thus, a definition of digital trade must incorporate the international nature of online trade.

The AfCFTA Digital Trade Protocol adopted on 18 February 2024 by African Heads of State and Government at the AU Assembly Summit did not address the need for a clear definition of digital trade.¹⁰ Instead, the Protocol adopts the definition that digital trade entails trade in goods and services that take place both online and offline.¹¹ Contrary to what was expected, the Protocol has done little to address present regulatory challenges on digital trade in the continent, with the scope and definition of digital trade being one of the challenges.

Thus, this study recommends that a clear definition of digital trade should be established either at the WTO level in the ongoing discussions on e-commerce/digital trade or through ongoing bilateral and domestic discussions on digital trade. Any such definition should identify the medium for conducting digital trade; the nature and/or context in which digital trade takes place i.e. whether fully online or partially offline; the scope of digital trade i.e. whether it includes trade that could also be physically delivered;

⁷ WTO 'WT/L/274' (n 1) paras 2.1, 3.1, 4.1 & 5.1.

⁸ Z Chen, J Lin, J Li & Z Chen 'Digital Trade: Definition, Measurement and Development' (2022) 4(1) *Scientific and Social Research* 112- 118, 113.

⁹ Agreement on Safeguards art 2.1.

¹⁰ Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade Protocol, 9 February 2024 Draft shared for legal scrubbing at the Ninth Extraordinary Session of the Special Technical Committee on Justice and Legal Affairs held in Durban, South Africa from 7th to 10 February 2024.

¹¹ As above, art 1(g).

what is traded online, i.e. whether data, services, products or goods; the mode of payment; and cross-border nature of digital trade.

Provide rules for applying a safeguard measure to digitally traded data and services

As discussed in the previous chapters of this study, the application of safeguard measures is premised on the satisfaction of the requirements that make up a safeguard measure. These requirements are clear and elaborate for safeguard measures applicable to goods. It was evident in the discussions espoused in the previous chapters that in the application of safeguard measures it must be established that there are increased quantities of imports; there is serious injury or threat of serious injury to a domestic industry dealing in like or directly competitive products and services; and that the impact has been caused by the increased imports. These requirements inform the specific recommendations examined in detail below.

(a) Establish rules to provide a framework for determining increased quantities of digital trade imports

This study recommends that rules should be established to provide a framework for determining an increase in the quantities of digital imports in a safeguard measure application, as is the case under the Agreement on Safeguards.¹² There is currently a clear framework for establishing an increase in imported goods under the Agreement on Safeguards. The big question under this study is how to establish that digitally traded data or service has increased in quantities justifying the application of a safeguard measure.

As discussed in the second chapter of this study for an increase in imports to arise, it must be shown that the imports are in increased quantities, either in absolute terms or relative to production in the importing country. Secondly, both the ‘amount’ and the ‘rate’ of imports must have increased.¹³ Additionally, before a safeguard measure may be imposed, it must be shown that imports increased ‘under such conditions’ as to cause or threaten serious injury.¹⁴ As also discussed, any increase in imports must have been

¹² Agreement on Safeguards art 2.1.

¹³ Appellate Body Report, *Argentina – Footwear* (EC) para 129.

¹⁴ The words “under such conditions” under the Agreement on Safeguards has been construed not

sudden, sharp, recent and significant. The concept of ‘unforeseen developments’ ought not to be applied to safeguards on digital trade, as there have been no commitments on tariffs on digital trade, thus there cannot be any developments subsequent to any GATS tariff commitments. Significantly, all relevant factors and trends must be evaluated during the period of investigations to ascertain the increase in imports.

Building on the parameters set out above for establishing an increase in imports of traded goods, this study recommends that a framework for collecting data relating to digitally traded data or services should be established. In the same breath, the framework should provide a basis for assessing increased quantities of imported digital data or services. Ordinarily, in the case of physically traded goods, the quantities are assessed upon crossing international borders. This is not the case with digital trade since trade takes place online. In the case of cross-border digital trade, data moves from one country to another online. There currently is no framework for collecting digital trade data. It cannot, therefore, be ascertained in the prevailing circumstances whether or not there has been an increase in digital trade imports.

This study recommends that a multilateral framework to uniformly and instantly establish digital data that crosses borders should be established to allow for: -

- i) An assessment that there is importation and exportation of digital trade across two or more countries.
- ii) To establish the amount and rate of digital imports into a country.
- iii) To establish the amount and rate of digital imports vis-à-vis like data or services produced or made available domestically.
- iv) To establish an increase in the volumes of digital data or services in conditions that cause or threaten to cause serious injury to domestic industries dealing in like or directly competing data or services.
- v) To provide a framework for investigation authorities to assess whether an increase in digital trade imports is a result of unforeseen development.

to impose an additional obligation for applying safeguard measures. It is therefore not an essential element in analysing whether or not there has been increased in quantities of imports.
https://www.wto.org/english/res_e/publications_e/ai17_e/safeguards_art2_jur.pdf.

Presently, data is stored in data centres situated in select countries with existing data frameworks. Data localisation requirements also impact the cross-border transfer of data. Furthermore, with the existing moratorium on the imposition of customs duties on electronic transmissions, countries do not find the need to track the volumes of digital trade. As discussed in the previous chapters of this study, there have been attempts by some countries to tax digital services, however, the existing measures are not well developed, have been impacted by criticisms, and are specific to select countries with laws/regulations.

Thus, an increase in digital trade imports can only be established through a framework that provides the rules for establishing any such increase and mandating an institution, say a safeguard measure investigation authority, to ascertain the existence of digital imports and any increase in the volumes of imports. The investigating authority would also assess whether the increase in digital imports has fully satisfied the criteria for assessing an increase in imports in a safeguard measure application. The investigations would be guided by the legal framework recommended in this study.

(b) Establish rules to provide a framework for determining domestic industry concerning digital trade

This study recommends that rules should be established to determine that an industry is domestically dealing in digital trade. The framework could, for instance, provide a definition of a domestic industry for purposes of digital trade. It was pointed out in the second chapter of this study that a domestic industry under the Agreement on Safeguards is construed as ‘producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.’¹⁵ This definition has two elements, i.e. producers and ‘like or directly competitive products’,¹⁶ meaning that producers who deal in like or directly competitive products must exist.

¹⁵ Agreement on Safeguards art 4.1(c).

¹⁶ Appellate Body Report ‘US — Lamb’ para 84.

The above definition of a domestic industry under the Agreement on Safeguards could be contextually applied or modified to reflect trade taking place digitally. This study recommends for instance that the below definitions could be applied in the case of digital trade:

- i) Producers as a whole of the like or directly competitive digital service or data operating within a territory, or those whose collective output of the like or directly competitive digital service or data constitutes a major proportion of the total domestic production of those services or data; or
- ii) Domestic industries or platforms within a territory producing or dealing, as a whole or collectively, in like or directly competitive digital service or data.

Thus, once digital services and data are categorised for purposes of international trade, the next step is to ascertain whether or not domestic industries or platforms dealing in like or directly competitive digital services or data exist. It is therefore also necessary to develop rules to assess whether or not a digital service or data is 'like or directly competitive'. This is explored below.

(c) Establish rules to provide a framework for determining like or directly competitive digital data/content and services

This study recommends that to determine a domestic industry or platform, it is necessary to develop rules to provide a framework for determining like or directly competitive digital data or services. This stems from first defining and categorising digital data and services under tariff nomenclatures. Under GATT, products are uniformly classified under a tariff nomenclature based on a harmonised system.¹⁷ The harmonised system is classified in six-digit codes through which participating countries classify traded goods on a common basis.¹⁸ There currently are no tariff classifications for digitally traded data. Some countries have made commitments in services sectors relevant to digital services under

¹⁷ WTO 'Harmonised System' available at https://tao.wto.org/site/glossary/en/HARMONIZED_SYSTEM_HS.htm.

¹⁸ WTO 'Glossary Term: Harmonised System' https://www.wto.org/english/thewto_e/glossary_e/harmonized_system_e.htm (accessed 20 February 2024).

GATS.¹⁹ Significantly, only some WTO Members have made commitments concerning select digital services. In addition, not all digital services are contained in the commitments.²⁰ This study, therefore, recommends that to assess whether two or more sets of digital data or services are like, a harmonised system for digital data and services ought to be developed. The harmonised system could adopt a structure similar to that of traded goods or a different structure could be adopted.

Once the digital data or services have been defined and categorised under a tariff nomenclature, what follows is to assess whether two or more sets of digital data or services are equal, identical or have similar qualities.²¹ This will inform whether or not they are like digital data or services. As is the case and as was discussed in the second chapter of this study, like data or services could also be assessed on a case-by-case basis. In addition, the criteria offered up for assessing like products under GATT could also be adapted for digital data or services.²² As discussed previously, product likeness is assessed based on the physical characteristics of the product; tariff classifications of the product; end use of the product; and consumer's perceptions about the product.²³ This criterion could be adapted to digital trade to read as follows:

- i) A like digital data or service is assessed based on the features of the digital data and nature of the digital service; tariff classifications of the digital data and service; the end use of the digital data and service; and perceptions of consumers about the digital data and service.
- ii) In the case of digital services, like digital services must have like digital service suppliers.

To consider directly competitive or substitutable digital data and service, two sets of digital data and service, one imported and another domestic, are assessed to

¹⁹ WTO 'Schedules of specific commitments and lists of Article II exemptions' https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (accessed 20 February 2024).

²⁰ As above.

²¹ See definition of "like" in GATT Panel Report '*Spain – Tariff Treatment of Unroasted Coffee* (GD/106)' para 4.5.

²² See Report by the Working Party on Border Tax Adjustments, L/3464, 20 November 1970, available at [3464.PDF \(wto.org\)](#).

²³ GATT Panel Report '*Japan - SPF Dimension Lumber*' paras 3.40-3.53.

determine whether or not they are ‘interchangeable’ or offer ‘alternative ways of satisfying particular needs or tastes’.²⁴ The two sets of digital data and services should be in competition with each other and/or can be substituted in the market.²⁵

Thus, in assessing whether digital data is directly competitive or substitutable, their capacity to compete and degree of proximity are considered. The more unlike two sets of data are, the wider the indirect competitive relationship. In addition, the direct competitiveness of data is assessed based on latent demand and consumer behaviour. Lastly, the digital data must be interchangeable. This should apply in equal measure to like digital services.

Once the above requirements for applying a safeguard measure to digital trade are met, it can thereafter be assessed whether or not there is a serious injury or a threat thereof to a domestic industry or platform dealing in a like or directly competitive digital data or service. The criteria used under the Agreement on Safeguards can be adapted for this purpose.

Develop harmonised rules and review and/or amend existing rules on digital trade

This study calls for the establishment of harmonised digital trade rules at the multilateral or African-continental levels. This could be through the adaptation of existing trade in goods and services rules to digital trade or by developing independent rules on digital trade. An adaptation could be for instance through contextual application of GATT or GATS rules to digital trade. This would involve clarifying certain concepts that might prove to be problematic if directly applied to digital data or services. This study has severally emphasised the need for a harmonised legal instrument on digital trade both under the WTO and, in Africa, under the AfCFTA.

At the commencement of this study, there were ongoing efforts at the WTO and under the AfCFTA to develop independent instruments for digital trade. This has since been realised under the AfCFTA, and as discussed earlier in this chapter, African Heads of State and Government at the AU Assembly Summit on 18 February 2024 adopted the

²⁴ Appellate Body Report ‘Korea – Alcoholic Beverages’ para 115.

²⁵ Appellate Body Report ‘Korea – Alcoholic Beverages’ para 114.

Protocol to the AfCFTA on Digital Trade Protocol.²⁶ The Protocol's general objective is to harmonise rules, common standards, and principles on digital trade for the continent's sustainable and inclusive socio-economic development and digital transformation.²⁷ The Protocol has been criticised for provisions that fail to factor in Africa's digital infrastructural development and the need to protect African domestic industries and platforms from unfair digital competitive environments and the challenges faced by consumers in the digital environment. This study argues that little consideration was placed on the relevance of the provisions to African situations, the drafters did not take time to engage with key stakeholders and the Protocol was generally hastily adopted. In the end, the Protocol appears to be a replication of existing digital economy and bilaterally agreements from other parts of the world that are currently ongoing reforms. Africa, therefore, wasted its opportunity to develop a timely digital trade legal instrument and now joins the world in advocating for certain reforms that it would have engaged amongst itself and made African-centred provisions on them, for instance, on the moratorium on customs duties, and cross-border data flows, source codes, amongst others.

At the WTO, e-commerce reforms are ongoing. There are efforts to develop a multilateral agreement on digital trade under the Work Programme on E-commerce and through the JSI on E-commerce. Should the current JSI work conclude and materialise into an e-commerce agreement, before the Work Programme on E-commerce does so, then the agreement can be integrated into the WTO, since it is being developed outside the WTO rules and only a few WTO Members are involved.

In addition to the foregoing, this study recommends that in the reforms of digital trade rules, the reforms should aim to provide a basis for applying existing trade rules to digital trade. For instance, the reforms should provide a roadmap for applying safeguard measures to digital trade. While this study discusses the need to apply safeguard measures to digital trade, there is no legal framework for doing this. A guiding legal instrument is, therefore, necessary.

²⁶ AfCFTA Digital Trade Protocol (n 10).

²⁷ AfCFTA Digital Trade Protocol art 2.

WTO Members need to make a final decision on the moratorium on the imposition of customs duties on electronic transmissions

This study recommends that WTO Members need to decide with finality whether the moratorium on customs duties on electronic transmissions will be made permanent or whether it will be lifted. As discussed previously in this study, the moratorium was first formally introduced into the WTO by Ministers during the 1998 Second Ministerial Conference.²⁸ WTO Members have since then been inclined towards extending the moratorium temporarily from one ministerial conference to the next. The latest extension was made at the 13th Ministerial Conference in February 2024 until the 14th Ministerial Conference or 31 March 2026, whichever is earlier.²⁹

The impact of the moratorium is that WTO Members may not impose customs duties on electronic transmissions. The moratorium has been replicated under bilateral and regional trade agreements negotiated by WTO Members amongst themselves or with others. For instance, the moratorium has been replicated in the AfCFTA Digital Trade Protocol which was adopted in February 2024.³⁰

While there is no issue per se with the moratorium, it is ambiguous in terms of what constitutes electronic transmissions and the scope thereof. In addition, despite the consensus decision to extend the moratorium under the WTO, not all Members are fully in agreement with the extension. As pointed out previously, South Africa and India have expressed the need to have the moratorium lifted.³¹ India also opposed the extension of the moratorium at MC13,³² though it was eventually extended as highlighted above.

Thus, WTO Members need to discuss with finality whether or not the moratorium is to be made permanent. If they resort to making it permanent, then the Members also

²⁸ WTO 'Declaration of Global Electronic Commerce' adopted 20 May 1998, WT/MIN(98)/DEC/2 of 25 May 1998.

²⁹ WTO 'Work Programme on E-commerce: Draft Ministerial Decision of 1 March 2024' WT/MIN(24)/W/26/Rev.1 of 1 March 2024.

³⁰ AfCFTA Digital Trade Protocol art 6.

³¹ WTO Work Programme on Electronic Commerce 'The E-Commerce Moratorium: Scope and Impact' WT/GC/W/798 (11 March 2020) Communication from India and South Africa.

³² M Kumar 'India to oppose extended e-commerce tariff ban at WTO meet – sources' (20 February 2024) <https://www.reuters.com/business/retail-consumer/india-oppose-extended-e-commerce-tariff-ban-wto-meet-sources-2024-02-20/> (accessed 9 March 2024).

should clarify what constitutes ‘electronic transmissions’ or outline other parameters to be followed in imposing the moratorium.

This study recommends that the moratorium should be lifted to allow African countries to impose tariffs on digital trade in general. The lack of a definition of what constitutes electronic transmissions has inhibited African countries from applying tariffs to all forms of digital trade. Because of this and as pointed out by India and South Africa, the moratorium impacts developing countries’ industrialisation, and results in a general loss of tariff revenue and other charges.³³ Subsequently, tariff classifications for digitally traded data can be developed, thus giving room for a discussion on safeguard measures on digital trade.

7.2.2 Necessary safeguard measures reforms at the African level

This study recommends that there is a need to reform the current safeguard measures regime in Africa to (1) boost Africa’s involvement in the investigation and application of safeguard measures and (2) take into consideration digital trade development. Chapter six of this study discussed that Cameroon, Egypt, Ghana, Kenya, Liberia, Madagascar, Mauritius, Morocco, South Africa, Tunisia, Zambia, and Zimbabwe are some of the African countries with existing legal frameworks on safeguard measures.³⁴ This makes up 12 of 55 African countries. It has also been discussed previously that between 1995 and 2023, six African countries initiated a total of 57 safeguard investigations under the WTO.³⁵ The same countries have also contributed to the few statistics of safeguards measures applied under the African safeguards measures legal regimes, more so, under RECs’ legal regimes such as COMESA.

This study identified challenges that limit African countries from initiating safeguard investigations and imposing safeguard measures both at the WTO and in Africa either regionally or domestically. These challenges inform the recommendations in this section.

³³ WTO ‘WT/GC/W/798’ (n 31) para 2.7.

³⁴ WTO ‘Notifications on Safeguards Legislations’ <https://notifications.wto.org/en/notification-status/safeguards> (accessed 10 May 2024).

³⁵ WTO ‘Safeguards Initiations by Reporting Member: January 1995- June 2023’, available at https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

The need to either enact or update safeguard measures laws and regulations

As pointed out above, less than 25% of African countries have domestic laws on safeguard measures. This shows that over 75% need to develop domestic laws on safeguard measures. While a majority of the countries without domestic safeguard laws are either Members of the WTO or Members of one or more African RECs, meaning that they can apply either WTO rules or REC rules on safeguard measures, domestic frameworks are also necessary to provide specific rules and bases for the concerned countries to apply a safeguard measure. For instance, specific rules are paramount in establishing a safeguard measure investigating authority and for carrying out safeguard investigations. WTO and REC safeguard rules are general in nature as they regulate safeguard investigations in multiple countries and would, therefore, lack the element of specificity and/or contextual applications.

In addition to enacting new laws, this study further recommends that the new and existing laws should be updated to regulate digital trade. This study has argued that the increase in digital trade points to a potential increase in digital trade volumes in a manner that is likely to cause or threaten to cause serious injury to African domestic industries dealing in like or directly competitive digital data or services. There is, however, no law to regulate this development. This study therefore calls for a review of existing laws to provide a framework for applying safeguard measures to digitally trade data and services.

The need to enforce existing safeguard measures laws

This study recommends that there is a need to enforce WTO, REC and domestic laws on safeguard measures. The limited use of safeguard measures by African countries shows that most of them are not enforcing existing safeguard measures laws. At the EAC for instance, it was shown that whereas there is a law on safeguard measures in place, it is yet to be enforced as no safeguard investigation has been initiated or measure applied under the EAC. In the domestic set-up, a country such as Kenya has a domestic law that regulates safeguard measures, but the law is yet to be enforced (even though Kenya has imposed two safeguard measures under COMESA rules).

This study, therefore, calls for enforcement of existing safeguard measures laws by African countries through the below actions:

- i) This reform is realised by the respective governments as it requires political goodwill to see to it that the laws are enforced through, for instance, establishing and empowering investigation authorities, resource allocation and support of the private and public sectors in safeguard investigations.
- ii) Trade remedies agencies also must play a role in the enforcement of the laws by creating awareness of trade remedies, conducting safeguard investigations and constantly prompting the government and private sector for any support that they may need during the investigation of a safeguard measure.
- iii) The private sector can also aid in the enforcement of the laws by forwarding complaints for investigation by investigating authorities.
- iv) Safeguard measures experts are also key players in the enforcement and should be engaged to offer training and capacity building or advisory services to trade remedies agencies on safeguard investigations and applications.
- v) The developed world/communities such as the EU and the WTO have in the past facilitated developing countries in the enforcement of safeguard measures; African countries can reach out to these institutions for support.

The need to constitute and empower safeguard measures investigating agencies/authorities

It was discussed in the previous chapter of this study that only Cameroon, Egypt, Ghana, Kenya, Madagascar, Mauritius, South Africa, Tunisia and Zimbabwe have trade remedies investigating authorities.³⁶ This shows that most African countries do not have trade remedies investigating authority. This study, therefore, recommends that in addition to developing domestic safeguard measures rules, African countries should also constitute investigating authorities. This effort should also extend to countries and African RECs with existing safeguard measures laws that are yet to establish investigating authorities. For instance, the EAC Trade Remedies Agency is yet to be established. This needs to be established to allow for safeguard investigations under the EAC legal framework. In the

³⁶ See footnotes 179-184 of Chapter Six of this Thesis.

alternative investigating authorities at the RECs level would be beneficial to African countries that are constrained by resources from setting up domestic investigating authorities. Hence, respective RECs Members can collaborate in establishing regional investigating authorities to conduct investigations on behalf of the members.

In addition to establishing investigation authorities, those that are already established but are not operational need to be empowered through resource allocation and technical support. Kenya for instance has a trade remedies agency that is yet to carry out any safeguards investigations since it was established in 2017 under the Trade Remedies Act and constituted in 2020.³⁷

The few safeguard measures applied by African countries are a result of a lack of experts and resources. The role of resources cannot be overemphasised. Experts, however, are instrumental in steering the operations of the investigating agencies and in providing training to governments. The government has the primary mandate in realising this recommendation but can also contract African experts to assist in this regard. Governments can also avail itself of the training and capacity building services offered by the WTO, as well as institutions such as the ITC or countries/jurisdictions such as the EU.

The need to build the technical capacity of safeguard measures experts

As pointed out in the preceding sections of this chapter, few safeguard measures have been applied by African countries. This is largely a result of resource constraints and a lack of experts. The role of trade remedies experts cannot be overlooked since they offer the required technical support in the investigation and application of safeguard measures. African countries such as Egypt, Madagascar and South Africa which have been at the forefront in the application of safeguard measures, have done so due to the presence of experts to guide investigation authorities in their operations. Egypt, for instance, has allocated resources to have their experts trained in EU and US law firms that specialise

³⁷ State Department for Trade 'Kenya Trade Remedies Agency Board'
<https://www.trade.go.ke/blog/487> (accessed 10 March 2023).

in trade remedies,³⁸ and have also had international experts engaged under EU-funded projects.

This study therefore recommends that (1) African countries should identify African experts to guide investigation authorities in the conduct of safeguard investigations and (2) continuously build the capacity of experts through continuous training in more specialised institutions and through donor-funded projects. The technical nature of trade remedies requires continuous upskilling of professionals.

The need to conduct more training and capacity building on safeguard measures

While safeguard measures rules have technically been in existence since 1947 having been introduced under GATT 1947, they are still unpopular with both government officials and the private sector in Africa. This is evident in (1) the statistics of safeguard measures applied and maintained and (2) the number of and when domestic safeguard measures rules were enacted by African countries, a majority being recent. Most government officials know little about safeguard measures while others have no idea of their existence and importance, despite being employed in institutions responsible for trade matters.

The private sector is also largely unaware of the existence and importance of safeguard measures in their businesses. While a majority of African states are grappling with low levels of industrialisation, those industries that produce products for exports or are in competition with imported products largely do not understand how to leverage safeguard measures to protect them from injuries caused by increased volumes of imports. Those who may know that an injury might have been caused by increased volumes of imports, do not necessarily understand how to lodge complaints with investigating agencies, where such agencies exist.

This study therefore recommends that trade remedies agencies and experts should sensitise the private and public sectors on safeguard measures, their relevance to development, existing legal and institutional framework, available legal recourse and the support that they will receive from the agencies and government, as a whole. Once the

³⁸ D Achach 'Study on the Application and Impacts of Trade Remedies in the COMESA Region' COMESA Study Report 2023, 78.

private sector is informed, it would be easier for them to lodge complaints with investigation agencies. The public sector would also facilitate the investigations.

The need for collaboration between government and domestic industry players in the investigations and impositions of safeguard measures

This study notes that there is a general lack of collaboration between the domestic industry players and governments in safeguard investigations. As pointed out above, both the government and the domestic industry players, including the private sector should be trained in safeguard investigations. Once both sectors are well informed on safeguard measures, they can collaborate in the following ways: -

- i) The government should create an environment that allows for the lodging of safeguard complaints by the domestic industry players.
- ii) The domestic industry players should lodge safeguard complaints with investigating authorities.
- iii) The domestic industry players should organize themselves and work together in fighting international trade that causes or threatens injury to the domestic industry.
- iv) The government should aid in addressing international trade that causes or threatens to cause serious injury to a domestic industry or platform.
- v) The government and the domestic industry players should work together in implementing safeguard rules.
- vi) Where safeguard measures laws have not been enacted, with the support of the domestic industry players and experts, governments should see to it that the laws are enacted.
- vii) Academics should also support the government and domestic industry players in the implementation of safeguard measures rules through academic publications, capacity building, more so, as it relates to WTO safeguards in Africa and RECs safeguards. In addition to courses on international economic and trade law generally, African universities should also engage experts to offer courses on the WTO and safeguard measures.

7.2.3 Necessary digital trade reforms at the African level

Africa, unlike the rest of the world, is generally behind in the adoption of digital technologies and digital development.³⁹ The challenges resulting in minimal involvement of African countries in and impacting the growth of digital trade were extensively discussed in the previous chapter of this study. Some of the challenges inform the recommendations in this section.

African countries need to increase their participation and collaboration in developing harmonised digital trade rules

For the first time, Africa has a continental law on digital trade, i.e. the Protocol to the Agreement Establishing the AfCFTA on Digital Trade. The Protocol was developed as a result of mutual effort and collaboration among African Union Members under the leadership of the AfCFTA Secretariat.⁴⁰ While the Protocol is comprehensive, it is not conclusive since many provisions are partially regulated with a commitment made that further negotiations will be made and annexes to the Protocol developed on rules of origin, cross-border digital payments, cross-border data transfers, criteria for determining the legitimate public reasons for disclosure of source code, digital identities, financial technology, emerging and advanced technology and online safety and security.⁴¹ The annexes touch on very important provisions of digital trade that need to be developed soon for the full potential and benefits of the Protocol to be realised.

E-commerce strategies in African RECs are fragmented and in need of harmonisation. As also noted, the EAC, COMESA, ECOWAS and SADC are the only RECs with digital trade strategies and initiatives. It was shown that these strategies and initiatives are very diverse. This study, therefore, calls for their harmonisation. A trickle-down approach could be adopted whereby laws and initiatives at the RECs level are aligned with the initiatives at the continental level or the initiatives at the RECs level could

³⁹ S Adelia & others 'Economic development and industrialisation in the digital era: Where does Africa Stand' in Wilma Viviers and others (eds) *Africa's digital future: From theory to action* (Aosis Scholarly Books 2021).

⁴⁰ AfCFTA Digital Trade Protocol preamble.

⁴¹ AfCFTA Digital Trade Protocol art 46.

be grouped to form a more robust digital trade framework at the continental level, in a bottom-up approach. As the AfCFTA Agreement notes, African RECs are building blocks to the AfCFTA.⁴² The AfCFTA is also guided by the principle of the preservation of *acquis*.⁴³

Aside from the above legal instruments and as discussed in the previous chapter, there are no domestic laws in Africa that regulate digital trade. Instead, digital trade has been regulated in sub-sets of laws that singly or jointly result in the regulation of certain aspects that make up digital trade, for example, laws on data protection, e-transactions, cybersecurity, and online consumer protection.⁴⁴ African countries should therefore work together in developing mutual domestic laws on digital trade. For example, in addition to the AfCFTA Digital Trade Protocol, countries should develop mutual rules on digital trade to guide domestic regulations.

Put in place infrastructure to allow for the development of Africa's digital marketplaces or platforms

As discussed previously, the African Union Digital Transformation Strategy (2020-2030) aims to create a single African digital market by 2030.⁴⁵ Sokokuu, launched in 2020 by the African Union and African Electronic Trade Group, is yet to gain momentum in Africa. The AU should facilitate its widespread usage across the continent. In doing so, however, the AU should empower other similar African digital platforms to gain continental recognition and usage and not suppress them from growing.

As discussed, most of the existing digital platforms are situated in select African countries and are still not well established in those countries. This study therefore recommends that African countries should individually and collectively put in place infrastructure and create an environment for African start-ups and platforms to grow. This

⁴² AfCFTA Agreement art 5(b).

⁴³ AfCFTA Agreement art 5(f).

⁴⁴ UNCTAD 'Summary of Adoption of E-commerce Legislation Worldwide' (14 December 2021) <https://unctad.org/topic/ecommerce-and-digital-economy/ecommerce-law-reform/summary-adoption-e-commerce-legislation-worldwide> (accessed 2 November 2022).

⁴⁵ Africa Union 'The Digital Transformation Strategy for Africa (2020 – 2030)', available at <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>.

extends to the creation of laws that empower innovation and make the registration of innovations affordable to all. Measures that encourage Africans to trade online and, more importantly, those that enhance consumer trust online and digital payments are vital in this case. African countries could also conduct training or establish curriculums that educate the public on digital trade and the use of digital platforms for trade, for instance, training those in the informal sector and the marginalised groups.

Without discriminating between African and non-African digital platforms, African countries should put in place measures that allow for the growth of African digital platforms by levelling competition between African and non-African digital platforms. If necessary, African countries could give incentives to African digital platforms. It could also necessitate knowledge and best practices transfer from non-African to African digital platforms.

Safeguard measures also play a key role in mitigating injurious trade practices among digital platforms. To this extent, the number of digital trade imports into the continent by non-African digital platforms could be assessed vis-à-vis the volumes of digital trade by African digital platforms. If injurious digital trade is established, safeguard measures could be imposed to protect African digital platforms.

African countries should develop central data centres or mutual rules for developing country-specific data centres

Data centres are useful in assessing the volumes of digital trade within and across African countries. There currently is a scarcity of African digital trade data due to a lack of adequate processes for data collection. Data centres are also currently developing in select African countries. This study recommends that to address the scarcity of digital data in Africa, African countries should develop a central data centre or, in the alternative, develop mutual rules for the creation of data centres across Africa. This way African countries can develop domestic data centres that are guided by mutual rules for collecting digital data. This will mitigate the existing inadequacies and disparities in collecting cross-border data flows. Digital trade statistics are dependent on the availability of data on cross-border digital trade. Mutual rules and central points for collecting digital data would

be useful in safeguard investigations as soon as there is a framework for imposing safeguard measures on digital trade.

African countries should conduct training and capacity building on digital skills needed to investigate safeguards applicable to digital trade

As is the case with building expertise in the investigation of complaints on safeguards applicable to goods, it would be necessary to have experts who understand the investigation of safeguards applicable to digital trade. Experts would be required to investigate an increase in the volumes of digital trade imports, whether two sets of digital data and services are like or directly competitive, to ascertain whether a domestic industry has been impacted by the increase in digital imports and whether there is a threat or serious injury has been caused to a domestic industry or platform.

With the current digital skills divide and lack of access to reliable information, it might be difficult for the private sector to identify any increases in digital imports and it could not, therefore, lodge complaints with investigating agencies. In the same breath, investigation authorities would not have the knowledge and skills to investigate lodged complaints and conduct safeguard investigations.

Thus, this study recommends that African countries address the digital skills divide. This extends to training and capacity building on digital skills necessary for safeguard measures applicable to digital trade. For instance, necessary training must be done to empower experts in ascertaining the presence of unforeseen developments in the investigation of safeguards on digital imports.

The need to improve African digital infrastructure and internet connectivity

The previous chapter examined the challenges impacting Africa's digital infrastructure and internet connectivity. It noted that while there was a general increase in Africa's internet connectivity and infrastructure, it is still lagging behind the rest of the world. As a result, the volume of African digital trade is impacted since Africa is unable to effectively trade digitally with the rest of the world and amongst itself. This chapter therefore proposes more mutual efforts that ensure increased digital infrastructure and internet

connectivity development not only at the country level but also at the regional and continental levels.

Empowering informal traders to engage in digital trade for exports

In addition to the absence of African digital data, many traders in Africa engage in informal trade. As highlighted previously, safeguard measures in Africa are impacted by low levels of industrialisation. Most of the goods produced are also for domestic consumption and not exports. This explains why Africa's participation in global trade is low. This study therefore calls on African countries to empower informal traders to engage in trade for exports and, more importantly, leverage digital African marketplaces for cross-border digital trade. In a safeguard measure investigation, only those platforms or industries dealing in data or goods for exports are investigated. To enjoy safeguard protection, therefore, there should be increased participation in global trade by African domestic industries.

This study has investigated the application of safeguard measures to digital trade to protect African domestic industries and platforms. This can only be realised if more African industries and platforms take part in international trade.

In conclusion, this study has shown that the increase in digital trade points to a potential spike in digital trade volumes in a manner that is likely to cause or threaten to cause serious injury to African domestic industries and platforms dealing in like or directly competitive data or services. There is however no guiding legal framework to carry out safeguard investigations on digital trade. Africa is also grappling with various challenges that impact their application of safeguard measures and the growth of digital trade. There are, however, benefits that would derive from the application of safeguard measures to digital trade which Africa should leverage. Thus, this is an area that Africa should in the future focus to regulate since they stand to gain more through the regulation of safeguard measures and digital trade.

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