INCLUSIVITY AND THE TRANSFORMATIONAL POTENTIALS OF THE AFRICAN CONTINENTAL FREE TRADE AREA (AFCFTA) FOR AFRICAN COUNTRIES

Founders' Day Lecture Series

Inclusivity and the Transformational Potentials of The African Continental Free Trade Area (AFCFTA) For African Countries

By

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Foreword

The Nigerian Institute of Advanced Legal Studies (NIALS) Founders' Day is an annual event which provides the opportunity to re-energise efforts aimed at realising the vision and mandate of the founding fathers of the Institute. It also provides a veritable platform to motivate scholarly discourse and the exhibition of legal scholarship of outstanding academics. Over the years Guest Lecturers at the Founders' Day lectures have examined a plethora of contemporary issues such as intellectual property, the role of the International Criminal Court (ICC), human rights, and constitutional imperatives.

The 2019 Founders' Day Lecture titled '**Inclusivity and the Transformational Potentials of the AFCFTA for African Countries'** explores the potentials of regional trade within the African Continental Free Trade Area (AfCFTA). The lecture is delivered by Ambassador Faizel Ismail, Adjunct Professor at the Centre for Comparative Law in Africa, Faculty of Law, University of Cape Town, South Africa. This contemporary topic is no doubt timely, in view of Nigeria's and the international community's interest in pushing effective regional trading on the continent.

The lecture provides a historical perspective of the AfCFTA, discussing the roles and purposes of existing trade agreements such as the World Trade Organisation (WTO) Agreement and the General Agreement on Tariffs and Trade (GATT). The lecture interrogates the role of the AfCFTA and economic transformation and industrialization in Africa, and provides insights into the inter-relationship between the AfCFTA and effective democracy and good governance. The lecture also analyses the inextricable role of the private sector and stakeholders in pushing an all-inclusive process of negotiations arising from the AfCFTA agreements. The lecture provides salient recommendations to African States, including the building of necessary institutions and development of a regulatory framework to ensure effective transition of the AfCFTA.

Professor Faizel Ismail is an outstanding lecturer and eminent scholar in the field of international trade law and he brings his profound knowledge of the subject to bear in this insightful lecture which will no doubt provide a practical guide to nations and International trade law and policy experts.

Professor Adedeji Adekunle, *SAN*
Director-General
March 2019

"INCLUSIVITY AND THE TRANSFORMATIONAL POTENTIALS OF THE AFRICAN CONTINENTAL FREE TRADE AREA (AFCFTA) FOR AFRICAN COUNTRIES"

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I am very humbled by the honour bestowed upon me by Professor 'Deji Adekunle SAN and the leadership of the Nigerian Institute of Advanced Legal Studies (NIALS) to deliver the NIALS 2019 Founders Day Lecture.

Background

Regional integration and indeed, the process of "globalization" and "free trade" has become a major topic of political debate and controversy across the world. The exit of Britain from the European Union, referred to as "BREXIT", and the tendency towards increasing protectionism reflected in President Trump's "America First" trade policies, are major set-backs for more open markets, regional integration and multilateralism generally.

The US and the United Kingdom, are the architects of the United Nations (UN), the Bretton Woods Institutions (the World Bank and International Monetary Fund (IMF)) and the multilateral trading system. These institutions were, arguably, the bastions of stability, inclusivity, more open trade and world peace. This crisis of global governance causes us to reflect on the system of multilateralism and more open trade and what implications it has for regional integration in Africa.

As the negotiations began in Geneva in 1946 for an international trading system, the United States had insisted that this system must be based on the principle of "most-favoured-nation" or "non-discrimination" between member states. The United States became an advocate of freer trade and more open global markets in the middle of the 1930s. In 1934, the US Reciprocity Act compelled the US trade negotiators to seek reciprocity from all their trading partners. Thus, in 1947 the fledgling General Agreement on Trade and Tariff (GATT)[1] adopted the principle of the Most-favoured Nation (*mfn)* in Article 1 of the GATT while the principle of reciprocity was incorporated in the preamble of the GATT.

Developing countries objected to these principles. India and Brazil submitted proposals arguing that these principles while appearing to be fair and equitable had precisely the opposite effect. This was because these principles failed to underscore that not all countries were equal. Indeed, the majority of the developing countries based in Africa, Asia and Latin America were less developed than the major developed countries. The US and other developed countries ignored the proposals made by India and Brazil. It was only in 1964 that the GATT recognized the concerns of developing countries and incorporated the concept of Special and Differential Treatment. (with *Part IV of the GATT on Trade and Development*). In 1979, the GATT also allowed developing countries the flexibility to exchange preferential tariffs between themselves thereby reducing the strictures of Article XXIV of the GATT.

While the GATT principles of non-discrimination and reciprocity were enshrined in its rules, the contradiction between the principles and rules and the practices of the developed countries were not lost on developing countries.

1 61 Stat. Pt.5; 55 U.N.T.S. 194. The text of the original agreement establishing the GATT, with annexes and schedules, is attached to the Final Act of the United Nations Conference on Trade and Employment.

Earlier on in the GATT, the US had insisted on reciprocity from developing countries and refused to open its market to the agriculture and textile products of developing countries. The US insisted on retaining its quantitative restrictions (QRs) in agriculture early in the GATT while insisting on the elimination of QRs for its more competitive manufactures. Agriculture trade was not brought into the GATT rules until the end of the Uruguay Round[2] in 1994 while high tariffs and subsidies in developed countries continued to block developing country exports today. In 1961,the developed countries secured short-term restrictions from more competitive developing countries, stemming their exports into developed country markets. These measures were extended in 1964 and incorporated into the Kennedy Round at the end of the 1960s with protectionism only finally reduced a decade after the end of the Uruguay Round.

Special Needs and Interests of Developing Countries

It is for this reason that developing countries insisted that the World Trade Organisation (WTO) Doha Round of trade negotiations should prioritize the "needs and interests of developing countries" in its mandate. The Doha Round that was launched at the end of 2001 was to collapse by the end of 2008. Developed countries were unable to deliver on the promise to make the WTO more development oriented, equitable and inclusive. Susan Schwab, the United States Trade Representative at the time, declared in an article in the US Journal of *Foreign Policy* that the Doha round was dead.[3]

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2 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr.
15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994)

3 Susan Schwab, "Why the Negotiations Are Doomed and What We Should Do About It" Vol. 90.
No. 3 Foreign Affairs (May/June 2011)

In her view, the world had changed fundamentally since the Doha Round had begun. The main reason she offered for this view was that the concept of Special and Differential Treatment (SDT) was no more valid and should be abandoned by the WTO. She argued that majority of so-called emerging economies led by China including India, Brazil, South Africa, Egypt and Nigeria needed to be "graduated" from the developing country category.

More recently, this debate has re-surfaced under the guise of WTO reform. In a recent submission to the WTO General Council dated 14th February 2019 (WTO/GC/W/757/Rev.1), the United States has argued that the current approach of "self-declaration" by developing countries has rendered the WTO obsolete and ineffective. The WTO recognizes Less Developed Countries (LDCs) that are declared to be so by the United Nations. Developing countries however, can self-declare if they wish to be recognized as such in the WTO. While it is true that there is an increasingly wide range of countries that have declared themselves to be "developing", this has in practice not been an insurmountable challenge in the WTO negotiations. Indeed, some developing countries have declared themselves to belong to different categories to be able to benefit from Special and Differential Treatment. In addition to LDCs, these categories include: "Small and Vulnerable Economies (SVEs)","Landlocked Developing Countries (LLDCs)" and "Small Island Economies (SIDS)".

In the Agriculture negotiations, the concept of small farmers farm for subsistence, food security and livelihoods has been recognized by the WTO. These differentiations have been discussed and negotiated amongst developing countries and their coalitions (Africa Group, ACP, LDCs, G33, G20 etc.). In most part, the larger and more competitive developing country economies have recognized that they need to make a greater contribution to opening markets and contributing to the development of smaller and more vulnerable developing countries.

I know this because I was the Chair of the WTO Negotiating Group (CTD-SS) for two years (from 2004-2006) and managed the negotiations between developing countries on the recognition of the category of "Small and Vulnerable Developing Countries" or SVDCs. In a re-joinder to the US paper, a large number of developing countries (including China, India, Brazil, South Africa and Kenya) submitted a proposal to the WTO General Council on the 28th of February 2019 titled: *The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness* (WTO/GC/W/765/ Rev.2) arguing that the evidence produced by the United States to justify its claim that a large number of developing countries should be "graduated" out of the "developing country" category is selective and misleading. Their submission in turn argued that"despite impressive achievements by developing members since the creation of the WTO, old divides have not been substantially bridged and, in some areas, they have substantially widened while new divides such as in the digital and technological spheres are becoming more pronounced".

Thus, developing countries in their submission, produced evidence to point to the persistence of the enormous development divide between developed and developing members including in their levels of economic development, competitiveness, industrial structure, GDP per capita and poverty levels etc.The current debate on WTO reform is another phase in the GATT/WTO on the fairness of the founding principles of the GATT and,the effectiveness of its Special and Differential Treatment provisions. In a paper I wrote for the journal of *World Economics* in 2009 titled "*Reforming the World Trade Organization"*, I argued that the WTO should adopt the principle of "development" as its main objective to enable it to be fair, equitable and inclusive. I have utilized a broad conceptual definition of development put forward by Amartya Sen in his book, *Development as Freedom* (1999). For Sen's definition of "development" to be implemented in the WTO, the members of the WTO would need to base their decisions not on the narrow prescripts of mercantilism but on the values of social justice.

The African Continental Free Trade Agreement (AfCFTA).

How is this debate relevant to the discussion about inclusivity and the transformational potentials of the AfCFTA? I discuss this question after providing a brief overview of the history of the AfCFTA. The launch of the African Continental Free Trade Area (AfCFTA) on 21 March 2018 at a Summit of the African Union held in Kigali, Rwanda, is a great leap forward for Africa's regional integration efforts. President Paul Kagame declared that the launch of the AfCFTA was "historic". Seen from the long lens of history, this was indeed, a historic event. It was the most ambitious expression yet of the dream and vision of Pan-African leaders such as Kwame Nkrumah, Jomo Kenyatta, …and others who had begun the long journey towards African unity and integration since the de-colonisation and independence of African States in the late 1950s.

The formation of the Organization of African Unity (OAU) in 1963 ignited the vision of regional integration. However, it was only in the early 1980s that the vision of regional integration was given substantive meaning by the first executive secretary of the Economic Commission of Africa, Adedeji Adebayo – a great Nigerian intellectual who recently passed away. His influential leadership led to the launch of the Lagos Charter in 1975 and the Lagos Plan of Action in 1980. The Lagos Plan of Action called for the integration of the continent based on "self-reliance, endogenous development and industrialization". Ten years later, the OAU adopted the Abuja Treaty (June 1991). The treaty set out a step-by-step approach to regional integration in Africa with the creation of the Regional

Economic Communities (RECs) such as ECOWAS, SADC and the EAC.

However, by the early 2000s, Africa’s RECs were beginning to overlap, creating a so-called “spaghetti bowl” of overlapping regional arrangements. It is for this reason that African Leaders from SADC, COMESA and the EAC took a decision in June 2011 to launch negotiations towards a Tri-partite Free Trade Area and in June 2015, Leaders of the African Union launched the negotiations to include the rest of Africa in a Continental Free Trade Agreement.

The major documents agreed in Kigali and the Mauritania AU Summit held in July 2018 include a Framework Agreement establishing the AfCFTA plus three Protocols - the Protocol on Trade in Goods, the Protocol on Trade in Services and the Protocol on the Rules and Procedures on the Settlement of Disputes.These agreements form the first phase of the AfCFTA negotiations. While the negotiators agreed on the broad framework for the reduction of tariffs, the percentage of lines for each category is still to be negotiated. Trade negotiators have a saying that “the devil is in the detail”.

The Mauritania Summit of the AU also agreed on five services priority sectors (Transport, Communication, Finance, Tourism and Business Services) for the member states to begin making “requests and offers” as they advance the “Service”’ negotiations. Phase II of the AfCFTA negotiations will include the issues of Investment, Competition and Intellectual Property Rights. Much store has been placed by economists for example, in the Economic Commission for Africa on the potential of the AfCFTA to be inclusive and transformational for Africa’s economies.

Several studies undertaken by economic researchers predict that the AfCFTA has the potential to increase growth, raise welfare and stimulate industrial development on the continenthowever, there are concerns that some countries particularly, the smaller and more vulnerable economies may experience the negative impacts of premature liberalisation and fiscal revenue losses. In a recent book[4] Joseph Stiglitz, the celebrated Nobel Prize Economist argues that, for economic integration to be successful" there has to be a minimal level of "solidarity" so that countries that are in a stronger position help those that are in need. This principle of "solidarity" is comparable to the African concept of "Ubuntu" ("humanity towards others").

Nelson Mandela, in his visionary leadership implored his compatriots in South Africa to contribute to the prosperity and integration of the African continent not in a spirit of paternalism but in a spirit of Ubuntu and solidarity. Several writers including Adebajo Adedeji and Rob Davies and, studies undertaken by UNCTAD and the UNECA have also argued that the "sequential" or simple "free trade" European approach to regional integration is not appropriate for developing countries, especially in the African context. These researchers argue that African countries should adopt an approach to regional integration referred to as "developmental regionalism".

Developmental regionalism is defined as "cooperation among countries in a broader range of areas than just trade". It includes cooperation between countries on policies aimed at accelerating regional industrial development and regional infrastructure provision.This is an opportune moment for African policymakers to ask a few pertinent questions. How can the AfCFTA be inclusive and transformational? How can the AfCFTA benefit *all* African countries? How can the AfCFTA lead to economic transformation and industrialisation of the continent? How can the AfCFT Acatalyse and advance the building and strengthening of democracy and good governance in Africa?

4 Joseph Stiglitz, *The Euro: How A Common Currency Threatens the Future of Europe.* 2016, W.W. Norton Company

AfCFTA and Developmental Regionalism

I argue that the "developmental regionalism" approach to trade integration provides us with the best prospects for the AfCFTA to catalyse the process of transformative industrial development, cross-border investment, democracy and governance in Africa. In the remaining time available for the discussion, I review the progress being made by African countries and the continent in implementing each of the four legs of the "developmental regionalism" approach, and argue that by adopting this approach, African Leaders will ensure that the AfCFTA benefits *all* African countries.
In a paper I wrote recently titled:*A Developmental Regionalism Approach to the AfCFTA*[5], I argued that for Africa's regional integration to succeed in being inclusive and transformational, it needs to walk on four legs:

First Leg: Fair Trade Integration
Africa's member states have a wide variety of categories of countries that may require special attention and specific treatment. The 55 African member states are made up of 34 LDCs, 16 LLDCs and six SIDS. Building trade agreements in favour of small and less developed economies will assist in contributing to fairer outcomes of the AfCFTA and a more balanced and mutually beneficial regional integration process.The role of the private sector in driving the process of regional integration is crucial, as the experience of Europe suggests. In Africa, only a few countries have a significant private sector that have become regional "multinationals" driving the regional integration process.

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5 Faizel Ismail, A 'Developmental Regionalism' Approach To The AfCFTA, A Trades and
industrial Policy Strategies (TIPS) Working paper Delivered in celebration of the 90th birthday of Chief OluAkinkugbe CFR CON, 5 December 2018

Some critics have argued that the major beneficiaries of the AfCFTA will be those economies in Africa that have the capacity to expand their exports of goods and services into the rest of the continent. These include companies mainly from South Africa, Nigeria, Kenya and Egypt.The South African government has recognised this reality and taken steps to discipline the role of its private sector. The government of South Africa has issued a document titled:*Guidelines for Good Business Practice by South African Companies Operating in the Rest of Africa*. The guidelines are voluntary but offer an opportunity for engagement between the South African government and the major private sector firms on their role in the rest of Africa. The principles listed in these guidelines include building local supplier capacity,promoting employment of local labour, skills development and technology transfer, avoiding engaging in corrupt and illegal activities, and compliance with tax laws and regulations. These principles need to be complied with. Companies that invest in the rest of the continent should be accountable to their host countries.

African governments should ensure that their stakeholders: business (both big and small), trade unions and civil society NGOs are included in the national consultation process and, provide their negotiators with clear mandates for negotiations. African countries need to build effective institutions that are inclusive and enable the fullest participation of stakeholders in the negotiating process.This will improve both the qualityand the sustainability of the AfCFTA agreements. In South Africa, Nelson Mandela in his wisdom, created the National Economic and Development Labour Council (NEDLAC) which obliges government policy makers to consult and engage with all the major stakeholders including the trade unions, business associations and other civil society representatives on new policies, legislation, regulations and international trade negotiations.

In addition, building the capacity and empowering the negotiators and stakeholders from the poorest and smallest countries will also ensure that the agreements will be fair and mutually beneficial.Regional integration is not just an inter-governmental process. It is far more important to be left to governments alone. The private sector, civil society and academics/intellectuals must play a robust and active role in driving the process in parallel, and in partnership with national governments.

Second Leg: Building Regional Value Chains

Most African countries have been growing rapidly since the early part of the new millenium. Reflecting on this trend, the African Centre for Economic Transformation based in Ghana commented that "the continent is growing rapidly, transforming slowly". This prompted some development economist such as the Harvard based Dani Rodrik to argue that "structural transformation is essential to ensure labour-demanding employment and social inclusion"[6]. Transformation involves the process of moving the economy away from being based on low value-added primary products towards higher value-added production and knowledge-based products. In the economic literature, these processes include *agricultural transformation*, *export diversification*, *building technological capabilities among firms and farms*, *industrial upgradingand industrial deepening*.

African countries are increasingly connected to the global economy through Global Value Chains (GVCs). However, they are mainly suppliers of raw materials and other low-value manufactures and operate at the lowest rung of the ladder in GVCs.The good news is that while Africa's exports is largely made up of commodities to the developed countries and to China, the composition of its intra-African trade is made up of more technology-intensive*manufactured* products.

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6 Rodrik, D. 2013.Africa's Structural Transformation Challenge. Project Syndicate, December 12, 2013.

Therefore, the development of regional value chains and the insertion of African firms into global value chains will, by their nature, facilitate increased intra-African trade of manufactures and could contribute to sustainable long-term growth. There are numerous industrial sectors in Africa that are ripe for the development of regional value chains in agro-processing, pharmaceuticals, iron and steel and capital goods, clothing and textiles, leather and footwear and even in the automotive sector.

In advancing regional trade integration in these sectors, African policy makers must recognize the need to carefully nurture small and medium sized enterprises and manufacturing. Thus, adequate policy space should be availableto African states to build the necessary trade and industrial policies, laws, regulations and institutions to ensure safe and fair trade and,to build their infant industries. In addition, these industries will need adequate attention to laws and regulations to protect the integrity of Africa's borders from illegal imports, sub-standard goods and third country trans-shipment. African countries must be able to protect themselves from unfair trade, sub-standard and dumped goods from the north and south whether this is in the form of second-hand clothing or vehicles.

Cooperation between Africa's emerging entrepreneurs and industries towards building of regional value chains, and to compete more effectively in global markets will advance transformative industrialization, obtain a fairer share of the value we obtain from our commodities and our labour and, improve the lives of the people on our continent. The AfCFTA must facilitate this process.

Third Leg: Cross-Border Infrastructure Investment

As I have already stated,Africa is divided into 55 states of landlocked (16), least developed countries (34) and small island developing states. The landlocked countries (Botswana, Burkina Faso, Burundi, Chad, Central African Republic, Ethiopia, Lesotho, Malawi, Mali, the Niger, Rwanda, South Sudan, Swaziland, Uganda, Zambia and Zimbabwe) may face very specific challenges- all lack maritime access, are isolated from the world markets and suffer high transit costs, which seriously constrain their overall socio-economic development.

African countries are making significant progress in building their *hard infrastructure*(ports, road and rail to facilitate intra-regional trade) and *soft infrastructure*(customs cooperation at borders, port efficiency and reduction of roadblocks along major transport routes).Forexample,much progress has been made to improve the Abidjan-Lagos corridor, which handles more than two-thirds of West African trade, transport and transit activities as well as modernising the ports in Côte d'Ivoire, Ghana, Togo, Benin and Nigeria.

The AfCFTA has annexes on "customs cooperation" (Annex 3), "trade facilitation" (Annex 4) and on "transit" (Annex 8). All three of these issues are covered in the World Trade Organization Agreement on Trade Facilitation and must be implemented with adequate attention to the capacity constraints of the poorest countries.

Fourth Leg: Democracy and Governance

A political sea-change has been underway in Africa since the end of the Cold War in late 1980s and early 1990s.Most African states have begun accepting multi-party systems of governance in the new millennium. Multi-party elections have begun to replace military coups. Most African countries have embraced a culture of constitutionalism, rule of law and human rights.

During the AU Summit held in Durban, South Africa, in 2002, the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance was adopted. The declaration committed African countries to work together in pursuit of the following objectives: democracy and good political governance, economic and corporate governance, socio-economic governance and the creation of an African Peer Review Mechanism (APRM). The APRM is a voluntary platform for self-assessment and peer review of governance policies, procedures and institutions by African Union member states aimed at institutionalizing and consolidating democratic governance.

The APRM is an instrument that is voluntarily acceded to by African Union (AU) member states. Countries voluntarily subjected themselves to being examined in governance areas within established guidelines.As at 17th March 2019, the APRM has 37 members with Namibia and The Gambia being the most recent members to accede with at least 20 of its members having already undertaken a first country review.The APRM is unique in both scope and breadth, with the review process extending to all levels of government (executive, parliament and the judiciary) as well as the private sector and civil society organizations.Several academic writers have observed that the APRM is a truly indigenous and locally owned initiative designed by Africans for Africans. This is a truly remarkable achievement that the AfCFTA must build on.

The Way Forward

I have argued that all four pillars of the developmental regionalism approach have begun to gain traction across Africa and, have begun to reinforce and strengthen each other in practice. This approach to regional integration in Africa has great potential to catalyse and accelerate a virtuous circle of regional trade integration, transformative industrialisation, cross-border infrastructure, democracy, inclusivity and good governance across the continent. Policymakers need to make the necessary linkages both conceptually and in practice.

The launch of the AfCFTA on 21 March 2018 could become a landmark and the transition to a new phase in the historic journey of Africa to realise the dreams of the Pan-African leaders for a peaceful, prosperous and integrated Africa.