FOREIGN INVESTMENTS, TRADE, AND SUSTAINABILITY IN SUB-SAHARAN AFRICA AND NORTH AMERICA UNDER THE WEST AFRICAN ECONOMIC AND MONETARY UNION AND THE UNITED STATES-MEXICO-CANADA FREE TRADE AGREEMENTS

N'Guessan Clément Kouame*

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ABSTRACT

Many scholars have commented on free trade, foreign investment, and sustainable development. The three concepts are intertwined and underlie global trade and economic and legal discussions on countries' development. The multilateral trade system gave leeway to countries for regional integration under Regional Trade Agreements ("RTAs"), shaped as customs unions or Free Trade Areas. These agreements aim to maximize free trade within specific regions. Facilitating free trade brings more benefits in different ways and is a strong incentive for foreign investments. Foreign investments generate jobs and wealth and are fuel for development. However, free trade has downsides. Corporations are in the "race to the bottom" to take advantage of lax environmental, human, and worker rights regulations to increase their benefits and profit. Here comes sustainability to mitigate free trade's adverse effects on vulnerable countries and, more broadly, humanity.

This study will comprehensively analyze the West African Economic and Monetary Union (WAEMU) and the United States, Mexico, and Canada (USMCA), two major Regional Trade Agreements. The WAEMU treaty was signed in 1997 and amended once in 2003, while the USMCA, building upon the North American Free Trade Agreement (NAFTA), entered into effect in 2020. The purpose of this study is to make a comparative analysis to, in fine, show the WAEMU treaty's shortcomings regarding free trade, foreign investment policies, and sustainability, and how the USMCA, a more recent and innovative free trade agreement, can fill its gaps.

Thus, this comprehensive and comparative analysis will have three parts. As a background and to set the scene, we will explain (I) the global logic of free trade agreements, with the World Trade Organization (WTO) representing the multilateral trade system and Regional Trade Agreements (RTA) in global trade. Then, (II) the USMCA and the WAEMU treaties will be sketched out individually before (III) our final comparative analysis and assessment of both treaties regarding free trade, foreign investments, and sustainability, followed by critiques, recommendations, and suggestions for improvements.

I. INTRODUCTION

> A few years ago, we asked a slave newly freed on a cocoa farm in West Africa if he knew what happened to the cocoa he harvested. "No," he said…. So we asked him, what would you say to those millions of people who eat the chocolate made from the cocoa you have grown in slavery? "Tell them," he said, "when they eat chocolate, they are eating my flesh."[1]

Humans began trading to create wealth, not for self-destruction. Trade is a long-standing activity that has progressively metamorphosized and become sophisticated throughout time and humanity's evolution. In *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith[2] demonstrates that markets (and economies) existed before the development of states. According to Smith, markets emerged out of the division of labor.[3] Taking up specialized crafts, individuals began to depend on others for subsistence goods, which led to the formation of markets.[4] Barter was the first method of exchanging these goods.[5] Historically, around 6000 B.C., barter was one of the primary exchange and trade materialization systems.[6] Participants in barter could directly exchange goods and services without using any medium of exchange, such as money.[7] However, barter

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1 Brief of Members of Congress Senator Blumenthal, Representative Smith, et al., as Amici Curiae Supporting Respondents at 14–15, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (Nos. 19-416, 19-453), 2020 WL 6322316 (quoting *The Ongoing Tragedy of International Slavery and Human Trafficking: An Overview: Hearing Before the Subcomm. on Hum. Rts. and Wellness of the Comm. on Gov't Reform*, 108th Cong. 109 (2003) (statement of Kevin Bales, President, Free the Slaves)).

2 "Adam Smith (1723–1790) was a Scottish philosopher and economist who is best known as the author of An Inquiry into the Nature and Causes of the Wealth Of Nations (1776), one of the most influential books ever written." *About Adam Smith,* ADAM SMITH INST., https://www.adamsmith.org/about-adam-smith (last visited Dec. 20, 2023).

3 Michael Munger, *Division of Labor, Part 1*, ADAMSMITHWORKS (Aug. 7, 2019), https://www.adamsmithworks.org/documents/division-of-labor-part-1.

4 *Id.*

5 *Barter Services – History of Barter System*, HISTORYPLEX, https://historyplex.com/barter-services-history-of-barter-system (last visited Apr. 13, 2024).

6 *Id.*

7 *Id.*

required the "double coincidence of wants."[8] For the exchange to occur, both participants had to want what the other had, which hindered specialization. Thus, people developed mechanisms to circumvent this issue using salt and metal.[9] According to Smith, this is the origin of money conceptualized as a universal medium of exchange.[10]

Aligning with the world's evolution and human needs, the concept of trade was expanded and elaborated step by step beyond barter and with money as the cornerstone. The *comparative advantage theory* developed by British economist David Ricardo[11] in the 19th century is the underlying and firm basis of international trade's modern legal and economic perspective. This theory posits that States should specialize or do what they are better at and import what they need.[12] The comparative advantage theory favors free and liberalized trade where countries are all better off.[13] Rapid technological development in the modern era accentuated worldwide exchanges between countries. The world is undoubtedly the "global village" Marshall McLuhan described and predicted in the early 1960s.[14] With globalization and technology virtually shattering physical barriers separating countries, they are willing to extend their areas of interest and economic activities worldwide through trade and foreign investments. Indeed, the Internet, technology, new kinds of media, and communication have revolutionized business and trade.[15] For instance, it would have been unthinkable three decades ago to employ overseas workers to carry out tasks previously done within a country at lesser costs or to outsource or "offshore" part of the manufacturing or production process of goods

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8 *What is barter system and double coincidence of wants?*, GEEKSFORGEEKS (Apr. 6, 2023), https://www.geeksforgeeks.org/what-is-barter-system-and-double-coincidence-of-wants/.

9 *Barter Services – History of Barter System*, *supra* note 5.

10 *Chapter IV: Of the Origin and Use of Money*, ADAMSMITHWORKS, https://www.adamsmithworks.org/documents/chapter-iv-of-the-origin-and-use-of-money (last visited Dec. 22, 2024).

11 *David Ricardo, among the brightest and best – and richest*, ADAM SMITH INST. (Sept. 11, 2019), https://www.adamsmith.org/blog/david-ricardo-among-the-brightest-and-best-and-richest.

12 Free trade allows economies to specialize, making them better off. For example, a country better at producing wine can export it to pay for wool imports, ultimately benefiting both countries. *Comparative Advantage*, WTO, https://www.wto.org/english/res_e/reser_e/cadv_e.htm (last visited Dec. 20, 2023).

13 *Id.*

14 The term "global village" was used by Marshall McLuhan in the 1960s to describe how people worldwide are interconnected through new media technologies. Today, the internet is considered the primary medium that links people across the globe, enabling anyone with an internet connection to stay informed and communicate with others in far-flung areas. *Do we live in a global village?*, UNIV. OF ILL. LIBR.: GLOB. NEWS VILLAGE, (Aug. 14, 2009), https://www.library.illinois.edu/village/globalnews/mod1/pg1.htm.

15 Alex Smith, *How The Internet Has Changed The Business World*, TECH. EDUC., https://technologyeducation.org/internet-has-changed-the-business-world/ (last visited Dec. 22, 2024).

to firms in multiple countries.[16] The technology rush, illustrated by the AI revolution, also aims to facilitate exchange and trade, increase wealth and economic growth, and create jobs and opportunities.[17] However, countries must also insulate themselves against "economic aggression" from other countries within their territories under the mask of unfair competition or unbalanced trade relationships.[18] These economic aggressions generally lead to environmental, human, and workers' rights impairments.[19] The multilateral trading system with the General Agreement on Tariffs and Trade (GATT)[20] and the World Trade Organization[21] found itself in turmoil in addressing sustainability issues involving environmental, human, and workers' rights violations in global trade.[22] Therefore, countries will use unilateral economic and legal tools such as RTAs or other international treaties to pursue their interests and profitability by accessing new markets, protecting themselves, and moving toward sustainable goals in trade.[23] RTAs and the further expansion of the WTO will both play a role in global economic development.

RTAs aim to promote the interests of countries with similar development levels or common interests. Indeed, countries can find the multilateral trading system inefficient in addressing their specific issues.[24] For instance, the least developed and developing countries complain about the GATT/WTO fairness.[25]

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16 This phenomenon is referred to as "outsourcing" or "offshoring" and is overly controversial for reasons based on economic, political, or social perspectives and consequences. JOOST H.B. PAUWELYN ET AL., INTERNATIONAL TRADE LAW 37 (Aspen eds., 3d ed. 2016).

17 Pushkar Mukewar, *How Technology Can Help Global Trade Become More Efficient, Inclusive and Equitable*, FORBES (Sept. 2, 2022, 07:30 AM), https://www.forbes.com/councils/forbesfinancecouncil/2022/09/02/how-technology-can-help-global-trade-become-more-efficient-inclusive-and-equitable/.

18 PAUWELYN ET AL., *supra* note 16, at 51–54.

19 Gregory Schafer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORDHAM INT'L L.J. 608, 611–14 (2000).

20 Between 1948 and 1994, the GATT established and oversaw global trade regulations. *The GATT years: from Havana to Marrakesh*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Apr. 13, 2024); *see also The General Agreement on Tariffs and Trade (GATT 1947)*, WTO, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited Mar. 9, 2025).

21 The World Trade Organization (WTO) is the only global international organization dealing with trade rules between nations. At its heart are the WTO agreements, negotiated and signed by most of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. *What is the WTO?*, WTO, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Dec. 20, 2023).

22 Schafer, *supra* note 19, at 611–25.

23 Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO*, 8 GLOB. POL'Y 107, 108–109 (2017).

24 Vahini Naidu, *Knowledge Production in International Trade Negotiations is a High Stakes Game*, AFRICA AT LSE BLOG (June 14, 2019), https://blogs.lse.ac.uk/africaatlse/2019/06/14/knowledge-production-international-trade-digital/.

25 *Id.*

Then, RTAs are found more beneficial to remedy the WTO's failures. They do so by conceding more significant reductions or zero tariffs and eliminating unfavorable identified economic or legal policies among countries with common interests in specific geographic regions.[26] Such agreements aim to facilitate trade and investment and enhance economic growth through foreign investments.[27] Indeed, foreign investment may represent a valuable tool and lever for economic development. Consequently, numerous countries worldwide have signed Regional or Free Trade Agreements within bilateral or multilateral treaties.[28]

One important RTA in Sub-Saharan Africa is the West African Economic and Monetary Union (WAEMU) (also known by its French acronym, UEMOA).[29] Its members are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.[30] WAEMU member countries are collaborating to achieve greater regional integration by implementing unified external tariffs.[31] North America's most important Regional Trade Agreement is the United States-Mexico-Canada (USMCA) treaty.[32] This treaty replaces and revises the NAFTA (North American Free Trade Agreement).[33] The USMCA, or NAFTA 2.0, retains most of NAFTA's substantive provisions but implements tremendous and essential trade and business activity changes.[34]

This study has three main objectives. First, it will elucidate (I) the global logic underlying the use of Free Trade Agreements, highlighting the GATT/WTO multilateral trading system and RTAs' functioning. Understanding the relationships among member countries of these Free Trade Agreements and among their counterparts outside the agreements, as well as their interactions with the multilateral trading system, will require explaining some economic approaches and concepts. Second, it will (II) portray an overview of the USMCA and WAEMU free

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26 *Regional Trade Agreements*, WORLD BANK GRP. (Apr. 5, 2018), https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements.

27 *Id.*

28 "Seventy-eight WTO Members (out of 131, counting the EU-28 as one) have at least one bilateral relationship covered by multiple PTAs, and 99 out of the 248 PTAs are affected by this overlap with at least one other PTA in at least one bilateral relationship." PAUWELYN ET AL., *supra* note 16, at 353.

29 *Le Traité modifié* [*The Amended Treaty*], UEMOA, https://www.uemoa.int/traite-modifie; *see also Presentation of UEMOA*, UEMOA, https://www.uemoa.int/en/presentation-of-uemoa (last visited Dec. 22, 2024) [hereinafter *UEMOA treaty*].

30 *UEMOA treaty*, *supra* note 29.

31 *Id.*

32 *Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited Dec. 22, 2024) [hereinafter *USTR*].

33 North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (effective Jan. 1, 1994). For more on NAFTA, see ALSO USTR, THE NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT 1 (n.d.) [hereinafter USTR NAFTA], https://ustr.gov/sites/default/files/uploads/countries%20regions/africa/agreements/nafta/nafta%20chapter%20summaries.pdf.

34 David Evans, *The United States-Mexico-Canada Agreement: How NAFTA 2.0 Represents a New Era in North American Trade*, 71 DEPAUL L. REV. 831, 831 (2022).

trade agreements and their core characteristics in light of the principles set by the GATT/WTO. Lastly, it will (III) compare the WAEMU and the USMCA treaties and evaluate their efficiency in addressing legal and economic trade and sustainability issues. This will ultimately lead to recommendations and suggestions regarding how the USMCA provisions might help to improve the WAEMU treaty regarding environmental, human, and workers' rights.

II. THE GLOBAL LOGIC OF FREE TRADE AGREEMENTS

Governments may impose substantial impediments to international trade through tariffs, duties, restrictions, or prohibitions on trade. A prominent example in the United States is the Smoot-Hawley Tariff Act of 1930, instituted during the 1930s economic depression to protect domestic production.[35] It significantly increased import tariffs and, predictably, triggered retaliation, worsening the depression.[36] Nonetheless, economists demonstrated that free trade, even animated by self-interest, would benefit countries more than ultra-protectionism and draconian trade barriers.[37]

As mentioned in the introduction, economists Adam Smith and David Ricardo are precursors and pioneers in the contemporary perception of international trade. Their works and studies on global economic issues are the cornerstones of modern global trade economy and practice. Smith's "invisible hand"[38] and "division of labor (economically apprehended)"[39] theories established the frame for Ricardo's "comparative advantage" theory.[40] In other words, the "comparative advantage theory" applies Smith's ideas and concepts on an international scale.[41] It is merely

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35 Tariff Act of 1930, 19 U.S.C. §§ 1202–1683(g) (2010).

36 *Id.*

37 *Comparative Advantage*, *supra* note 12.

38 "[I]nvisible hand, metaphor, introduced by the 18th-century Scottish philosopher and economist Adam Smith, that characterizes the mechanisms through which beneficial social and economic outcomes may arise from the accumulated self-interested actions of individuals, none of whom intends to bring about such outcomes. The notion of the invisible hand has been employed in economics and other social sciences to explain the division of labour." F. Eugene Heath, *Invisible hand*, ENCYCLOPEDIA BRITANNICA (Mar. 22, 2024), https://www.britannica.com/money/topic/invisible-hand; *see also* Peter Foster, *Adam Smith's Invisible Hand*, ADAMSMITHWORKS, https://www.adamsmithworks.org/documents/adam-smith-peter-foster-invisible-hand; *see also What is 'Invisible Hand'*, ECON. TIMES, https://economictimes.indiatimes.com/definition/invisible-hand (last visited Dec. 20, 2023).

39 Brianne Wolf, *Why Does The Division of Labor Matter?*, ADAMSMITHWORKS (Aug. 12, 2019), https://www.adamsmithworks.org/speakings/why-does-the-division-of-labor-matter.

40 *Comparative Advantage*, *supra* note 12; *see also* David R. Henderson, *David Ricardo: 1772-1823*, ECONLIB, https://www.econlib.org/library/enc/bios/ricardo.html (last visited Dec. 20, 2023).

41 Henderson, *supra* note 40.

a shift from a microeconomic to a macroeconomic conceptualization.[42] Accordingly, countries began to negotiate free trade agreements. These free trade treaties were initially multilateral agreements.[43] The most crucial multilateral trade treaty was the GATT 1947, which we will discuss in section A. Ever since the GATT, significant progress has been made to mitigate trade barrier effects and eliminate non-tariff barriers hindering free trade.[44] It was still possible for countries to contemplate other means to get more advantages from the global movement toward free trade and its positive economic effects.[45] In addition to multilateral trade agreements, governments negotiate specific trade agreements. Those may have several appellations. Sometimes, they are called "cooperation agreements" and other times "Free Trade Agreements" (FTAs), even though, inherently, they serve the same objectives.[46] Thus, it is crucial to examine and distinguish (A) the nature of Free Trade Agreements before explaining (B) their functioning. Then, we will (C) evaluate their functioning under the current controversial legal and economic question of the Regional Trade Agreement as "stepping stones" or "stumbling blocks" of the WTO.[47]

A. The Nature of Free Trade Agreements

Free trade means the freedom to import and export goods without quotas or tariff barriers.[48] A trade agreement is a deal between two or more countries to buy or sell goods.[49] The American International Trade Administration also defines a Free Trade Agreement (FTA), which is an agreement between two or more countries with obligations regarding trade in goods and services to protect investors and other rights.[50] From these definitions, we may infer that the necessity and purpose of Free

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42 "On the economic side of things, this innovation that Smith recognized helped spark the Industrial Revolution, and was a precursor to comparative advantage—David Ricardo's economic concept about advantages in production among industries and nations." Wolf, *supra* note 39.

43 Matthew Johnston, *A Brief History of International Trade Agreements*, INVESTOPEDIA (Aug. 27, 2021), https://www.investopedia.com/articles/investing/011916/brief-history-international-trade-agreements.asp.

44 *Id.*

45 *Id.*

46 *MOUs in International Relations: A Global Perspective*, FASTER CAP. (June 2, 2024), https://fastercapital.com/content/mous-in-international-relations--a-global-perspective.html.

47 Rizqi Sari Dewi Girsang, *The Debate of Regional Trade Agreements for the WTO: Stepping Stones or Stumbling Blocks?*, MOD. DIPL. (Nov. 11, 2023), https://moderndiplomacy.eu/2023/11/11/the-debate-of-regional-trade-agreements-for-the-wto-stepping-stones-or-stumbling-blocks/.

48 *Free Trade*, BLACK'S LAW DICTIONARY (11th ed. 2019).

49 *Trade agreement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

50 *Free Trade Agreement Overview*, U.S. DEP'T OF COM.: INT'L TRADE ADMIN., https://www.trade.gov/free-trade-agreement-overview#:~:text=a%20free%20trade%20agreement%20(fta,property%20rights%2c%20among%20other%20topics (last visited Dec. 20, 2023).

Trade Agreements stemmed from the countries' willingness to obtain more benefits from trade liberalizations and access to foreign markets. The international trading system is constantly evolving as it faces changes in production and distribution technologies and demands from the world for progress in sustainability, environmental protection, and other new challenges.[51] Thus, all actors must adapt and seek new trade opportunities, reducing costs and increasing production through various free trade agreements. Consequently, Free Trade Agreements are drifting away from the classic (1) multilateral conception.[52] The modern trend in international trade is negotiating (2) Preferential Trading Arrangements (or agreements),[53] Bilateral, or Regional Trade Agreements.

1. The classic view of FTAs: multilateral trade agreements

A multilateral trade agreement is typically an international free trade agreement between at least three countries for multilateral reductions in trade barriers.[54] Three core principles of multilateral trade agreements are the Most Favored Nation treatment (MFN),[55] the non-discrimination in international trade, and the national treatment in trade, a general prohibition on using internal taxes and other internal regulatory measures to protect domestic production.[56] The GATT and the WTO Multilateral trade agreements have shaped the classic view of Free Trade Agreements.[57] What are they, where do they come from, and why?

a. History of the GATT/WTO

Explaining the genesis of these multilateral free trade agreements that represent the classic approach is essential.[58] World War II's devastating consequences forced countries towards global cooperation.[59] The first step was the creation of the United Nations to preserve and maintain peace.[60] Then, efforts have

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51 *MOUs in International Relations: A Global Perspective*, *supra* note 46.

52 Mahmut Tekçe & Sevil Acar, *From Multilateralism to Bilateralism: The Impact of Free Trade Agreements On Global Trade Policies*, MARMARA UNIV. J. ECON. & ADMIN. SCIENCES 105, 111–14 (2008).

53 *Reference Note on Trade Policy, Preferential Trade Agreements, and WTO Consistency*, INT'L MONETARY FUND (Jan. 10, 2010), https://www.elibrary.imf.org/view/journals/007/2010/003/article-a001-en.xml.

54 Tekçe & Acar, *supra* note 52, at 111.

55 *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. I. [hereinafter GATT].

56 *See id.* at art. III.

57 Tekçe & Acar, *supra* note 52, at 106–10.

58 *See History of the Multilateral Trading System,* WTO, https://www.wto.org/english/thewto_e/history_e/history_e.htm (last visited Feb. 13, 2025).

59 Tekçe & Acar, *supra* note 52, at 106.

60 RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK 5–6 (13th ed. 2019).

been made to fulfill greater economic, commercial, and financial cooperation through the three most important institutions for the modern international financial system: the World Bank, the International Monetary Fund (IMF), and the first General Agreement on Tariffs and Trade (GATT).[61] The GATT was signed in 1947 during broader negotiations to establish the International Trade Organization (ITO), which was supposed to accompany the World Bank and the International Monetary Fund in rebuilding the ruins caused by World War II and expanding world trade.[62] The IMF was meant to provide liquidity to countries running trade deficits to support the International Trade Organization's efforts to reduce tariffs and other trade barriers.[63] The ITO has never been created due to the United States' reluctance to join this treaty.[64]

Afterward, a reformed and improved version of the GATT, which is the GATT 1994, was signed, and at the same time, the WTO was created to replace the unborn ITO and be functional in 1995.[65] The signing of the GATT in 1947 was critical in addressing trade barriers and towards a more liberalized trade system that would benefit all international actors.[66] The GATT regulated a significant portion of world trade from 1948 to 1994, and the global economy experienced some of its fastest growth.[67] The WTO ensures the efficiency of free trade.[68] The WTO also mediates disputes between member countries over trade matters.[69] It has over 160 members, representing 98 percent of world trade, with about 20 compelling agreements for the signatory parties.[70] Countries have surrendered some of their trade sovereignty and freedom by joining the WTO. These multilateral free trade agreements have been and still are the primary international free trade-related treaties, paving the way for more international inclination for negotiations and drastically diminishing trade obstacles.[71] Nonetheless, they are not flawless. Their shortcomings have been subject to criticism throughout the years.

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61 FOLSOM ET. AL., *supra* note 60, at 6.

62 *Id.*; *see also The GATT years: from Havana to Marrakesh*, *supra* note 20.

63 PAUWELYN ET AL., *supra* note 16, at 87 (quoting WILLIAM DAVEY, THE WORLD TRADE ORGANIZATION: A BRIEF INTRODUCTION (2003)).

64 *Id.*

65 *See History of the Multilateral Trading System*, *supra* note 58.

66 *Id.*

67 Douglas A. Irwin, *International Trade Agreements*, ECONLIB, https://www.econlib.org/library/enc/internationaltradeagreements.html (last visited Feb. 13, 2025).

68 *UEMOA treaty*, *supra* note 29.

69 *See GATT 1947 and the grueling task of signing*, WTO, https://www.wto.org/english/tratop_e/gatt_e/task_of_signing_e.htm (last visited Feb. 13, 2025).

70 *Who We Are*, WTO, https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Feb. 13, 2025).

71 *What We Stand For*, WTO, https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm (last visited Feb. 13, 2025) [hereinafter *What We Stand For*].

b. The GATT/WTO Under Criticism and Skepticism

Countries have profoundly questioned the WTO's role in many aspects. Global dissatisfaction has emerged from the WTO's ability to regulate trade, be impartial and accountable in its relationship with developed and developing countries, and function through its dispute settlement system.[72] These general concerns have led some authors to characterize the WTO as "the problem,"[73] and others to call for reconsideration of some "sacred cows" of the WTO.[74] There are five fundamentals that should supposedly be revisited: (1) the "consensus" decision-making, (2) the WTO as a "member-driven" organization, (3) the WTO as "hard law" subject to compulsory dispute settlement, (4) the WTO as "a single package," and (5) the special and differential treatment for "developing countries."[75]

The culminating point of these purportedly unsatisfactory and latent unsolved issues has been the paralysis of the Appellate Body of the WTO's Dispute Settlement Body through the United States' veto on its members' appointments.[76] To circumvent this blockade of the WTO's Appellate Body, some members entered into the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) to solve their trade disputes.[77] The Global South also complained about the WTO's participation in the decision-making process and its bargaining on uneven terms, arguing that

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72 For more about multilateral organization accountability, *see generally* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29–43 (2005).

73 *See* Susan George, *'The problem isn't beef, bananas, cultural diversity or the patening of life. The problem is the WTO*', GUARDIAN (Nov. 24, 1999), https://www.theguardian.com/society/1999/nov/24/wto.guardiansocietysupplement.

74 Joost Pauwelyn et al., *The WTO in Crisis: Five Fundamentals Reconsidered*, WTO (Sept. 2012), https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/article_e.htm?art=9.

75 *Id.*

76 "An old and rooted conviction of the Americans was that the Appellate Body was undoing the promises and commitments of the parties, it was, using jargon, 'adding to the rights and to the obligations' of the parties. In a word, it was an activist body, indulging in creating law. All this, clearly, to the detriment of US' interests." Alexander Orakhelashvili, *'The crown and the jewel' The rise and fall of the WTO Appellate Body: a critical analysis*, *Dr Luca Rubini*, BIRMINGHAM L. SCH. RSCH. & SCHOLARSHIP BLOG (Oct. 7, 2021), https://blog.bham.ac.uk/lawresearch/2021/10/the-crown-and-the-jewel-the-rise-and-fall-of-the-wto-appellate-body-a-critical-analysis-dr-luca-rubini/. *See also* Chad P. Bown & Soumaya Keynes, *Why did Trump end the WTO's Appellate Body? Tariffs.*, PETERSON INST. FOR INT'L ECON. (Mar. 4, 2020, 11:30 AM), https://www.piie.com/blogs/trade-and-investment-policy-watch/why-did-trump-end-wtos-appellate-body-tariffs; *Ambassador Shea: Matters Related To The Functioning Of The Appellate Body,* U.S. MISSION TO INT'L ORGS. IN GENEVA (Dec. 9, 2019), https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/.

77 *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, GENEVA TRADE PLATFORM, https://wtoplurilaterals.info/plural_initiative/the-mpia/#:~:text=known%20as%20the%20multiparty%20interim,and%20staffed%20wto%20appellate%20body (last visited Feb. 13, 2025).

decisions are made with the Western-oriented perspective of international law.[78] The African Group of the WTO still has unsolved concerns.[79] Although two Appellate Body Members were from African countries (South Africa and Mauritius), African voices in the WTO dispute settlement body still have to be heard.[80] The WTO is deemed the sound box of developed countries like the United States or the EU, undermining the issues raised by minor actors.[81] The desire to gain access to new markets and make more profits, as well as the controversy surrounding the WTO, led countries to step aside from the classic multilateral trading system and diversify their trade agreements, negotiating other profitable and adaptable Free Trade Agreements.[82]

2. The Modern Trend of FTAs: Bilateral, Regional Free Trade Agreements or Preferential Trade Arrangements (PTAs)

The default rule under the GATT and the WTO's principle of non-discrimination is that all WTO members are not allowed to discriminate in any manner.[83] This principle is well established and embedded in the Most-Favored-Nation (MFN) rule in the GATT Article I.[84] However, Article XXIV of the GATT,[85] the Enabling Clause (Paragraph 2(c)),[86] and Article V of the General Agreement on

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78 Naidu, *supra* note 24.

79 *See id.*

80 Clair Gammage et al., *Symposium Introduction: The WTO's Dispute Settlement Reform and Developing Countries*, AFRONOMICSLAW (Oct. 2, 2023), https://www.afronomicslaw.org/category/analysis/symposium-introduction-wtos-dispute-settlement-reform-and-developing-countries.

81 *Id.*

82 Tekçe & Acar, *supra* note 52, at 111.

83 *What We Stand For, supra* note 71.

84 *See* GATT, *supra* note 55, at art. I.

85 The origins of the GATT Article XXIV have been unknown and intriguing. Professor Kerry Chase has enlightened those origins, pointing out that a secret Canada-U.S. free trade agreement (never realized) significantly sheds light on its content. Kerry Chase, *Multilateralism compromised: the mysterious origins of GATT Article XXIV*, 5 WORLD TRADE REV. 1, 1 (2006). *See also Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, WTO Doc. LT/UR/A-1A/1/GATT/U/4 (1994).

86 The Enabling Clause, officially called the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries," was adopted under GATT in 1979 and enabled developed members to give differential and more favorable treatment to developing countries. *Special and differential treatment provisions*, WTO, https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Mar. 9, 2025). *See also Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause")*, WTO, https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm (last visited Mar. 9, 2025).

Trade in Services (GATS),[87] allow WTO members to conclude customs unions and free trade areas. These customs unions and free trade areas are indistinctly called "Regional Trade Agreements" in the GATT/WTO agreement.[88] RTAs, as a notable exception, provide specific, strict criteria with which to comply.[89] They are defined as "reciprocal preferential trade agreements between two or more partners" and enable countries to negotiate rules and commitments that are not possible through multilateral negotiations.[90] GATT Article XXIV 4 provides that:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.[91]

Therefore, aside from the benefits obtained through the multilateral trade agreements (GATT/WTO), countries are allowed under specific conditions to enter into tailored free trade agreements to serve their specific trade needs or interests for additional benefits.[92] These "extra" benefits include, among other things, low or zero tariffs, eliminating non-tariff barriers, facilitating trade, and deeper regional integration between countries having good diplomatic or economic relationships or sharing a common history and interests.[93] For instance, the United States has comprehensive free trade agreements with 20 countries.[94] These "customized" free

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87 The General Agreement on Trade in Services (GATS) covers more than 160 service sectors and sub-sectors, including education, health, and the environment. *General Agreement on Trade in Services*, WTO, https://www.wto.org/english/docs_e/legal_e/gats_e.htm (last visited Feb. 13, 2025). Its Article V(1), titled Economic Integration, allows countries to enter into regional trade agreements concerning services.

88 "Although the labels applied to FTAs and CUs collectively often include the word 'regional,' not all such agreements are regional…." Henry Gao et al., *Most-Favored-Nation Treatment & Preferential Trade Agreements*, *in* INTERNATIONAL TRADE LAW: A CASEBOOK FOR A SYSTEM IN CRISIS ch. 7, 7.2(c) Distinguishing a Free Trade Agreement (FTA) from a Customs Union (CU), (Geneva Trade Platform, 2024).

89 Henry Gao et al., *supra* note 88, at ch. 7, 7.2(c).

90 These rules favored agreements in WTO services, intellectual property, environmental standards, investment, and competition policies with the issues attached to them. *Regionalism: friends or rivals?*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm (last visited Apr. 13, 2024).

91 GATT, *supra* note 55, at art. XXIV:4.

92 *Id.*

93 "[I]n many cases, countries conclude PTAs for reasons beyond tariff preferences and seek what is often referred to as 'deep integration,' covering areas such as services, capital flows, standards, intellectual property, regulatory systems (many of which are non-discriminatory), and commitments on labor and environmental issues." PAUWELYN ET AL., *supra* note 16, at 358.

94 FOLSOM ET AL., *supra* note 60, at 446.

trade agreements have different legal forms. The *lato sensu* designation of RTAs embedded in the GATT/WTO and assembling all Free Trade Agreements as "Regional" is not a suitable description of the reality when, for example, China and Brazil, Cote d'Ivoire and Mexico, the United States and India, or the European Union and South Africa agree on free trade.[95] Legal concision would call to distinguish Free Trade Agreements as (a) Bilateral, Regional, or (b) Preferential.

3. Bilateral Trade Agreements (BTAs) and Regional Trade Agreements (RTAs)

A Bilateral Trade Agreement is between two countries, while a Regional Trade Agreement is between two or more countries that typically share a common geographical characteristic referred to conceptually as a "region."[96] To broaden the spectrum of these agreements, the WTO does not differentiate between bilateral and regional trade agreements. As previously pointed out, they are all encompassed within the denomination of "Regional Trade Agreements" (RTAs).[97] Nevertheless, they generally serve different purposes, and the reasons they are signed and how they operate fluctuate, as we will see in the forthcoming discussion on their functioning. Thus, the international community increasingly depends on BTAs and the *stricto sensu* RTAs.[98] Four agreements are commonly used as examples: (1) the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP);[99] (2) the Regional Comprehensive Economic Partnership (RCEP);[100] The

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95 PAUWELYN ET AL., *supra* note 16, at 268.

96 John Shijian Mo, *Bilateral and Regional Trade Agreements*, OXFORD BIBLIOGRAPHIES (Mar. 23, 2012), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0019.xml.

97 The WTO provisions on RTAs should be read as covering bilateral and regional trade agreements. As of January 2024, the WTO received notice of 594 RTAs with 361 in force. *Regional trade agreements*, WTO, https://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Feb. 13, 2025).

98 *See generally* Tekçe & Acar, *supra* note 52.

99 A free trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. *See* COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP, https://www.iilj.org/wp-content/uploads/2018/03/cptpp-consolidated.pdf (last visited Feb. 13, 2025).

100 The world's largest trade deal. Fifteen Asia-Pacific countries signed it—the ten members of the Association of Southeast Asian Nations and five of their largest trading partners: China, Japan, South Korea, Australia, and New Zealand. *See* Yen Nee Lee, *World's largest trade deal will come into force in January. The U.S. won't be part of it*, CNBC NEWS (Nov. 3, 2021, 4:27 AM), https://www.cnbc.com/2021/11/03/worlds-largest-trade-deal-rcep-to-come-into-force-in-january-2022.html. *See also* Kate Whiting, *An expert explains: What is RCEP, the world's biggest trade deal?*, WORLD ECON. F. (May 18, 2021), https://www.weforum.org/agenda/2021/05/rcep-world-biggest-trade-deal/.

EU-Canada Comprehensive Economic and Trade Agreement (CETA);[101] and the one subject of this study, the United States-Mexico-Canada treaty (USMCA).[102] Many obligations and exceptions contained in these FTAs are inspired by and similar to the GATT or GATS. However, they can have more depth and be more comprehensive than those of the multilateral trading system.[103] Sometimes, they may extend to subject matters beyond WTO competence, like foreign investment.[104]

4. Preferential Trade Arrangements (PTAs)

Now, we turn to the Preferential Trade Agreements (PTAs). Typically, Preferential Trade Arrangements (PTAs) are unilateral trade preferences, including the Generalized System of Preferences (GSP) schemes allowing developed countries to grant preferential tariffs to imports from developing countries and preferential schemes designed by the General Council granting waivers of reciprocity.[105] The GSP was initially a temporary ten-year waiver to permit "generalized, non-discriminatory, nonreciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries."[106]

The primary purpose of this system was to dilute the legal effects of the MFN provisions of the GATT (Article I) to authorize developed countries to accord preferential tariffs to developing or least-developed countries.[107] Subsequently,

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[101] A progressive trade agreement between the EU and Canada. *EU-Canada Comprehensive Economic and Trade Agreement (CETA)*, EUROPEAN COMM'N, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en (last visited Feb. 13, 2025); *see also Canada-European Union Comprehensive Economic and Trade Agreement (CETA)*, GOV'T OF CAN. (Feb. 3, 2025), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng.

[102] USTR, *supra* note 32.

[103] *Preferential trading arrangements: Stepping-stones or stumbling blocks?* IMFSURVEY (Dec. 14, 2004), https://www.elibrary.imf.org/view/journals/023/0033/022/article-A006-en.xml. *See generally* Mo, *supra* note 96.

[104] "Foreign investment law is a prime example [of why countries engage in bilaterals], and many bilaterals serve as investment magnets. Government procurement, optional at the WTO level, is often included in bilaterals. Competition policy and labor and environmental matters absent from the WTO are sometimes covered in bilaterals. In addition, bilaterals can reach beyond the scope of existing WTO agreements." Ralph H. Folsom, *Bilateral Free Trade Agreements: A Critical Assessment and WTO Regulatory Reform Proposal*, SAN DIEGO LEGAL STUD. PAPER NO. 08-070 (2008).

[105] *Preferential trade arrangements*, WTO, https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (last visited Feb. 14, 2025) [hereinafter *Trade Agreements*]. For the WTO's formal definition of PTAs, see *Preferential trade arrangements (PTAs)*, WTO, https://www.wto.org/english/thewto_e/glossary_e/preferential_trade_arrangements_ptas_e.htm (last visited Feb. 14, 2025) [hereinafter *Formal Definition of PTA*].

[106] World Trade Organization, Generalized System of Preferences, GATT/AIR/853 (Apr. 20, 1971) [hereinafter Generalized System of Preferences].

[107] *See* Generalized System of Preferences, Decision of 25 June 1971, L/3545 (June 28, 1971) GATT BISD.

before its expiration, the GSP waiver shifted from temporary to permanent when the GATT contracting parties adopted the Enabling Clause decision under which differential and favorable treatment to developing countries has been allowed.[108]

In other terms, and to clarify this definition, PTAs are trade preferences, such as lower or zero tariffs, that a country may grant to a trade partner unilaterally.[109] Providers of Preferential Trade Arrangements are generally developed or developing countries (e.g., UE, United States, Canada, India, China) that favor least developed countries (LDCs).[110] An example of such an agreement is the U.S. Preferential Trade Arrangements towards Sub-Saharan Africa integrated into the African Growth and Opportunity Act (AGOA).[111] Several PTAs have been signed or provided and entered into force.[112] The GATT contracting parties established the Generalized System of Preference (GSP), under which PTAs are generally entered.[113]

As we can see, FTAs are multiform. How do they all play out in the international trade scheme?

B. The Functioning of Free Trade Agreements

The core principle governing Free Trade Agreements in the GATT/WTO multilateral system is enshrined in the GATT Article XXIV:4 quoted above.[114] Typically, GATT Article XXIV governs the formation of "customs unions" and "free trade areas."[115] Allowing "free trade areas" or "customs unions" in a

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[108] Being a GATT decision, the Enabling Clause is implemented into the WTO treaty as part of GATT 1994 (paragraph 1(b)(iv) of GATT 1994 incorporates "other decisions of the CONTRACTING PARTIES to GATT 1947."); The Enabling clause has four categories: (1) the Generalized System of Preferences, (2) the special and differential treatment with respect to non-tariff measures, (3) regional arrangements between developing countries, and (4) special treatment for least-developed countries. *See* Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 CHIC. J. INT'L. L., 597, 607 (2011).

[109] *Formal Definition of PTA*, *supra* note 105; *Trade Agreements*, *supra* note 105.

[110] "Unilateral trade agreements are one-sided, non-reciprocal trade preferences granted by developed countries to developing ones, with the goal of helping them to increase exports and spur economic development." *Unilateral trade arrangements*, EUR. COMM'N, https://trade.ec.europa.eu/access-to-markets/en/content/unilateral-trade-arrangements#:~:text=Providing%20countries-,What%20is%20a%20unilateral%20trade%20agreement%3F,exports%20and%20spur%20economic%20development (last visited Feb. 16, 2025).

[111] AGOA offers duty-free access to the U.S. market for over 1,800 products to sub-Saharan African countries. Over 5,000 products are also eligible for duty-free access under the Generalized System of Preferences program. *African Growth and Opportunity Act (AGOA)*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa (last visited Feb. 14, 2025).

[112] *List of PTAs*, WTO, http://ptadb.wto.org/ptaList.aspx (last visited Feb. 14, 2025).

[113] Generalized System of Preferences*, supra* note 106.

[114] GATT, s*upra* note 55, at art. XXIV:4.

[115] *Id.*

multilateral trade system requires formation rules.[116] Indeed, an absolute freedom to enter into separate trade agreements with no mandatory rules to comply with would have led the multilateral trade system to anarchy and chaos. The appropriateness of imposing formation rules for these Free Trade Agreements is increasingly apparent nowadays, where the norm is the recourse to BTAs, RTAs, and PTAs.[117]

Most WTO members are engaged in multiple FTAs, which sometimes overlap.[118] Therefore, a deeper dive into FTAs' functioning is crucial for a comprehensive approach to how these agreements are made to comply with the GATT/WTO prescriptions, how they regulate the signatory parties' relationships, and, finally, how they might affect the non-signatory counterparts. To be permitted, a Free Trade Agreement must satisfy the definition of a "free trade area" or "customs union" in paragraph 8 and the rules for formation in paragraph 5.[119]
The GATT/WTO establishes a clear distinction between "Free Trade Areas" and "Customs Unions" that is encapsulated within the GATT Article XXIV:8.[120] However, as we previously highlighted, they are all referred to as "Regional Trade Agreements" *lato sensu*.[121] Moreover, they can indistinctly be encompassed in the generic term "Free Trade Agreements."[122] Consequently, and for clarity purposes, our analysis of the functioning of Free Trade Agreements will differentiate between the (1) functioning of Free Trade Areas and the (2) functioning of Customs Unions.

1. Functioning of Free Trade Areas

A free Trade Area "shall be understood to mean a group of two or more customs territories[123] in which the duties and other restrictive regulations of commerce . . . are eliminated on *substantially all the trade* between the constituent territories in products originating in such territories."[124] One of the best-known examples of a free-trade area is the expired NAFTA (North American Free Trade Agreement).[125] As mentioned above, the USMCA replaced NAFTA.[126] This section will constitute the backbone of the USMCA free trade agreement presentation and partially foreshadow our assessment of this treaty. The functioning of Free Trade

116 GATT, s*upra* note 55, at art. XXIV:4.
117 Leal-Arcas, *supra* note 108, at 609–23 (analyzing why countries engage in RTAs and their relation to multilateral negotiations at the WTO).
118 PAUWELYN ET AL., *supra* note 16, at 358.
119 GATT, *supra* note 55, at art. XXIV:5, XXIV:8.
120 *See* GATT, *supra* note 55, at art. XXIV.
121 Gao et al., *supra* note 88, at ch. 7.2(c).
122 *See Free Trade Agreement Overview*, *supra* note 50.
123 Then, what is a "Customs territory"? GATT Article XXIV:2 defines a customs territory as "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories." GATT, *supra* note 55, at art. XXIV:2.
124 GATT, *supra* note 55, at art. XXIV:8(b) (emphasis added).
125 *See* USTR NAFTA, *supra* note 33, at 126.
126 Evans, *supra* note 34, at 835.

Areas will be examined in the light of their (a) internal functioning within the area and (b) external functioning with parties out of the area.

a. Internal Functioning of Free Trade Areas

The internal requirements of Free Trade Areas are outlined in GATT Article XXIV paragraph 8(b). In a Free Trade Area, duties and trade restrictions must be eliminated for "substantially all the trade" among the FTA members.[127] Translated in plain language, a free-trade area means a group of countries that have agreed to remove trade barriers like import tariffs or quotas for "substantially all" their trade.[128] Besides USMCA in North America, several free trade areas have been established worldwide: CAFTA[129] in Central America, ASEAN[130] in Southeast Asia, and EFTA[131] in Europe, for instance.

b. External Functioning Free Trade Area

The external obligations towards countries outside Free Trade Areas are mandated through Article XXIV:5(b).[132] Accordingly, duties or other regulations of commerce of the Free Trade Area members toward third countries must not increase when the Free Trade Area is formed.[133] Each member maintains its own external tariff schedule applicable to goods from countries outside the Free Trade Area.[134] Rules of origin ("ROO")[135] in Free Trade Areas treaties prevent third parties from

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127 GATT, *supra* note 55, at art. XXIV:8(b).

128 *See id.*

129 CAFTA-DR stands for Central America-Dominican Republic Free Trade Agreement, a regional free trade between the United States, five of the seven nations in Central America (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua), and the Dominican Republic. *Central America-Dominican Republic Free Trade Agreement (CAFTA-DR)*, U.S. CUSTOMS & BORDER PROT. (June 1, 2023), https://www.cbp.gov/trade/free-trade-agreements/cafta-dr.

130 ASEAN stands for Association of Southeast Asian Nations. It was established on August 8, 1967, in Bangkok, Thailand, and initially regrouped Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam, Vietnam, Lao PDR, Myanmar, and Cambodia later joined ASEAN, which has ten Member States. *About ASEAN*, ASS'N SE. ASIAN NATIONS, https://asean.org/about-asean (last visited Feb. 11, 2025).

131 EFTA is the European Free Trade Association (EFTA), the intergovernmental organization of Iceland, Liechtenstein, Norway, and Switzerland that promotes free trade and economic integration. *The European Free Trade Association*, EUR. FREE TRADE ASS'N, https://www.efta.int/about-efta/european-free-trade-association (last visited Feb. 11, 2025).

132 GATT*, supra* note 55, at art. XXIV 5(b).

133 *Id.*

134 *Id.*

135 The rules of origin (ROO) mean that free trade agreements must identify rules for a product to be deemed originating from a member state party and eligible for preferential

exploiting trade advantages within the area, deviating their imports through Free Trade Areas member's borders, or seeking the lowest tariff or highest quota state.[136] Rules of origin keep Free Trade Areas "free" only for goods substantially originating therein.[137] Because Free Trade Areas' member-state goods will be preferred over goods from other states, authors find that "Rules of origin" provisions within Free Trade Areas are a cause of trade diversion.[138]

2. Functioning of Customs Unions

GATT Article XXIV:8(a) defines *Customs Unions* as "the substitution of a single customs territory for two or more customs territories[.]"[139] The West African Economic and Monetary Union (WAEMU) in Sub-Saharan Africa, the object of the present study, is a Customs Union.[140] Consistent with the analysis for free trade areas, the subtleties of customs unions will also be discussed through the lens of their (a) internal and (b) external functioning.

a. Internal Functioning of Customs Unions

Regarding GATT Article XXIV:8(a), the internal requirement for a Customs Union is similar to Free Trade Areas.[141] Indeed, Customs Unions must equally eliminate duties and trade restrictions concerning "substantially all" trade among members.[142] Among the few existing Customs Unions,[143] the European Union (EU) is one of the largest. Another example of a Customs Union is Mercosur[144] in South America.

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treatments or tariffs. Two broad approaches attempt to determine a product's origin. The first is the value-added approach, which considers the percentage of the product's value added in the member state party of the Free Trade Agreement. The other is the tariff classification approach, which considers the result of processing in the member state party to the Free Trade Agreement. PAUWELYN ET AL., *supra* note 16, at 353–60.

136 PAUWELYN ET AL., *supra* note 16, at 353–60.

137 *Id.*

138 FOLSOM ET AL., *supra* note 60, at 5.

139 GATT, *supra* note 55, at art. XXIV:8(a).

140 Notification by Burkina Faso, *Treaty on the West African Economic and Monetary Union (WAEMU)*, WTO Doc. WT/COMTD/N/11/Add.1 (Mar. 2, 2001) [hereinafter *WAEMU*].

141 *See generally* GATT, s*upra* note 55, at art. XXIV:8(a).

142 *Id.* at art. XXIV:8(a)(i).

143 *Customs Unions*, EUR. COMM'N, https://trade.ec.europa.eu/access-to-markets/en/content/customs-unions (last visited Feb. 12, 2025).

144 MERCOSUR, for its Spanish initials, is the Southern Common Market. It is a regional integration process, with Argentina, Brazil, Paraguay, Uruguay, Venezuela, and Bolivia (accession procedure pending). *See MERCOSUR in Brief: What is MERCOSUR?*, MERCOSUR, https://www.mercosur.int/en/about-mercosur/mercosur-in-brief/ (last visited Feb. 12, 2025).

b. External Functioning of Customs Unions

In contrast to Free Trade Areas, Customs Unions must have common external tariffs and harmonized trade policies in their relationships with third countries.[145] Indeed, to qualify as a Customs Union, member states must apply substantially the same duties and other regulations of commerce toward third countries (GATT Article XXIV:8(a)).[146] Additionally, GATT Article XXIV:5 prescribes that:

> [T]he duties and other regulations of commerce imposed at the institution of [Customs Unions] in respect of trade with contracting parties not parties to such union or agreement shall not *on the whole* be higher or more restrictive than the *general incidence* of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union[.][147]

Therefore, the common external tariff has to be fixed and harmonized among state members in a manner that is not egregiously disproportionate or unreasonable compared to any "customs territory's" previous schedule of tariff concessions before the formation of the union.[148] In contrast to Free Trade Areas, where there is an absolute prohibition to raise tariffs, for Customs Unions, it is only necessary that tariffs within the Customs Unions are not higher "on the whole" and regarding the "general incidence."[149]

Like the Free Trade Areas, the trade preferences that naturally stem from Customs Unions also generate questions over trade diversion issues.[150] Being a fundamental exception to the WTO non-discrimination and MFN principles, Free Trade Agreements or Regional Agreements have raised multiple systemic issues. Despite the clarifications in the agreement upon *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade* of 1994, scholars and economists underline the relative lack of clarity of GATT Article XXIV on several matters and its inconsistency with economic theory.[151] Hence, a debate over whether the "Regional Agreements" are "stepping stones" or "stumbling blocks" of the WTO is raging and worth discussing to evaluate the

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145 GATT, *supra* note 55, at art. XXIV:8(a)(ii).

146 *Id.*

147 *Id.* at art. XXIV:5(a) (emphasis added).

148 *Id.*

149 *See id.* at art. XXIV:5(b).

150 FOLSOM ET AL., *supra* note 60, at 4–5.

151 "While international trade lawyers may celebrate full employment, it bears remembering that bilaterals are discriminatory. They could render MFN the least favored status in world trade. Such an outcome would be especially harmful to the world's poorest nations, those with whom few WTO partners seek a bilateral agreement." *Id.* at 3.

international functioning of Free Trade Agreements and their modern correlation with the WTO.[152]

C. Evaluation of the Functioning of Regional Trade Agreements: "Stepping Stones" or "Stumbling Blocks" of the WTO?

One critical factor has shaped the history of trade and economic integration through RTAs. After unsuccessful negotiations within the WTO, trading partners tend to form RTAs; thereby, they may achieve on a regional level what they failed to accomplish through multilateralism.[153] The ongoing process of adding new members renders the multilateral trading system's single undertaking[154] ineffective. The WTO is weakening in the international trading system while RTAs are increasing tremendously.[155] Jagdish Bhagwati[156] criticized RTAs and characterized them as "spaghetti bowls" to refer to the varying tariff structures and rules of origin that exporters encounter, and customs officials apply.[157] These concerns raise the legitimate question of whether RTAs are an opportunity as "stepping stones" or an obstacle as a "stumbling block" for further multilateral liberalization.[158]

On the one hand, three arguments may be relevant to show how RTAs play a crucial role in strengthening the multilateral trading system as "stepping stones." First, trade creation. In effect, eliminating trade barriers is a powerful incentive for more significant efficiency gains critical to achieving economies of scale.[159] Second, as an experimentation bubble. RTAs may represent laboratories of

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152 Girsang, *supra* note 47.

153 "The failure to reach agreement on … the Doha round, suggests the era of multilateral trade agreements is coming to an end. The US some time ago switched its attention from multilateral to bilateral deals and has, over the past decade, concluded a battery of them. The reason is not difficult to fathom. When negotiating bilaterally, the US can use its economic power to impose far more unfavourable terms on its negotiating partner, which is what it has done . . . In a sense, the death of Doha is a dress rehearsal, albeit an early one, for the end of globalization. And those who bury it will be those who designed it and proselytized for it — the US and Europe." Martin Jacques, *The death of Doha signals the demise of globalisation*, THE GUARDIAN (July 12, 2006, 7:11 PM), http://www.guardian.co.uk/commentisfree/2006/jul/13/comment.globalisation.

154 "Single undertaking" is a trade provision that mandates countries to accept all the agreements made during a round of multilateral negotiations as a single package. Leal-Arcas, *supra* note 108, at 599.

155 Girsang, *supra* note 47.

156 Bhagwati is one of his generation's most influential economists and trade theorists. He is currently teaching at Columbia Law School. *Jagdish Bhagwati*, COLUM. L. SCH., https://www.law.columbia.edu/faculty/jagdish-bhagwati (last visited Feb. 12, 2025).

157 *See* JAGDISH BHAGWATI, A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION, AND DEMOCRACY, 290–91 (2d ed. 1998).

158 *See* Girsang, *supra* note 47.

159 PAUWELYN ET AL., *supra* note 16, at 369. Pro-competitive effects may arise from creating a larger and more efficient market within the RTA.

multilateralism for change and global improvements.[160] Their disciplines may serve as examples for laboratories of integration.[161] Lastly, RTAs are a source of regional competition between countries or other RTAs, competitiveness in the international global market, and growth because they attract foreign direct investment.[162] For instance, Spain and Mexico have undoubtedly benefited from the foreign investment incentives stemming from the EU for Spain and NAFTA (now USMCA) for Mexico.[163] This was illustrated by the shift in investment (for lower cost) and new foreign direct investment policies directed to these countries.[164]

On the other hand, we may also point outside effects in the disfavor of RTAs, supplanting the multilateral trading system and hindering its evolution as "stumbling blocks." Trade diversion, as opposed to trade creation, negatively affects multilateralism.[165] Trade diversion intertwined with investment diversion—benefiting Spain in the EU and Mexico in USMCA, as outlined above—occurs when the reduction of internal trade barriers combined with unchanged external trade barriers leads private persons to import from an RTA producer instead of a lower-cost non-RTA producer.[166]

Moreover, the more regionalism thrives, the fewer countries will be enthusiastic about multilateral trade negotiations.[167] The failure of the WTO Doha round materializes this assertion perfectly.[168] Also, the logical consequence of RTA proliferation is the increased lack of transparency and clarity in the multilateral trading system and rules.[169] Indeed, knowing who is doing what with whom is increasingly difficult since countries are concluding RTAs limitlessly among themselves.[170] Furthermore, the abuse of RTAs may tend to leave out weaker

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160 Leal-Arcas, *supra* note 108, at 624 (noting that among the most notable examples is the transformation of the EU since its inception in the 1950s); *see* Ceri Parker, *6 things the EU has achieved, 60 years on from its founding treaty*, WORLD ECON. F. (Mar. 23, 2017), https://www.weforum.org/stories/2017/03/6-things-the-eu-has-achieved-60-years-on-from-its-founding-treaty-7609e02c-01bb-4763-8cbf-716d2287a647/.

161 PAUWELYN ET AL., *supra* note 16, at 369–72.

162 Leal-Arcas, *supra* note 108; *see* PAUWELYN ET AL., *supra* note 16, at 373.

163 PAUWELYN ET AL., *supra* note 16, at 373.

164 *Id.* at 369–72.

165 *Id.*

166 Mina Mashayekhi et al., *Multilateralism and Regionalism: The New Interface* 6-7 (UNCTAD Working Paper, Paper No. UNCTAD/DITC/TNCD/2004/7, 2004), https://unctad.org/system/files/official-document/ditctncd20047ch1_en.pdf; some argue that the negative effects of trade and investment diversion are insignificant as RTAs can lead to economic growth and increased trade with the rest of the world. PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 696 (2d ed., 2008).

167 BOSSCHE, *supra* note 166, at 696.

168 *See* Jacques, *supra* note 153.

169 Jagdish Bhagwati described the "spaghetti bowl" phenomenon, emphasizing the decrease in transparency in the multilateral trading rules, which creates confusion for traders. Leal-Arcas, *supra* note 108, at 624.

170 *Id.*

countries with less bargaining power and raw materials to trade.[171] Lastly, scholars are concerned that RTAs create a risk of polarization in international trading.[172]

The RTAs, although benefiting the multilateral trade system, are undoubtedly eroding the WTO in some regards, specifically concerning the principle of nondiscrimination embodied in the GATT/WTO rules.[173] The coexistence of RTAs and the multilateral trading system will still be the international trade picture and debate for future years. It seems harsh to draw a strict line between both of them. Also, the legal and economic questions that have arisen cannot be answered with an affirmative or negative response. The following lines of this study will address some unanswered questions in the correlation between RTAs and the multilateral trade system through the lenses of two existing and in-force major Free Trade Agreements: the USMCA in North America and the WAEMU in Sub-Saharan Africa.

III. USMCA AND WAEMU FREE TRADE AGREEMENTS

Part I presented the political and economic reasons why countries engage in Free Trade Agreements and the global logic behind these Free Trade Agreements. Now, we shift to the Free Trade Agreements that this study will focus on—the United States, Mexico, and Canada (USMCA) Free Trade Agreement and the West African Economic and Monetary Union (WAEMU) Free Trade Agreement. While the USMCA is deemed a Free Trade Area, the WAEMU treaty is a customs union.[174] One might ask why the USMCA, a Free Trade Area, is comparable to the WAEMU, a customs union, instead of choosing another customs union like the EU. The answer to this question is that the WAEMU bears a strong colonial legacy stemming from its member states' relationship with a few European countries, such as France.[175] Thus, a WAEMU treaty revision should envision parting ways with

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171 Leal-Arcas, *supra* note 108, at 626.

172 *Id.*

173 Girsang, *supra* note 47.

174 The USMCA fits the definition of a Free Trade Area as described by GATT Article XXIV(8)(b). *United States-Mexico-Canada Agreement (USMCA/CUSMA/T-MEC)*, REG'L TRADE AGREEMENTS DATABASE, https://rtais.wto.org/ui/publicshowrtaidcard.aspx?rtaid=1087 (last visited Mar. 9, 2025). The WAEMU fits the definition of Customs Union as described by GATT Article XXIV(8)(a). *West African Economic and Monetary Union* (WAEMU), REG'L TRADE AGREEMENTS DATABASE, https://rtais.wto.org/ui/publicshowrtaidcard.aspx?rtaid=97 (last visited Mar. 9, 2025); *see also* GATT, *supra* note 55, at art. XXIV(8)(a).

175 For instance, Guinea-Bissau was colonized by Portugal, and France has colonized all other WAEMU country members. *French West Africa*, BRITANNICA, https://www.britannica.com/place/french-west-africa (last visited Mar. 9, 2025); *History of Guinea-Bissau*, BRITANNICA, https://www.britannica.com/place/guinea-bissau/history (last visited Mar. 9, 2025).

colonialism and embracing a more trade-oriented (and less political) approach typical to Free Trade Areas.[176]

It is noteworthy that the choice of these specific treaties is not random. NAFTA was one of the major Free Trade Agreements before its renegotiation into USMCA by the Trump administration.[177] Several improvements have been integrated into the USMCA to address the shortcomings of NAFTA.[178] The WAEMU treaty was revised for the last time in 2003, twenty-one years ago.[179] Therefore, it should be the subject of a profound rethinking in the context of the current international trade trend regarding trade agreement drafting. Indeed, three critical factors, among others, may strongly suggest that West African countries have no choice but to improve the legal framework of the WAEMU, which in its current state is deeply rooted in colonial history.[180] First, the United States' willingness to revamp its trade policy relations with Sub-Saharan Africa calls for substantive improvements in trade practices in Africa.[181] Second, the African Continental Free Trade Agreement (AfCFTA)[182] entered into force in 2021, awaiting operational and material effectivity, meant to reshape trade in Africa substantively.[183] Third and last is the global movement towards sustainability through clean energy, forced labor, human rights, and environmental concerns (which we will discuss further in Part III).[184]

This part sketches out the genesis, purposes, and functioning of USMCA and WAEMU, walking through (A) NAFTA as a starting point for USMCA and (B) presenting the WAEMU.

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176 *See generally* Armin Cuyvers & Patricia Ouma, *The EU as a Model for African Regionalism: Decolonizing Regional Integration in Africa?*, 3 AFR. J. INT'L ECON L. 159 (2022).

177 NAFTA was a free trade agreement with North America's three most important countries and economies: the United States, Canada, and Mexico. Trump characterized NAFTA as "the worst trade deal ever" and promised to renegotiate it, making it more beneficial to Americans.

178 *Modernizing NAFTA into a 21st Century Trade Agreement*, OFF. USTR, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing (last visited Dec. 30, 2024).

179 *Mapping African Regional Cooperation*, ECFR, https://ecfr.eu/special/african-cooperation/waemu/ (last visited Feb. 16, 2025).

180 *See* Cuyvers & Ouma, *supra* note 176, at 160.

181 Katherine Tai, USTR campaigns to renegotiate AGOA when it expires in 2025, shifting from a unilateral treaty under the GSP to a reciprocal FTA imposing obligations between all parties. AGOA has been at the core of U.S. trade and investment policy with sub-Saharan Africa since 2000. Ana Monteiro, *US-Africa Trade Law Renewal as Is Would Be Lost Chance, Tai Says*, BLOOMBERG L. NEWS (Sept. 22, 2023, 4:21 PM), https://www.bloomberg.com/news/articles/2023-09-22/us-africa-trade-law-renewal-as-is-would-be-lost-chance-tai-says.

182 The African Continental Free Trade Agreement (AfCFTA) is the major African RTA regrouping all 55 African countries. *About The AfCFTA*, AFCTA, https://au-afcfta.org/about/ (last visited Feb. 15, 2025).

183 *Id.*

184 *See generally* Schafer, *supra* note 19.

A. From NAFTA to USMCA

The effects of NAFTA on North America's economy have been fiercely criticized by all the signatory parties, especially the United States. In 1992, at the dusk of NAFTA's negotiations, Ross Perot[185] predicted that NAFTA would create a "giant sucking sound" as U.S. jobs would relocate across U.S. borders because of lax regulations in Mexico concerning environmental, human, and worker rights.[186]

NAFTA has long been subject to political skepticism and criticism.[187] Yet in 2008, during his presidential campaign, U.S. President Obama promised to renegotiate NAFTA to include stricter labor and environmental standards.[188] The Obama administration undertook to solve the issues with NAFTA through the Trans-Pacific Partnership (TPP), a Free Trade Agreement encompassing eleven other countries, including Canada and Mexico.[189] The TPP finally failed with the United States' withdrawal from the negotiations under the Trump administration.[190]

Afterward, qualified as the "worst trade deal ever negotiated" by U.S. President Donald Trump, NAFTA kept raising many questions and concerns for American economists and trade policymakers.[191] Some of them were willing to terminate it.[192] Thus, the renegotiation of NAFTA was a key campaign promise by Trump that he fulfilled in May 2017 when he began the renegotiation.[193] He proudly announced that "[t]hroughout the campaign, I promised to renegotiate NAFTA, and today we have kept that promise."[194] His goals were mostly to level the playing field with Mexico regarding labor and environmental regulations, prevent the offshoring

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185 Henry Ross Perot Sr. was an American business magnate, politician, philanthropist, and former presidential candidate who died on July 9, 2019. *See Profile H. Ross Perot, Sr.*, FORBES (Mar. 4, 2019), https://www.forbes.com/profile/h-ross-perot-sr/?sh=7bfb7b47470f.

186 ROBERT LIGHTHIZER, NO TRADE IS FREE: CHANGING COURSE, TAKING ON CHINA, AND HELPING AMERICA'S WORKERS 215–16 (2023).

187 "In 2008, candidate Obama had threatened to pull out of NAFTA, if necessary, to get better terms in that agreement." *Id.* at 70.

188 Laura Carlsen, *Obama Reaffirms Promise to Renegotiate NAFTA*, HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/obama-reaffirms-promise-t_b_157316.

189 "The Obama administration had taken steps to improve the labor situation in Mexico with its Trans-Pacific Partnership trade deal. But the key disciplines the administration negotiated were vague and would have been difficult to enforce." LIGHTHIZER, *supra* note 186, at 222–23.

190 The TPP was unpopular. Trump withdrew the United States from the TPP when he was elected. Andrew Chatzky et al., *NAFTA and the USMCA: Weighing the Impact of North American Trade*, COUNCIL ON FOREIGN RELS. (CFR) (Jul. 1, 2020, 8:00 AM), https://www.cfr.org/backgrounder/naftas-economic-impact#chapter-title-0-1.

191 LIGHTHIZER, *supra* note 186, at 216.

192 Robert Lighthizer, former USTR who negotiated USMCA, explains that after the inauguration, "there were some in the administration who wanted to simply tear up the agreement—before [his] own confirmation, a story circulated that Peter Navarro and Steve Bannon had gone so far as to draft a notice of termination." *Id.*

193 Sheelah Kolhatkar, *Trump's Rebrand of NAFTA*, NEW YORKER (Oct. 3, 2018), https://www.newyorker.com/news/news-desk/trumps-rebrand-of-nafta.

194 Kolhatkar, *supra* note 193.

of American jobs to Mexico, and strengthen the ROOs to capture more wealth for the United States.[195]

Scholars have commented on and analyzed NAFTA from the official start of renegotiations on May 18, 2017, until the entry into effect of the USMCA on July 1, 2020.[196] The prolific literature review on NAFTA and its renegotiation into the USMCA brings us to the following questions: what is NAFTA? What are the economic and diverse factors that led to its renegotiation? What is new in the USMCA (or NAFTA 2.0)? We will address these questions with (1) an overview of NAFTA before turning to (2) the USMCA, its current improved version.

1. NAFTA At a Glance

In 1984, the U.S. Congress passed the Trade and Tariff Act.[197] This law grants the President "fast-track authority," also known as Trade Promotion Authority (TPA), to negotiate bilateral trade deals without Congress's direct involvement.[198] The United States then discussed forming the Canada-U.S. Free Trade Agreement (CUSFTA) in 1986 to improve trade and bilateral cooperation between the two countries.[199]

Thus, before NAFTA, the United States and Canada, the most developed countries and largest economies of North America, already had a Free Trade Agreement. Why NAFTA, then? In addition to CUSFTA, the United States began negotiating a distinct bilateral agreement with Mexico in September 1990.[200] Canada, concerned about potential disparities and unfairness in the U.S.-Mexico agreement compared to CUSFTA, requested a trilateral trade agreement with the United States and Mexico on February 5, 1991.[201] This agreement was named the North American Free Trade Agreement (NAFTA)[202] and was signed on December 17, 1992, by Canadian Prime Minister Brian Mulroney, U.S. President George H. W. Bush, and Mexican President Carlos Salinas de Gortari. It went into effect on January 1, 1994.[203]

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195 *See* LIGHTHIZER, *supra* note 186, at 217–23.

196 *See generally* Putri Febrianty Ardhana & Rahmah Daniah, *The Shifting of Regional Regime: Study Case of Renegotiation NAFTA to USMCA*, 4 GLOB. S. REV. 62, 66 (2023).

197 Omnibus Tariff and Trade Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984).

198 Lee Hudson Tesslik, *Fast-Track Trade Promotion Authority and Its Impact on U.S. Trade Policy*, COUNCIL ON FOREIGN RELS. (June 22, 2007, 3:05 PM), https://www.cfr.org/backgrounder/fast-track-trade-promotion-authority-and-its-impact-us-trade-policy.

199 Canada–United States Free Trade Agreement (CUSFTA), WORLD TRADE LAW, https://www.worldtradelaw.net/document.php?id=nafta/cusfta.pdf&mode=download (last visited Feb. 12, 2025).

200 Ardhana & Daniah, *supra* note 196, at 65.

201 *Id.* at 65–66.

202 *Id.* at 66.

203 *Id.*

NAFTA's primary goal was to integrate Mexico into the CUSFTA deal to create and enhance economic cooperation and encourage fair economic competition.[204] Besides that, the other targeted objective of NAFTA was illegal immigration from Mexico to Canada and the United States.[205] In short, the expectation was that freer trade would benefit Mexico, creating jobs and opportunities for its growing workforce and deterring illegal migration.[206] Mexico's former President Carlos Salinas was confident in NAFTA's ability to empower its country's development and growth so that it would "export goods, not people."[207] Additionally, the United States and Canada have seen Mexico as a promising export market and a lower-cost and lucrative investment location for United States and Canadian companies.[208]

NAFTA became one of the world's largest regional cooperation organizations.[209] More importantly, a Free Trade Agreement involving developed countries (Canada and the United States) and a less-developed country such as Mexico was unprecedented.[210] As part of the NAFTA agreement and complying with GATT Article XXIV:8(b) provisions on Free Trade Areas,[211] most tariffs were eliminated on agricultural products, textiles, and automobiles. The deal also sought to protect intellectual property by establishing dispute resolution mechanisms and implementing labor and environmental safeguards through side agreements.[212] By incorporating labor and environmental provisions, NAFTA pioneered a trend that has become prevalent in subsequent Free Trade Agreements.[213]

After NAFTA became effective, trade between the three countries exploded, and the North American regional economic integration thrived.[214] According to the Council on Foreign Relations, the trilateral trade between NAFTA

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204 *See* Ardhana & Daniah, *supra* note 196*,* at 66.

205 "And while NAFTA arguably helped stem the tide of illegal immigration from Mexico, the persistent weakness of Mexican institutions means that Mexico has done very little to prevent a new wave of migrants from Central America, who use Mexico-based trafficking networks to make their way to the United States illegally." LIGHTHIZER, *supra* note 186, at 216.

206 *See id.*

207 Ani Hadjian, *SALINAS SPEAKS OUT ON FREE TRADE In an exclusive interview, Mexico's President rebuffs naysayers on NAFTA and argues that the agreement will produce winners on both sides of the Rio Grande. He knows his economics.*, CNN (Dec. 28, 1992), https://money.cnn.com/magazines/fortune/fortune_archive/1992/12/28/77310/index.htm.

208 *See* Gerhard Peters & John T. Woolley, *White House Fact Sheet: The North American Free Trade Agreement*, AM. PRESIDENCY PROJECT (Aug. 12, 1992), https://www.presidency.ucsb.edu/node/266726.

209 *See* David Evans, *The United States-Mexico-Canada Agreement: How NAFTA 2.0 Represents A New Era In North American Trade*, 71 DEPAUL L. REV. 831, 831 (2022).

210 Chatzky et al., *supra* note 190.

211 GATT Article XXIV paragraph 8(b) provides that duties and trade restrictions must be eliminated for "substantially all trade" among the FTA members in a Free Trade Area. GATT, *supra* note 55, at art. XXIV:8(b).

212 Peters & Woolley, *supra* note 208.

213 *See* Chatzky et al., *supra* note 190.

214 M. Angeles Villarreal & Ian F. Fergusson, *The North American Free Trade Agreement (NAFTA),* CONG. RSCH. SERV. 11 (2017).

partners reached USD 1.1 trillion in 2016.[215] The cross-border investments also rose, with U.S. foreign direct investment (FDI) stock in Mexico that remarkably jumped from $15 billion to more than $100 billion between the years 1993 to 2016.[216] Also, according to data from the WTO, exports of NAFTA goods in 2018 have increased almost fourfold compared to 1993.[217]

However, NAFTA also had countless unintended shortcomings and perversive economic effects on the three signatory parties' economies.[218] The overall economic impact of NAFTA is deemed hard to evaluate.[219] Robert Lighthizer, former U.S. Trade Representative, categorized problems in NAFTA into three parts: "autos, labor, and a grab bag of trade irritants and structural flaws in the agreement."[220] Manufacturing jobs have been most affected in the United States. Roughly 700,000 manufacturing U.S. workers lost their jobs in 2011 due to U.S. companies relocating to Mexico for cheaper labor costs.[221] Moreover, U.S. workers who lost their jobs because their companies relocated to Mexico had to train their company's new Mexican employees to replace them.[222] In Mexico, Mexican deforestation worsened because U.S. companies sought low fertilizer and chemical costs, taking advantage of more lax domestic environmental-related legislations.[223] Additionally, Mexico's subsistence agricultural sector has been ravaged by imports of U.S. grain products.[224]

Assessing how it affected its economy, the United States found that NAFTA was imbalanced and detrimental and had to be terminated or renegotiated.[225] As previously developed, U.S. President Donald Trump undertook the initiative to renegotiate NAFTA to make it more even and beneficial to the United States.[226] At the end of the negotiations, NAFTA became USMCA.[227]

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215 Chatzky et al., *supra* note 190.

216 Evans, *supra* note 209, at 833.

217 Nadiia Kryvenko, *Trade and Economic Cooperation Between US, Canada, and Mexico in the Context of NAFTA and USMCA Agreement*, 19 J. EUR. ECON. 583, 588 (2020).

218 *See* Chatzky et al., *supra* note 190.

219 Villarreal & Fergusson, *supra* note 214, at 15.

220 LIGHTHIZER, *supra* note 186, at 217.

221 Morris Cohen & Mauro Guillen, *NAFTA, 20 Years Later: Do the Benefits Outweigh the Costs?*, WHARTON SCH. BUS. J. NEWS, UNIV. PA (Feb. 19, 2019), https://knowledge.wharton.upenn.edu/article/nafta-20-years-later-benefits-outweigh-costs/.

222 Richard Davies, *When a Factory Relocates to Mexico, What Happens to Its American Workers*, N.Y. TIMES (Oct. 12, 2021), www.nytimes.com/2021/10/12/books/review/american-made-farah-stockman.html.

223 Ardhana & Daniah, *supra* note 196, at 66.

224 LIGHTHIZER, *supra* note 186, at 216.

225 The United States experienced an average and growing $21.8 billion trade deficit with Mexico during the first 10 years of NAFTA. Robert Hudson, *The USMCA: An Ideal "New NAFTA?"*, 109 KY. L.J. 1, 2–3 (2021).

226 On May 18, 2017, the Trump Administration sent a 90-day notification to Congress to renegotiate NAFTA with Mexico and Canada. Villarreal & Fergusson, *supra* note 214.

227 Hudson, *supra* note 225, at 4.

2. The Birth of the USMCA or NAFTA 2.0

The USMCA was not born from scratch but from the ashes of NAFTA, carrying over most of its substantive provisions. This is why it is considered a NAFTA 2.0, an updated NAFTA, or a new NAFTA deal.[228] The most noticeable changes in the USMCA were more coercive labor and environmental-related provisions and their better enforcement.[229] Therefore, USMCA has been designed to "amend" NAFTA, mitigating its unintended adverse effects, protecting states' interests, and finding solutions to the upcoming trade-related challenges.[230] In other terms, it was meant to be construed as an agreement to rebuild the balance between the member states and adapt to the changes in international trade. USMCA entered into force on July 1, 2020, after seven rounds of negotiations from 2017 to 2020.[231] The text of the USMCA contains thirty-four chapters, twelve separate annexes, and sixteen side letters.[232] The substantial modifications implemented into the USMCA may be categorized into nine topics: automotive, agriculture, labor, environment, intellectual property rights, digital trade, dispute settlement, sunset clause, and non-market countries.[233] Some of these topics will be further discussed in Part III. Nonetheless, the non-market country provision must be pointed out and explained since it modifies the intrinsic nature of the USMCA as a Free Trade Area, derogating from the principles we presented in Part I.

Unlike NAFTA, which could be designated a Free Trade Area, USMCA seems to be a hybrid Free Trade Agreement, standing on the fence between GATT/WTO Customs Unions and Free Trade Areas.[234] This stems from the USMCA Chapter 32 related to "Exceptions and General Provisions."[235] Article 32.10 from Chapter 32 regulates or limits USMCA members' freedom to enter free trade agreements with non-market countries.[236] USMCA Article 32.10, requiring USMCA members to comply with the same rules regarding non-member countries (specifically non-market countries), expresses a more profound—or higher—

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228 *Comparison of USMCA and NAFTA Free Trade Agreements*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/sites/default/files/assets/documents/2020-jul/comparison%20usmca%20and%20nafta%20free%20trade%20agreement%20provisions_draft_2020-06-26_v2.pdf (last visited Feb. 12, 2025).

229 *See* Evans, *supra* note 209, at 836–40.

230 *See id.* at 853–54.

231 Ardhana & Daniah, *supra* note 196, at 63.

232 *Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text*, OFF. U.S. TRADE REPRESENTATIVE (July 1, 2020), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter *USMCA Treaty*].

233 Ardhana & Daniah, *supra* note 196, at 66–68; *see also Major differences between USMCA and NAFTA in key chapters*, U.S. INT'L TRADE ADMIN. (ITA), https://www.trade.gov/usmca-vsnafta (last visited Feb. 12, 2025).

234 *See* Ardhana & Daniah, *supra* note 196, at 69.

235 *Chapter 32: Exceptions and General Provisions*, USMCA, https://ustr.gov/sites/default/files/files/agreements/fta/usmca/text/32_exceptions_and_general_provisions.pdf (last visited Feb. 15, 2025).

236 *Id.*

collaboration than Free Trade Areas.[237] Thus, USMCA Article 32.10 partially meets the requirements for Customs Unions in their external functioning—developed in Part I (B)(2)(b)—prescribed by GATT Article XXIV:8(a), applying "substantially" the same trade regulations (economic policies) to third countries [here non-market countries].[238] However, USMCA does not have a Common External Tariff required by the GATT/WTO Article XXIV:5 to qualify as a Customs Union.[239] It is implicit that Article 32.10 has been narrowly woven to target China.[240] Lighthizer confirmed this hypothesis.[241] Consequently, one might ask whether such a Free Trade Agreement should have been allowed under GATT/WTO Article XXIV since its configuration contributes to the weakening of the multilateral trading system.

Although it was implemented in mid-2020 during the COVID-19 pandemic when governments were constrained to limit trade and business activities, observers believe USMCA is a "winning bet" for all parties regarding its first-year performance review in July 2021 and are optimistic for its second year.[242] During the 2020 presidential campaign, the candidate Joseph Biden, despite running against Trump, acknowledged that the USMCA was a "better deal" for Americans because the USMCA established benchmarks leveling the playing fields within the Free Trade Area.[243] Elected in 2020, President Biden continued to implement USMCA.[244] The agreement also received widespread support in Canada and Mexico.[245] Year one implementation and performance of USMCA was a frank success even under the COVID-19 pandemic border restrictions.[246] USMCA seems to be a robust Free Trade Agreement, creating stability, a supportive policy environment for supply chains, and trade resilience moderating potential adverse effects of external factors such as pandemics.[247] In Part III, we will assess the specific changes implemented in the USMCA and their efficacy to determine to what extent the USMCA is a "winning bet" in these trade or non-trade areas.

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237 *Chapter 32: Exceptions and General Provisions*, *supra* note 235.

238 To qualify as a Customs Union, member-states must apply substantially the same duties and other regulations of commerce toward third countries (GATT Article XXIV:8(a)). *See* GATT, *supra* note 55, at art. XXIV:8(b).

239 Ardhana & Daniah, *supra* note 196*,* at 69.

240 *Id.* at 68.

241 He explains that the USMCA was tailored to prohibit or at least make it difficult for all three parties to engage in FTAs with non-market economies such as China. The other two countries could eject from the USMCA one negotiating with China. This provision was motivated by the fear of seeing the U.S.' interests undermined. LIGHTHIZER, *supra* note 186, at 191–92.

242 ANDREW I. RUDMAN & CHRISTOPHER SANDS, A WINNING BET: THE USMCA AT ONE YEAR 1 (2021).

243 *Id.* at 2.

244 *Id.*

245 *Id.*

246 *Id.* at 7.

247 RUDMAN & SANDS*, supra* note 242, at 2–7.

B. The WAEMU Treaty

For all African countries, poverty is the most pressing public policy issue.[248] The African economy needs customized, robust private sectors, and efficient markets to tackle poverty and improve living conditions for its citizens away from Western solutions.[249] It is essential to build and strengthen Africa's infrastructure so that trade can realize its full potential.[250] When improving living conditions relates not only to economic growth but also to financial inclusion and human development,[251] converging towards a robust private sector requires more than merely relying on the WTO Generalized System of Preferences (GSP) Programs providing unilateral and preferential deals to developing and LDCs (Least Developed Countries) such as the U.S. AGOA[252] or the EU Everything But Arms (EBA).[253]

Instead, African countries must elaborate a new strategy to boost Africa's market access within the current global environment[254] and look beyond their domestic markets to grow their economies.[255] As previously discussed, regional integration within a Free Trade Area or Customs Union may arguably be a lever to achieve this purpose.[256] Nonetheless, African countries should be cautious of modern economic colonialism by mirroring Western economic policies in forming regional integration entities.[257] The success of such a "legal transplant" is mitigated depending on several factors.[258]

The West African Economic and Monetary Union (WAEMU) is a Customs Union born after decades of struggles for West African Countries to implement effective economic and regional integration.[259] The WAEMU was meant to address

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248 *See generally* Alexandra E. Cubaleski, *Book Annotation*, 52 N.Y.U. J. INT'L L. & POL. 709, 710 (2020).

249 *Id.* at 711–12.

250 Landrum Rhonda, *The Future of Trade in Africa: Opportunities and Challenges*, DEHUB-SATRA BLOG (Mar. 7, 2025), https://www.satradehub.org/the-future-of-trade-in-africa-opportunities-and-challenges/.

251 Olatunde Julius et al., *Financial Inclusion and Human Development in Sub-Saharan Africa*, 11 J. ECON. FIN., 1 (2020); *see also* Ibrahim C. Oumarou & Celestin, Mayoukou, *Determinants of Financial Inclusion in West African Economic and Monetary Union Countries*, 11 THEORETICAL ECON. LETTERS 489, 489 (2021).

252 *Trade Developments Between the United States and Sub-Saharan Africa,* 96 AM. J. INT'L L. 978, 978–79 (2002).

253 The EBA scheme removes tariffs and quotas for imports from LDCs into the EU market. *See Everything but Arms (EBA)*, EUR. COMM'N, https://trade.ec.europa.eu/access-to-markets/en/content/everything-arms-eba (last visited Apr. 4, 2025).

253 SOULEYMANE COULIBALY ET AL., AFRICA IN THE NEW TRADE ENVIRONMENT: MARKET ACCESS IN TROUBLED TIMES 27 (World Bank Group Eds., 2022).

255 *Id.*

256 *See* Part I of this article.

257 Olabisi D. Akinkugbe, *Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)*, 1 AFJIEL 293, 311–12 (2020).

258 *Id.*

259 Tres Ricks, *From The Abuja Treaty To The Sustainable Development Goals: Realizing Economic Integration In Africa*, 42 N.C. J. INT'L L. 249, 253 (2016).

latent issues unsolved through previous unsuccessful or unsuitable regional integration attempts.[260] To efficiently assess the effectiveness of the WAEMU in Part III, this section will present (1) the history of WAEMU and (2) its functioning.

1. History of the WAEMU

On December 17, 2016, Nigerian President Muhammadu Buhari made an optimistic, audacious, and ambitious declaration about West African countries' economic and regional integration in his uplifting address at the Fiftieth Ordinary Session of the Economic Community of West African States (ECOWAS) Authority of Heads of State and Government.[261]

The future of West African countries' economic and regional integration has not always been so hopeful. Financial distress debilitated the African economy for much of its past and recent history and continues to affect it.[262]

The early history of West Africa shows a century of economic integration. In pre-colonial times, there were no formal institutions or international boundaries to prevent free trade flow.[263] Despite some local chiefs collecting tolls, wealthy empires such as Mossi and Songhai had extensive trade networks in West Africa's highly integrated commerce.[264] The currency used on the region's market was the "cowry" or "cowrie" shell, the shell from *Cypraea moneta* and *Cypraea annulus sea* snails native to the Indian Ocean.[265] Then, post-colonial West African economic integration will show many organizations throughout time.[266] To better understand the birth of the WAEMU treaty, it is necessary to revisit its predecessors. The WAEMU treaty is the consequence of attempts and experiments at West African

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260 Ricks, *supra* note 259, at 253.

261 The Fifteen Member States forming ECOWA are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. *Member States*, ECOWAS CEDEAO, http://www.ecowas.int/member-states/ (last visited Feb. 15, 2025); Nigerian President Muhammadu Buhari stated that the Economic Community of West African States remains the "envy of the international community" and that he was "encouraged with the appreciable efforts being recorded to transform [West African] economies into a regional market by liberalizing trade within the Community." He added that the region is "currently implementing programs intended to lead [West African States] to a single monetary zone and common currency…." *See generally* Daily Post Staff, *Welcome Statement to the 50th Ordinary Session of the ECOWAS Summit of Heads of State and Government*, DAILY POST (Dec. 17, 2016), https://dailypost.ng/2016/12/17/full-text-welcome-speech-president-buhari-ecowas-50th-session/.

262 Ricks, *supra* note 259, at 250.

263 Aaron M. Miers, *Monetary Union And Privatization In The Economic Community of West African States (ECOWAS),* 26 TRANSNAT'L L. & CONTEMP. PROBS. 473, 476 (2017).

264 TOYIN FALOLA, TRADE AND MARKETS IN PRE-COLONIAL ECONOMY, IN GABRIEL O. OGUNREMI, AN ECONOMIC HISTORY OF WEST AFRICA: SINCE 1750, 57–60 (1996).

265 Marion Johnson, *The Cowrie Currencies of West Africa: Part I*, 11 J. AFR. HIST. 17, 17 (1970).

266 Miers, *supra* note 263, at 476.

regional integration through many treaties: the West African Monetary Union (WAMU), the Economic Community of West African States (ECOWAS), and the African Economic Community (AEC).[267]

After colonization, a colonial monetary union named the West African Monetary Union (WAMU) was institutionalized with the West African Monetary Union Treaty of 1962.[268] Its role was to determine the currency of the francophone West African states (CFA Franc)[269] meant to be pegged to the then-French Franc for price stability and convertibility within the francophone states, preventing the inflation crises that affected the economies of the anglophone states since their independence in the 1960s.[270]

On May 28, 1975, the enthusiasm for regional economic integration and the convergence towards a unique Monetary Union in West Africa and a common currency culminated in the Lagos Treaty, which formed the Economic Community of West African States (ECOWAS).[271] The Treaty of ECOWAS was signed by 15 countries: Benin (formerly Dahomey), Burkina Faso (formerly Upper Volta), Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.[272] Its objective was to promote regional economic integration with common market objectives such as trade liberalization, harmonization of policies, and free movement of production factors, leading to an economic and monetary union.[273] Due to political and economic[274] obstacles to

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267 Ricks, *supra* note 259, at 252.

268 Amended in 1973 and 2007. *Treaty of the West African Monetary Union*, WTO, https://www.bceao.int/sites/default/files/inline-files/traiteumoa2010_tr_eng.pdf?form=mg0av3 (last visited Mar. 13, 2025).

269 France established the "Communauté Financière Africaine" ("CFA Zone") to facilitate trade with her colonies in 1945 with a currency named CFA Franc as Franc des "Colonies Francaises d'Afrique" (Franc of African French Colonies), which became after the decolonization (the late 50s and early 60s) Franc de la "Communaute Financiere en Afrique"(Financial Community in Africa) for WAEMU countries and "Cooperation Financiere en Afrique" (Financial Cooperation in Africa) for CAEMC countries. *See generally* ALI ZAFAR, THE CFA FRANC ZONE, ECONOMIC DEVELOPMENT AND THE POST-COVID RECOVERY 5 (2021).

270 David Buchan & Leslie Crawford, *IMF Persuades French Africa for Growth*, FIN. TIMES Jan. 13, 1994, at A4.

271 "The very first attempt at regional integration, which purported to cover the entire West African region, was the West African Clearing House (WACH). The WACH agreement was signed in July 1975. WACH's aim was to promote the use of the currencies of the Clearing House members for intra-regional trade. However, this integration failed largely due to non-compliance by Member States with the articles of agreement." Iwa Akinrinsola, *Regional Integration: Comparative Experiences: Legal and Institutional Requirements for West African Economic Integration*, 10 L. & BUS. REV. AM. 493, 494 (2004).

272 Miers, *supra* note 263, at 473.

273 JOHN M. KABIA, HUMANITARIAN INTERVENTION AND CONFLICT RESOLUTION IN WEST AFRICA: FROM ECOMOG TO ECOMIL 60 (2013).

274 Corruption in West Africa has hindered the development of democracy. The dictatorial and military regimes destabilized many economies and slowed down monetary unification. ECOWAS Member States implemented policies that transferred control of foreign-owned economic resources or assets to the state or its nationals. Miers, *supra* note 263, at 481.

integration, ECOWAS failed to achieve its immediate goals.[275] The manifestations of this failure were the ECOWAS Trade Liberalization Scheme (TLS) and ECOWAS Monetary Cooperation Program (MCP), which purported to achieve the ECOWAS objectives (free movement of goods, the common external tariff, freer trade, etc.).[276] The failure of the member states to comply with the established rules they agreed upon was the cause for these failed attempts at integration.[277] For instance, the goal of the TLS was to progressively reduce tariffs on agricultural, handicraft, and industrial products, including food, agrochemicals, telecommunication, wood, steel, and pharmaceutical industries.[278] It failed because tariff and non-tariff barriers persisted due to the fear that lifting them would impair individual states' interests and tariff revenues.[279] The MCP aimed to create a monetary union by 1992.[280] It failed because of the lack of political actions, uniform and harmonized regulations, and coordination.[281]

To remedy ECOWAS's political and economic woes and fulfill African regional economic integration, in June 1991, the OAU[282] Heads of State signed the Abuja Treaty[283] during the twenty-seventh Ordinary Session of the Assembly in Abuja, Nigeria.[284] The Abuja Treaty aimed to establish the African Economic Community (AEC) by 2028[285] through a six-stage plan. The Abuja Treaty has been called "one of the most ambitious projects to unite the nations of Africa ever undertaken."[286]

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275 To overcome these challenges, ECOWAS revised the Lagos Treaty ("The revised treaty") in Cotonou, Benin, in 1993. *Id.* at 483.

276 Miers, *supra* note 263, at 482.

277 *Id.*

278 *Id.*

279 *Id.* at 483.

280 *Id.*

281 Miers, *supra* note 263, at 483.

282 The Organization of African Unity (OAU), based in Ethiopia, was established in 1963 as the main organization of independent African states. It was dissolved in 2002 when the African Union replaced it. *About the African Union,* AFRICAN UNION, https://au.int/en/overview (last visited Feb. 16, 2025).

283 *See* Organization of African Unity Member States, June 3, 1991, 30 I.L.M. 1241 [hereinafter Abuja Treaty] (signing the Abuja Treaty and establishing the African Economic Community).

284 The treaty went into force in May 1994. It provided a six-step process to create an economically integrated Africa over thirty-four years. *Id.*

285 The AEC aims to promote economic, social, and cultural development through a framework for utilizing resources, raising the standard of living, and fostering peaceful relationships among member states. It also coordinates policies among existing and future economic communities to establish the community gradually. Ricks, *supra* note 259, at 251–53.

286 *Id.* at 252.

The plan's first stage consisted of strengthening existing Regional Economic Communities (RECs)—such as ECOWAS—and creating RECs in regions where they were absent.[287] Moreover, Article 88 of the Treaty explains that the AEC "must be established mainly through the coordination, harmonization, and progressive integration of the activities of the RECs."[288]

The sixth stage, which is to implement an African Monetary Union, a single African Central Bank ("ACB"), and a single African currency (the "Afro"), required five monetary unions, one in each of the five existing RECs.[289] The five monetary unions are the West African Economic and Monetary Union ("WAEMU"), Central Africa Economic and Monetary Community ("CAEMC"), Arab Monetary Union ("ArMU"), Southern African Monetary Union ("SAMU"), and East African Monetary Union ("EAMU").[290] Therefore, in 1994, the WAMU treaty was revised to become the WAEMU[291] with eight countries: Bénin, Burkina Faso, Côte d'Ivoire, Guinée-Bissau, Mali, Niger, Sénégal, and Togo.[292] As we can see, the West African Economic and Monetary Union (WAEMU) is a subset of ECOWAS francophone countries.[293]

The purpose of the WAEMU was to enhance economic coordination and convergence among its Member States and prevent a new devaluation of the CFA Franc.[294] Another goal was to double down on WAMU's strengths to develop an effective and functioning common market in francophone West Africa.[295] The WAEMU treaty was revised on January 29, 2003.[296]

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287 The Abuja Treaty has six stages: removing tariffs, establishing a Free Trade Area and a customs union, creating an African Common Market, and implementing an African Monetary Union with a single African Central Bank and currency. *Id.*

288 The AEC currently has eight RECs: the Arab Maghreb Union ("AMU"); the Economic Community of West African States ("ECOWAS"); the East African Community ("EAC"), the Intergovernmental Authority on Development ("IGAD"); the Southern African Development Community ("SADC"); the Common Market for Eastern and Southern Africa ("COMESA"); the Economic Community of Central African States ("ECCAS"); and the Community of Sahel-Saharan States ("CENSAD"). Ricks, *supra* note 259, at 252.

289 Abuja Treaty, *supra* note 283, at art. 5, 44(g).

290 Ricks, *supra* note 259, at 253.

291 *Treaty Establishing the West African Economic and Monetary Union*, *WAEMU Treaty*, BING, https://www.bing.com/search?q=waemu+treaty&qs=n&form=qbre&sp=-1&ghc=1&lq=1&pq=waemu+treaty&sc=2-12&sk=&cvid=22ce8b849c434f0491b7cede38d0558d&ghsh=0&ghacc=0&ghpl= (last visited Feb. 16, 2025).

292 Akinrinsola, *supra* note 271, at 495.

293 *See id.* at 495–500.

294 Paul Masson & Catherine Pattillo, *Monetary Union in West Africa (ECOWAS): Is it Desirable and How Could it be Achieved?* 37 IMF Occasional Paper, Paper No. 204, 2001 (explaining that from 1948 to 1994, the French franc and CFA had a fixed parity of 1:50, but the CFA was devalued in 1994 to 1:50). This process is called "currency pegging." Pegging simplifies trade by setting fixed exchange rates with other currencies. It is also used for currency stability. *See* Caroline Banton et al., *What is a Currency Peg?*, INVESTOPEDIA (Apr. 3, 2024), http://www.investopedia.com/terms/c/currency-peg.asp.

295 Akinrinsola, *supra* note 271, at 501.

296 *Le Traite Modifie (the revised treaty)*, UEMOA, https://www.uemoa.int/traite-modifie (last visited Feb. 16, 2025).

2. Functioning of the WAEMU

The birth of the WAEMU has resulted from many experimental attempts to reach a functioning regionalism in Africa and West Africa.[297] Nonetheless, regionalism's current legal framework and function in African Regional Trade Agreements still need to be criticized. Some scholars question the coherence of developmental regionalism in African RTAs.[298] Comparing the African and Western regional trade regimes expresses this incoherence and explains why African regional trade agreements fail. These failures may be categorized under four main concerns: politics, economy, drafting, and currency.[299]

The primary issue is tied to politics. Unlike Western trade agreements, African regional trade agreements are not only trade-improving instruments,[300] but they are also politically oriented. They are multidimensional, encompassing economic and non-economic objectives (e.g., peacekeeping, political instability-related provisions, etc.).[301] Indeed, the different regional economic communities (RECs) in Africa—including the WAEMU—have developed strategies to address the underdevelopment legacies of colonialism in addition to substantive economic development aspirations.[302] However, regional integration, economic and anticolonialism objectives, and ideals in African Regional Trade Agreements are questionable.

The second issue with African Regional Trade Agreements is economic. Although trading with neighbors presents the best economic advantages because of proximity, African countries trade more with other non-African countries than with each other, even within the same region.[303] Africa's intraregional borders are considered "the most restrictive globally when measured by the cost of cross-border trade. Those costs typically stem from burdensome regulatory procedures and poor infrastructure, transport, and logistics."[304] Therefore, despite WAEMU's efforts towards freer trade through the abolition of visa and entry requirements, most countries still have numerous checkpoints hindering the free movement of goods and persons crossing other member countries' borders.[305] Intraregional trade within WAEMU is low. Exports to other WAEMU countries were around 15 percent

297 Ricks, *supra* note 259, at 1–2.
298 Akinkugbe, *supra* note 257, at 300.
299 *Id.* at 309.
300 *Id.* at 300.
301 *Id.*
302 *Id.* at 297.
303 ROBERTO ECHANDI ET AL., MAKING THE MOST OF THE AFRICAN CONTINENTAL FREE TRADE AREA LEVERAGING TRADE AND FOREIGN DIRECT INVESTMENT TO BOOST GROWTH AND REDUCE POVERTY, Report No. 172891, x (2022), https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099305006222230294/p1722320bf22cd02c09f2b0b3b320afc4a7.
304 *Id.*
305 *Id.* at 122.

between 2010 and 2017.[306] Reducing trade barriers with Regional Trade Agreements is undoubtedly a good thing. However, this must go beyond a theoretical approach, or a mere will to eliminate trade barriers. GATT Article XXIV:8(a) prescribes that Customs Unions like the WAEMU eliminate duties and trade restrictions concerning "substantially all" trade.[307] This rule is not only a prerequisite to qualify as a CU but also how a CU should function adequately at its fullest potential. Enforcing and strictly complying with Regional Trade Agreements is critical to enhancing economic growth through the flow of goods, services, capital, and people necessary for development.

The third issue is intrinsic to the drafting of African Regional Trade Agreements. Indeed, the WAEMU treaty seems to have adopted the EU model as a CU with a deeper integration. The European Union is well established as the most developed and relatively successful form of regional integration globally.[308] Consequently, the EU model—or anti-model—influenced other forms of regional integration and is mirrored as a benchmark for regional integration endeavors.[309] Africa is no exception, and the West African Economic and Monetary Union treaty is one example. For instance, some articles in the WAEMU treaty merely mirror the European Community Treaty (ECT) preceding the formation of the EU.[310] Thus, similarly to the EU, the WAEMU is a Customs Union with total economic integration.[311] It has integrated and harmonized legal and economic policies, including the unification of monetary (the controversial CFA Franc),[312] fiscal regulations (with a common external tariff), social and counter-cyclical policies, and a supranational authority empowered to bind member states.[313]

The EU attained a common market through a thoroughly constructed legal and institutional framework governing its operation but, most importantly, scrupulous compliance with the CU rules from member states.[314] As discussed above, the failure of African Regional Trade Agreements was fundamentally caused

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306 IMF AFR. DEPT., INTERNATIONAL MONETARY FUND, WEST AFRICAN ECONOMIC AND MONETARY UNION: STAFF REPORT ON COMMON POLICIES FOR MEMBER COUNTRIES–PRESS RELEASE; STAFF REPORT; AND STATEMENT BY THE EXECUTIVE DIRECTOR FOR THE WEST AFRICAN ECONOMIC AND MONETARY UNION 42 (Mar. 2023), https://www.elibrary.imf.org/view/journals/002/2023/102/002.2023.issue-102-en.xml.

307 GATT, *supra* note 55, at art. XXIV.

308 Cuyvers & Ouma, *supra* note 176, at 159.

309 *Id.*

310 For instance, WAEMU Article 43 is similar to the European Community Treaty (ECT) Article 249 regarding the sovereignty of the Customs Union and its provisions' primacy in member states. *Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community*, OFF. J. EUR. COMMUNITIES (2002), https://eur-lex.europa.eu/legal-content/en/txt/pdf/?uri=celex:12002e/txt.

311 Cuyvers & Ouma, *supra* note 176, at 175.

312 Ian Taylor, *France à fric: the CFA zone in Africa and neocolonialism*, 40 THIRD WORLD Q. 1064, 1074 (2019).

313 Treaty on the West African Economic and Monetary Union (WAEMU), art. 43, Jan. 10, 1994.

314 Ricks, *supra* note 259, at 13 (discussing the lessons to be learned from the European Union and the Euro).

by a lack of compliance of Member States to their obligations under these treaties or freer trade initiatives (e.g., removing administrative obstacles to the common market).[315] Consequently, a strong legal framework borrowed from a debatably successful design[316] will not be the panacea to solve West African issues to achieve regional integration and strengthen economic growth. Also, copying and pasting a foreign model seems inappropriate as it could not fit the specific historical, geographical, legal, economic, and social realities and challenges West African countries face.[317]

Lastly, West Africa's economic dependence on colonial powers, reflected in the WAEMU's and CAEMC's currency systems, is inconsistent with the anticolonialism posture and defies some economic principles. An economist said concerning the CFA Franc: "[T]here were ways for countries to grow and to end poverty. No one had done so with an overvalued currency and with an institutional and exchange rate regime that dated back to the 1940s."[318] Another scholar added that the CFA Zone is a region that "the World has left behind," and a third one echoed, asserting that "[the] CFA Franc zones have failed to promote strong economic growth. . . [P]olitical interests, both in Africa and France, trumped the functioning of monetary and fiscal institutions."[319] The WAEMU countries still use the CFA Franc as currency, part of their colonial heritage.[320] The 14 countries of WAEMU and CAEMC, respectively, in West and Central Africa, have their currency tied to France since 1945 with a fixed exchange rate and monetary arrangement for more than 70 years.[321] They were pegged to the French franc and have now been pegged to the euro since 1999.[322] The fixed exchange rate with the euro is €1:655.957 CFA.[323] A set of arrangements governs the CFA Zone, whereby the 14 countries deposit 50% of their reserves in an Operations Account in the French Treasury (the French State budget) for a convertibility guarantee.[324] Besides, France is represented or has a veto in the regional governing bodies or central banks[325] (the BEAC and the BCEAO).[326]

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315 Miers, *supra* note 263, at 483.

316 The success of the EU can be mitigated. Among many reasons, one important is probably the UK referendum to leave the EU on June 24, 2016. *See Brexit: What you need to know about the UK leaving the EU*, BBC NEWS (Dec. 30, 2020), https://www.bbc.com/news/uk-politics-32810887.

317 Akinrinsola, *supra* note 271.

318 ZAFAR, *supra* note 269, at vi.

319 *Id.* at preface (quoting Serdar Yilmaz, Lead Public Sector Specialist, World Bank).

320 *Id.* at 4.

321 *Id.* at vi.

322 *Id.* at 31.

323 On 1 January 1999, the CFA franc was pegged to the euro and one hundred CFA francs were valued at 0.152449 euro, replacing the franc in France. Taylor, *supra* note 313, at 1073.

324 ZAFAR, *supra* note 269, at 13–14.

325 Taylor, *supra* note 312, at 1079.

326 BCEAO stands for "Banque Centrale des Etats de l'Afrique de l'Ouest" (Central Bank for West African States) and BEAC stands for "Banque des Etats de l'Afrique Centrale" (Bank for Central Africa States). Emilio Sacerdoti, *Central Bank Operations and*

The bulk of the economic world agrees unanimously that the CFA Franc is responsible for West African underdevelopment and dependency,[327] or at least, the CFA no longer has strong support.[328] The arguments favoring the CFA and its Fixed Exchange Rate are avoiding currency fluctuation and keeping inflation low, maintaining stability, encouraging investments, and eliminating uncertainty and speculation.[329] CFA advocates praise this certainty and stability because most CFA Zone countries are classified as least developed countries that are highly vulnerable to currency fluctuation risk.[330] However, the CFA Zone does not really profit from the CFA. Even the French Senate acknowledges this economic ball and chain that the CFA represents.[331] It points out two reasons: when the euro depreciates, other convertible currencies become more expensive, as do debts held in U.S. dollars, while exports are more competitive.[332] Nonetheless, the Franc Zone cannot take advantage because their exports are still largely based on basic agricultural products, the demand for which is not very sensitive to price variations compared to the demand for industrial products.[333] Conversely, when the euro appreciates, the export competitiveness of the Franc Zone economies deteriorates, their revenues collapse, and imports become, on the contrary, less expensive.[334] The reasons why the CFA Franc is slowing down WAEMU member states' trade liberalization and growth may be summarized in four arguments: it principally serves France's interests (political, social, economic, and cultural) in overseeing its former colonies' economy and drawing the most benefits through importation for French multinationals; the fixed exchange rate prevents an independent monetary policy and deprives countries of having a competitive exchange rate;[335] its effects hurt

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Independence in a Monetary Union: BCEAO and BEAC, INT'L MONETARY FUND (June 15, 1991), https://www.elibrary.imf.org/display/book/9781557751850/ch011.xml#:~:text=cfa%20currency%20area.-,the%20banque%20centrale%20des%20etats%20de%20l%27afrique%20de%20l,have%20adopted%20a%20common%20currency.

327 The CFA franc zone operates under fixed parity against the euro, with France guaranteeing the convertibility of the CFA franc into the euro through each regional central bank holding an operating account with the French Treasury in Paris. The CFA zones and France have free capital mobility and share foreign exchange reserves. Taylor, *supra* note 312, at 1082.

328 *Id.* at 1066.

329 Christina Majaski, *What Is a Fixed Exchange Rate? Definition and Examples*, INVESTOPEDIA (Dec. 22, 2020), https://www.investopedia.com/terms/f/fixedexchangerate.asp.

330 ZAFAR, *supra* note 269, at 58.

331 Mme Nathalie Goulet et M. Victorin Lurel, *RAPPORT D'INFORMATION FAIT au nom de la commission des finances sur le franc CFA,* [INFORMATION REPORT DONE on behalf of the Finance Committee of the CFA franc] 64 (Rapport N. 729, 2020), https://www.senat.fr/rap/r19-729/r19-7291.pdf (Fr.).

332 Lurel, *supra* note 331, at 64.

333 *Id.*

334 *Id.* at 65.

335 Taylor, *supra* note 312, at 1071; *see also* ZAFAR, *supra* note 269, at preface, ix (explaining that the exchange rate is crucial for global trade. It is its DNA. It affects a country's competitiveness and influences oil revenues, fiscal management, and export promotion policies. Reducing poverty is illusory without a competitive exchange rate).

exports' price competitiveness and penalize the rural economy; and finally, it devastates member countries' economies through capital flight (France being the main destination and beneficiary).[336] Because of the CFA Franc, the WAEMU does not meet all the criteria for an Optimal Currency Area (OCA), such as the Eurozone, and fulfills all of the shortcomings of currency unions, but it is still maintained.[337] Why? The CFA Franc in WAEMU (and the CFA Zone) was taboo for decades.[338] The CFA yields malfunctioning of the WAEMU treaty as an effective Customs Union and impairs trade and economic growth.[339]

For all the above reasons, some authors call to "decolonize Regional Integration in Africa."[340] Major undertakings towards this decolonization and better integration can be pointed out. On December 21, 2019, in Abidjan, French President Emmanuel Jean-Michel Frédéric Macron and Ivorian President Alassane Dramane Ouattara announced "the end of the CFA" or, instead, a significant reform to it.[341] The international community was informed of four decisions. First, a new currency called the "eco" would be introduced in 2020 to replace the CFA franc.[342] Second, African sovereignty would be empowered with France no longer represented in the regional governing bodies or central banks (the BEAC and the BCEAO).[343] Third, a delinking between the regional reserves and the Operations Accounts in the French Treasury would intervene.[344] Fourth, the peg to the euro would be momentarily conserved until West African countries transitioned to a complete monetary autonomy capacity, maintaining stability amidst the change.[345] The IMF Chief Kristalina Georgieva welcomed and supported the reforms.[346] Unfortunately, COVID-19 arose and delayed the process until today.[347] Other authors call on a single regional currency or national solidarity currencies to replace the CFA Zone.[348] Are West African countries prepared to sustain their own currencies? Would that solve all the issues stemming from the CFA Fixed Exchange Rate? The answers to these questions are still unknown. Nonetheless, West African countries are actively working to attain an effective and functioning regional integration

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336 Taylor, *supra* note 312, at 1080 (explaining that between 1970 and 2010, ten CFA Franc countries faced capital flight, with over US$10 billion leaving the country. Côte d'Ivoire lost the most with US $40 billion, followed by Gabon, Congo-Brazzaville, and Cameroon, and investing flight capital domestically could have reduced poverty by over ten percentage points annually).

337 ZAFAR, *supra* note 269, at 42.

338 *Id.* at 90–98.

339 *Id.* at 41–45.

340 Cuyvers & Ouma, *supra* note 176, at 160.

341 ZAFAR, *supra* note 269, at 35.

342 *Id.*

343 *Id.*

344 *Id.*

345 *Id.*

346 ZAFAR, *supra* note 269, at 36.

347 *Id.* at 39.

348 FANNY PIGEAUD & NDONGO SAMBA SYLLA, L'ARME INVISIBLE DE LA FRANÇAFRIQUE, UNE HISTOIRE DU FRANC CFA [THE INVISIBLE WEAPON OF FRANÇAFRIQUE, A HISTORY OF THE CFA FRANC], 165 (2018) (Fr.).

through ECOWAS and all other RECs.[349] The optimism for ECOWAS expressed by the Nigerian President in 2016 is also valid for the WAEMU treaty member states if they keep improving its enforcement and functioning and make appropriate trade and business-enhancing reforms encompassing progress toward sustainable development.

Having presented the USMCA and WAEMU Free Trade Agreements, our subsequent developments in Part III will compare and assess both treaties to identify ways to improve the WAEMU treaty through the lens of the USMCA.

IV. USMCA AND WAEMU FREE TRADE AGREEMENTS COMPARATIVE AND EVALUATIVE STUDY

Trade is deemed to be good. It creates wealth and development opportunities for countries.[350] Free Trade Agreements like the USMCA and WAEMU are trade instruments designed to facilitate and bolster trade and harness difficulties and obstacles arising from the multilateral trade system. However, we must look recursively while trading and hold a farsighted vision. We must look back at the past to unearth the adverse effects of trade, find remedies, and prospectively anticipate potential threats.

Indeed, trade effects are multidimensional and not only economical. The intersection of trade and other crucial areas is perceptible at the multilateral level and in RTAs. Thus, in addition to the economic consideration, the GATT/WTO exceptions target a variety of topics like environment, human rights, human and animal health, and national security.[351] Besides, countries that are mindful of the necessary regulation of these areas go beyond the multilateral trade system and tend to implement non-trade provisions (NTPs) in their RTAs.[352] The "linkage" of non-

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[349] As an illustration, beginning in 2024, a 1,028-kilometer highway corridor will be constructed between Abidjan (Côte d'Ivoire) and Lagos (Nigeria) and is expected to secure more than $15 billion in investment interests. *See Abidjan-Lagos Corridor Highway Development Project*, ECOWAS COMM'N, https://alchdp.com/ (last visited Mar. 13, 2025).

[350] "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods." GATT, *supra* note 55, at preamble.

[351] Some specific economic exceptions are the Anti-Dumping, SCV, and Safeguards Agreement, and some other nontrade exceptions are found in the SPS agreement. GATT, *supra* note 55, at arts. XX, XI; *see Decision on Trade and Environment*, WTO, https://www.wto.org/english/docs_e/legal_e/56-dtenv_e.htm (last visited Mar. 13, 2025); *see also Trade Policy Tools for Climate Action*, WTO, https://www.wto.org/english/res_e/publications_e/tptforclimataction_e.htm (last visited Mar. 13, 2025).

[352] For instance, it is settled that WTO members now have the right to adopt trade-related measures to protect the environment. *WTO rules and environmental policies: introduction*, WTO, https://www.wto.org/english/tratop_e/envir_e/envt_rules_intro_e.htm (last visited Mar. 13, 2025).

trade provisions with trade agreements is becoming the norm.[353] For instance, USMCA has environmental and labor carve-out provisions in its chapters 23 and 24 and a specific chapter 9 treats "Sanitary and Phytosanitary Measures" as comparable to the GATT/WTO SPS Agreement. Although these linkages are meant to balance trade and other social obligations and protections, they don't meet unanimity[354] and might threaten the multilateral trade system.[355] Unlike the USMCA, the WAEMU treaty does not have such provisions.[356]

The shift from NAFTA to USMCA perfectly illustrates the necessity of questioning trade's economic and social impacts over time and implementing economic solutions with beneficial social safety nets. Moreover, nowadays, trade's social impact is more than ever at stake because of climate change. The current global dynamic is sustainability. It includes a shift from fossil fuel to renewable energy, forced labor, human rights, and environmental concerns to ultimately reach a global sustainable "green" supply chain.

Thus, Part III will show the efficacy of the USMCA and WAEMU Free Trade Agreements as trade instruments under multiple aspects and their ability to accomplish their purposes and address past and modern trade-related issues. This will be analyzed through a comparative and evaluative study of both Free Trade Agreements aiming at (A) the assessment of legal and economic trade-related issues and (B) the assessment of modern-era sustainability-related issues.

A. Legal and Economic Trade-Related Issues Assessment

Law and the economy strongly underlie all aspects of trade. Free Trade Agreements, or RTAs, are typically legal tools serving as a framework for economic and geopolitical objectives. The USMCA and WAEMU implement various provisions that affect their regional trades' legal and economic scope. A logical consequence of RTA bargaining should be bolstering trade relationships, leading to wealth, economic growth, and development opportunities. Several legal and economic sectors are regulated within RTAs. But, for the purpose of this study, our assessment of the legal and economic trade-related issues under USMCA and WAEMU will be narrowed to (1) foreign investment and (2) tariffs.

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353 Schafer, *supra* note 19, at 630.

354 Leo H. Phillips et al., *International Trade in 1995 and 1996: Review and Preview*, 90 AM. SOC'Y INT'L L. PROC. 1, 6 (1996) (American Society of International Law Proceedings March 27-30, 1996. Panel with Daniel K. Tarullo, Deputy National Economic Advisor to President Clinton, discussing Clinton's trade policies. Some of the panelists expressed concerns about labor issues arising from trade and suggested their quick resolution [implicitly through labor carve-outs in the trade deals]).

355 Schafer, *supra* note 19, at 611–14.

356 *See Treaty Establishing the West African Economic and Monetary Union*, *supra* note 292.

1. Foreign Investment under USMCA and WAEMU

Before addressing foreign investment configurations under USMCA and WAEMU, the threshold question to answer is unarguably: What is foreign investment? One of the basic descriptions of foreign investment is the transfer of capital from one country to another to undertake business projects.[357] Foreign investment has been classified into two categories: Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI).[358] The amount of control, participation, and influence from the foreign investor over its investment in the host country differentiates one from another.[359] While FDIs tend to give the investor permanent or extended leeway, FPIs are more economically driven and generally do not give the investor participation rights.[360] FDIs involve owning equities or having voting powers through a wholly-owned branch, subsidiary, or joint venture with other investors (foreigners or nationals), private companies, or public agencies. In addition to the movement of capital, FDIs can also involve the movement of persons, organizations, technology, know-how, and information. The degree and extent of control varies on a case-by-case basis and may be contingent on specific circumstances.[361]

Globalization has strengthened foreign investments, which have become powerful tools for countries to integrate and bolster their national economies.[362] Both individuals and organizations engage in foreign investments. Depending on their owner's nature, they may be divided into four categories: private investors (including publicly traded corporations), state investors, international organizations, and mixed enterprises.[363]

On the one hand, foreign investments may represent opportunities for investors and host countries. Investors would consider undertaking a foreign venture for benefits such as developing or protecting a market in a foreign country, cheap or accessible raw materials, export or for further processing and sale, cheap labor, knowledge, or access to technology and expertise.[364] Host countries would welcome new resources, new jobs created, skills and technology transfer, better openness to the world, natural resources exploitation, local industries and production improvement, etc.[365]

On the other hand, foreign investments also present risks. For investors, those risks are political, economic, and commercial risks. Political risks involve governmental actions leading to expropriation, contract breach, capital movement

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357 WILLIAM P. STRENG & JESWALD W. SALACUSE, INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION § 10.01 (2023).
358 *Id.*
359 *Id.*
360 *Id.*
361 *Id.*
362 STRENG & SALACUSE, *supra* note 357.
363 *Id.*
364 *Id.* § 10.02.
365 *Id.* § 10.03.

restriction, and war, revolution, or civil disturbance.[366] Economic and commercial risks encompass the lack of available data to evaluate the business climate and plan investments, foreign exchange issues, lack of adequate infrastructure, and cultural factors.[367] For host countries, the risks are economic, political, and social.[368] The political risk may be the political influence of multinationals in internal affairs to ensure that the governments in power remain favorable to foreign investments.[369] The economic and social risks are the potential unfair and destructive competition from foreign investors in the domestic market by outplaying local actors with tremendous financial power, stealing and monopolizing market shares.[370] Moreover, technology transfer may be inappropriate for the host country's social reality and be harmful to the environment.[371]

To mitigate these risks and draw the best from the benefits, countries have tried to implement an international foreign investment framework, but they have failed.[372] Thus, treaties have long represented the primary source of international law regarding foreign investment.[373] The key principles embedded in these treaties (governed by the Vienna Convention on the Law of Treaties) were protection and security for investors, especially against expropriation without compensation, fair and equitable treatment, national treatment, most-favored nation treatment, and freedom to make international monetary transfers.[374] Finally, with the birth of the WTO, a trade-focused Foreign Investment framework under international law will be established: the Trade-Related Investment Measure (TRIM) Agreement. It echoed all the principles established under the GATT/WTO, which were applied to investment measures.[375] Although the scope of the TRIM agreement is restricted to trade, it may be seen as a starting point for a broader multilateral treaty regulating foreign investment.[376] The countries that are members of the USMCA and WAEMU are all members of the WTO. Therefore, they are subject to the TRIM agreement.[377] Having explained the concept of foreign investment, we now turn to how (a) the USMCA and (b) WAEMU address foreign investment and how their regulations interact with the TRIM Agreement.[378]

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366 STRENG & SALACUSE, *supra* note 357, § 10.02.
367 *Id.*
368 *Id.* § 10.03.
369 *Id.* § 10.02.
370 *Id.*
371 STRENG & SALACUSE, *supra* note 357, § 10.02.
372 *Id.*
373 *Id.* § 10.04.
374 *Id.*
375 *WTO Agreement On Trade-Related Investment Measures*, INT'L TRADE ADMIN. https://www.trade.gov/trade-guide-wto-trims (last visited Jan. 3, 2025).
376 Theodore H. Moran, *The impact of TRIMs on trade and development*, 1 TRANSNAT'L CORP. 55, 63 (Feb. 1992).
377 *WTO Agreement on Trade-Related Investment Measures*, *supra* note 375.
378 Since members of the USMCA and WAEMU are all members of the WTO and subject to the TRIM agreement, it will be interesting to analyze how the specific investment-related provisions in both treaties could be affected or altered by the TRIM agreement. *WTO*

2. FI within USMCA

In addition to its trade aspect, the USMCA also established a legal framework for investment for the three countries.[379] Chapter 14 of the USMCA, titled "Investment," provides (i) substantive protections, (ii) exceptions to these protections, and (iii) dispute settlement mechanisms related to investment within the free trade area from investors and citizens of a signatory party.

a. Investment protection

Some of the key investment protection rules within the USMCA mirror the WTO's core principles[380] we discussed above and are also enshrined in the TRIM[381] agreement. Indeed, USMCA chapter 14 prescribes non-discriminatory treatment with the national treatment[382] and most-favored-nation treatment.[383] Besides, it has six other specific investment-related protections (Articles 14.6 to 14.11).

First, the "Minimum Standard of Treatment" (Article 14.6) requires each USMCA country to accord investors of another USMCA country "fair and equitable treatment"[384] and "full protection and security"[385] in accordance with international law.[386] Second, the "Treatment in Case of Armed Conflict or Civil Strife" (Article 14.7) requires each party to accord non-discriminatory treatment to investors from another party regarding losses suffered by investments in its territory as a

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Agreement On Trade-Related Investment Measures, *supra* note 376; *see generally USMCA Treaty*, *supra* note 232; *see also West African Economic and Monetary Union (WAEMU) Documents* 1, INT'L MONETARY FUND, https://www.imf.org/en/publications/sprolls/waemu-362; *cf. Members & Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 13, 2025).

379 However, the U.S. Implementation Act states, "No provision of the USMCA, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States, shall have effect." *USMCA Treaty*, *supra* note 232.

380 Non-tariff barriers, National treatment, MFN, and non-discrimination. *WTO Agreement on Trade-Related Investment Measures*, *supra* note 375.

381 Trade-Related Investment Measures prohibits all WTO members from applying any trade-related investment measure (TRIM) inconsistent with Article III of the GATT on national treatment or Article XI prohibiting quantitative restrictions on imports. *USMCA Treaty*, *supra* note 232, at art. 2, ¶ 2.

382 *USMCA Treaty*, *supra* note 232, at art. 14.4, ¶ 3.

383 *Id.* at art. 14.5, ¶ 1.

384 "The obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." *Id.* at art. 14.6, ¶ 2(a).

385 "Requires each Party to provide the level of police protection required under customary international law." *Id.* at art. 14.6, ¶ 2(b).

386 "Customary International Law" defines "Customary international law" as a set of principles that protect the investments of aliens and resulting from a consistent practice of States that they follow from a sense of legal obligation. *USMCA Treaty*, *supra* note 232, at Annex 14-A.

consequence of armed conflict or civil strife.[387] This loss may also have originated from requisitioning or destruction of investment.[388]

Third, the "expropriation and compensation" provision (Article 14.8) requires that direct or indirect expropriation or nationalization be made only under specific circumstances[389] and with immediate, fair, and just compensation.[390] Fourth, "Transfers [of funds]" (Article 14.9) requires each party to authorize without restriction inbound transfers and international payments related to investments of an investor of another party.[391] Moreover, USMCA investors can convert local currency into foreign currency at the prevailing exchange rate.[392] Each party ensures that such foreign currency may be freely transferred. Furthermore, each party must not mandate capital transfers from its citizens investing to another USMCA country regarding earnings, profits, or other amounts derived from or attributable to this investment.[393]

Fifth, "Performance Requirements" (Article 14.10) prohibits the imposition or enforcement of certain requirements or the enforcement of any commitment or undertaking to impair or restrict the freedom of the investor of another party in establishing, acquiring, expanding, managing, conducting, operating, or selling or whatsoever related to its investment.[394] Finally, Article 14.11, relating to "Senior Management and Boards of Directors," prohibits nationality conditions for senior management positions and authorizes requirements that a majority of the board of directors be of a particular nationality[395] if it does not "materially impair the ability of the investor to exercise control over its investment."[396] Nonetheless, investment protection in the USMCA is not absolute. Some limitations must be highlighted to present the full spectrum of their extent. These limitations are protecting parties' interests and sovereignty.

b. Exceptions to Investment Protection

USMCA exceptions to investment protections are found in Articles 14.12, 14.13, 14.16, and 14.17. Article 14.12 (Non-Conforming Measures), restricts the application of Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 14.10 (Performance Requirements), and Article 14.11

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387 *USMCA Treaty*, *supra* note 232, at art. 14.7, ¶ 1.

388 *Id.* ¶ 2.

389 For a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation under paragraphs 2, 3, and 4; and following due process of law. *Id.* at art. 14.8, ¶ 1.

390 Compensation must be without delay, equivalent to the fair market value of the investment prior to expropriation, unaffected by market fluctuation, and fully realizable and transferable. *Id.*

391 *Id.*

392 *USMCA Treaty*, *supra* note 232, at art. 14.9, ¶ 2.

393 *Id.* ¶ 3.

394 *Id.* at art. 14.10, ¶ 1.

395 *Id.* at art. 14.11, ¶ 1.

396 *Id.*

(Senior Management and Boards of Directors) to certain listed non-conforming measures[397] and to some sectors, sub-sectors, or activities, set out in "Schedule to Annex II."[398] It also restricts the application of Articles 14.4 to "any measure that falls within an exception to, or derogation from, the obligations imposed by" Article 20.8 (National Treatment) and Article 3 of the TRIPS Agreement,[399] as well as the application of Article 14.5 to "any measure that falls within Article 5 of the TRIPS Agreement, or an exception to, or derogation from, an obligation imposed by" Article 20.8 (National Treatment) and Article 4 of the TRIPS Agreement.[400] Another restriction relates to Articles 14.4, 14.5, and 14.11 application to government procurement subsidies or grants, government-supported loans, guarantees, and insurance.

The exceptions arising from Article 14.13 (Special Formalities and Information Requirements), Article 14.16 (Investment and Environmental, Health, Safety, and Other Regulatory Objectives), and Article 14.17 (Corporate Social Responsibility) allow parties to contravene the agreement to ensure that foreign investments within the USMCA comply with legal formalities in the host country, for informational or statistical purposes, for concerns about environmental, health, safety, or other regulatory objectives, and principles of corporate social responsibility regarding, for instance, labor, environment, gender equality, human rights, Indigenous and Aboriginal peoples' rights, and corruption.[401]

c. Investment Dispute Resolution

Robust protections are necessary to incentivize investors. But, these protections must be paired with robust dispute resolution mechanisms in case of disagreement between the investor and the hosting State. These disputes may arise, for example, over new regulations allegedly harming the investor's interests in the host country or disagreement about compensation after expropriation. Thus, in these circumstances, Investor-State Dispute Settlement (ISDS) mechanisms are features of trade and investment agreements purported to address the issue.[402] When an investor suspects a violation of his rights by a party to a trade agreement, he can sue the State that supposedly violated his rights under the agreement. The claim will be litigated before private arbitrators, who are generally members of the international arbitration bar.[403]

The USMCA struck down the investor-state dispute resolution mechanism between Canada, the United States, and Mexico, which existed under NAFTA

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397 *USMCA Treaty*, *supra* note 232, at art. 14.12, ¶ 1.
398 *Id.* ¶ 2.
399 *Id.* ¶ 4(a).
400 *Id.* ¶ 4(b).
401 *Id.* at arts. 14.13, 14.16, 14.17.
402 *Glossary: Investor-State Dispute Settlement (ISDS)*, THOMSON REUTERS: PRAC. L. (2025), https://uk.practicallaw.thomsonreuters.com/0-624-6147?contextData=(sc.Default)&transitionType=Default&firstPage=true (last visited Jan. 4, 2025).
403 LIGHTHIZER, *supra* note 186, at 225.

because they found it ineffective. Actually, the United States has been the one aiming to set aside the ISDS.[404] They decided to address the disputes through other methods.[405] The new ISDS paradigm in chapter 14 of the USMCA leaves protection only for Mexican citizens investing in the United States and U.S. citizens investing in Mexico.[406] Additionally, the scope of claims that can be litigated through the ISDS has been narrowed down to certain types of claims.[407] American and Mexican investors in Canada willing to dispute Canada's measures or rulings will only be heard before domestic courts or through diplomatic efforts by the United States or Mexico with the Canadian government, in accordance with the USMCA.[408] However, transitional provisions allowed a three-year period after the termination of NAFTA and entry into force of the USMCA for the defunct NAFTA ISDS to remain available for investments established or acquired in Canada before the termination of NAFTA and the entry into force of the USMCA. Also, the claims initiated before the end of the three-year transition period could proceed until their settlement under the rules of the defunct NAFTA ISDS.[409] Robert Lighthizer found in the NAFTA ISDS an issue deeply detrimental to the United States that needed to

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404 LIGHTHIZER, *supra* note 186, at 225–27.

405 Mexico and Canada have concluded the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Mexican and Canadian investors/investments will benefit from the investment protections and dispute settlement mechanisms established in the CPTPP. *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, GOV'T CANADA, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng (last updated Jan. 20, 2025). They may also benefit from the Investment Court System (ICS) which provides a first instance tribunal and appellate tribunal, creating a departure from the long-standing ISDS model. It is included in the recent EU Agreements with Canada (EU–Canada Comprehensive Economic and Trade Agreement "CETA"), Singapore (EU–Singapore Investment Protection Agreement "IPA"), Vietnam (EU–Vietnam IPA), and Mexico (revised EU–Mexico Global Agreement). However, there is uncertainty around the enforcement of ICS awards under the ICSID Convention and/or the New York Convention. *See* Jin Woo (Jay) Kim & Lucy M. Winnington-Ingram, *Investment Court System Under EU Trade and Investment Agreements: Enforcement Issues*, REGULATING FOR GLOBALIZATION: TRADE LAB. & EU L. PERSP. (Mar. 29, 2021), https://regulatingforglobalization.com/2021/03/29/investment-court-system-under-eu-trade-and-investment-agreements-enforcement-issues.

407 Investors can only submit claims to arbitration under Chapter 14 as provided for in the USMCA's various annexes, including Annex 14-C, Annex 14-D, and Annex 14-E. New ISDS claims under Chapter 14 are restricted to U.S. and Mexican investors against Annex Parties, which are the United States and Mexico under Annex 14-D. Jenna Anne de Chong, *Changes for investor-state dispute settlement in new United States-Mexico-Canada Agreement*, NORTON ROSE FULBRIGHT (Oct. 2018), https://www.nortonrosefulbright.com/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement.

407 With the narrower availability of ISDS under the USMCA, investors in Canada, the United States, and Mexico will need to reconsider their dispute resolution options. *Id.*

408 Anne de Chong, *supra* note 406.

409 AMERICAN LAW OF MINING § 211.02 (The Foundation for Natural Resources & Energy Law eds., 2d ed. 1984).

be solved and "killed,"[410] although his justifications and arguments were controversial.[411] According to him, the NAFTA ISDS undermined one of the main advantages for investors to invest in the United States, which is the United States' "independent, fair, and relatively efficient legal system."[412] For now, not enough cases have been disputed under the USMCA ISDS mechanism to truly assess its efficiency.[413]

3. FI within the WAEMU

Unlike the USMCA, the WAEMU does not have a chapter or section devoted to investments or having such a denomination. Since 1997, attempts to draft a community investment code have failed.[414] Therefore, the treaty does not harmonize the investment rules, and each member state can pass its own investment legislation.[415] However, section III, titled "The Common Market," contains a few investment-related provisions.[416] Also, similarly to the USMCA, the TRIM agreements will apply to investments in the WAEMU area. The WAEMU treaty can interact with other Multilateral or Regional Investment Law instruments or entities

410 LIGHTHIZER, *supra* note 186, at 226.

411 According to Lighthizer, the ISDS undermines the U.S. legal system, which should be a core comparative advantage. It favors investing in other countries instead of the United States, eroding the United States' sovereignty. Killing ISDS in NAFTA was seen as necessary to encourage investment in the United States. Eliminating ISDS was controversial, but Lighthizer explained that it was subsidizing businesses to invest out of America, and President Trump supported it. The reaction of Washington lobbyists and some members of Congress was out of proportion to the actual economic consequences. *Id.* at 226; *but see* Ian Laird & Melissa Morris, *NAFTA Update a Step Backward for US Investors*, LAW360: LEXIS NEXIS (May 9, 2019), https://www.law360.com/telecom/articles/1157475/nafta-update-a-step-backward-for-us-investors.

412 LIGHTHIZER, *supra* note 186, at 226.

413 In December 2021, the United States won a dispute against Canada under the USMCA for breaching dairy commitments. A panel was established in May 2021, and the final report was issued on December 20, 2021. The United States has requested dispute settlement consultations with Canada related to certain measures by Mexico. STRENG & SALACUSE, *supra* note 357, § 12.05; *see also United States Requests Consultations Under the USMCA Over Mexico's Energy Policies*, OFF. U. S. TRADE REPRESENTATIVE (July 20, 2022), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-requests-consultations-under-usmca-over-mexicos-energy-policies-0.

414 *Report by the Secretariat: Member Countries of West African Economic and Monetary Union (WAEMU)*, WTO Doc. WT/TPR/S/362 (Sept. 14, 2017) [hereinafter *Report by the WTO Secretariat on WAEMU*].

415 For instance, Côte d'Ivoire. *See 2023 Investment Climate Statements: Côte d'Ivoire*, U.S. DEP'T OF ST., https://www.state.gov/reports/2023-investment-climate-statements/cote-divoire/ (last visited Apr. 15, 2024).

416 *UEMOA treaty*, *supra* note 29, at ch. II, § 3.

such as the MIGA (World Bank's Multilateral Investment Guarantee Agency),[417] the ICSID (International Center for Settlement of Investment Disputes),[418] and the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards[419] and the ECOWAS investment code.[420]

The analysis structure of foreign investment rules within the WAEMU area will echo the one used above for the USMCA through (i) substantive protections, (ii) exceptions to these protections, and (iii) dispute settlement mechanisms for investors and citizens of a signatory party.

a. Investment Protection

The key provisions that could be interpreted as investment provisions are found in articles 92, 93, and 96 within section III. Articles 92 and 93 prescribe the right to free establishment and national treatment.[421] The right of free establishment is granted to the nationals of a member state, including the operation of companies and legal entities lawfully constituted. The National Treatment principle is drawn from the combined reading of Article 92(3), stating that the right of free establishment is "in accordance with the conditions prescribed under the laws of the country for [the] establishment of its own nationals," and Article 93, asserting that "[t]he nationals of each Member State may provide services in another Member State under the same conditions as those which that member State imposes on its own nationals." Besides, Article 96 deals with the free movement of capital within the Union and prohibits restrictions on the movement of "capital belonging to persons resident in the member states."[422] The term "resident" seems broadly construed to encompass nationals of member states and foreigners established

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417 MIGA is a part of the World Bank Group that offers guarantees to investors and lenders to protect their investments against non-commercial risks. It helps investors get better access to funding sources with favorable terms and conditions. MIGA's advantage lies in its structure as an international organization, enabling it to offer protection against government actions that may hinder or interrupt projects and help resolve disputes between investors and governments. *See generally About Us*, WORLD BANK GRP., https://www.miga.org/about-us (last visited Mar. 13, 2025).

418 *See generally About ICSID*, INT'L CTR. FOR SETTLEMENT INV. DISP., https://icsid.worldbank.org/about (last visited Mar. 13, 2025).

419 *See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter Foreign Arbitral Awards].

420 *See generally* Ecowas Common Investment Code (ECOWIC) (July 1, 2018), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6441/download [hereinafter ECOWIC]; *UEMOA treaty*, *supra* note 29, at arts. 83–85 (mandating the WAEMU members to comply with the WTO/GATT obligations, to contribute to developing intra-African and global trade, and authorizing them to conclude international agreements complying with the WAEMU trade policies).

421 *WAEMU*, *supra* note 140, at arts. 92(1-3), 93.

422 *Id.* at art. 96.

within the Union. Those are the only provisions protecting investment rights under the WAEMU.

b. Exceptions to Investment Protection

Exceptions to the investment protections under the WAEMU treaty are mentioned in Articles 92(3), 93, 94, and 97. Articles 92(3), 93, and 94 authorize restrictions on the right to free establishment justified on grounds of "public policy, public security, public health or other reasons of public interest."[423] In addition, Article 97 enumerates member states' rights to lawfully restrict investment protections to prevent violation of tax law, for statistical purposes on capital movements, for public policy or public security, and consistently with other treaty provisions.[424]

c. Investment Dispute Resolution

The inexistence of harmonized investment dispute resolution rules leaves investment-related disputes arising within the WAEMU primarily resolved before member states' domestic courts and national investment authorities[425] or the WAEMU Court of Justice by a state-to-state dispute settlement.[426] The main attribution of the WAEMU Court of Justice is to ensure proper enforcement of the Treaty.[427] Unless investors, nationals of WAEMU states or not, specify forum selection or arbitration clauses or are favorable to an amicable settlement with member states' governments in case of disputes, there is no other formal and compelling recourse for them under the WAEMU treaty.[428] The available legal means of investor-state dispute resolution will vary between the WAEMU states.[429]

d. Synthesis and Assessment

The global and comparative evaluation of FDIs in the WAEMU and USMCA Trade Agreements leads us to two standpoints. First, the WAEMU treaty should undertake necessary reforms and amendments, as the UNCTAD

423 *WAEMU*, *supra* note 140, at arts. 92(3), 93, 94.
424 *Id.* at art. 97.
425 *See 2023 Investment Climate Statements: Côte d'Ivoire*, *supra* note 415.
426 This Court is instituted by Article 38 of the treaty, and its additional protocol number 1 sketches out its attributions. *WAEMU*, *supra* note 140, at art. 38.
427 *WAEMU*, *supra* note 140, at art. 1.
428 *2023 Investment Climate Statements: Côte d'Ivoire*, *supra* note 415.
429 *Id.*

suggested.[430] The West African Economic and Monetary Union (WAEMU) treaty does not comprehensively cover the essential aspects of investment, including expropriation and related issues. Therefore, it would be beneficial to take inspiration from the United States-Mexico-Canada Agreement (USMCA) and incorporate relevant provisions of international law concerning investment to fill the gaps. These reforms could be borrowed from the USMCA legal frameworks on FDIs, which seem more compliant with international standards and are better equipped to address investment disputes.

Uniformity in the rules regulating FDIs creates fewer disparities and risks within the same economic area and greater attractiveness to Foreign Investors.[431] Indeed, the decline in Foreign Direct Investments (FDIs) within the WAEMU area may be attributed to the legal uncertainty surrounding FDIs in Africa.[432] This lack of clarity in the legal framework may be causing potential investors to hesitate and divert their investment to other regions. The evidence supporting this argument may rest on the increase in FDIs within the USMCA region.[433] Concretely, these reforms may take the form, for instance, of an investment chapter or section more elaborated in the treaty or a common investment code. Regarding the investment dispute settlement mechanism, the WAEMU treaty could preferably adopt the standard ISDS. A more suitable option is a tailored investment dispute settlement system that considers local, political, and economic circumstances, such as the USMCA.

Second, besides the USMCA, there are other inspiring options available for the WAEMU countries when it comes to revising and adjusting their foreign direct investment regulations and mechanisms for settling disputes. Article 13 of the WAEMU treaty allows for international cooperation.[434] The WAEMU member states can benefit more from this through International Investment Law instruments or entities. Some examples are the MIGA, the ICSID, and the New York Convention

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[430] "Member State experts and the Commission discussed two options for revising substantive rules: – The establishment of a single system of law that would be applicable to the entire territory of WAEMU – The establishment of a framework allowing both community law and national law to coexist, but in which community law would take precedence." U.N. Conference on Trade and Development, *Preparatory Report For The Ex Post Review Of The Competition Policy Of The West African Economic And Monetary Union*, 46 U.N. Doc. UNCTAD/DITC/CLP/2020/2 (2020) [hereinafter *Preparatory Report*].

[431] "The implementation of national investment codes has always posed problems related to the harmonization of advantages granted to beneficiary enterprises within the same common market." *Id.* at 34.

[432] *Foreign Direct Investment in Africa: Trends and Prospects*, TRENDS RSCH. & ADVISORY (May 1, 2024), https://trendsresearch.org/insight/foreign-direct-investment-in-africa-trends-and-prospects/; *see also Report by the WTO Secretariat on WAEMU*, *supra* note 414, at 21 (explaining that FDI and portfolio investment within WAEMU experienced a drop in capital inflows).

[433] In 2022, the United States has seen a 9.5% increase in foreign direct investment (FDI) in USMCA, with a total of $569.0 billion. Meanwhile, USMCA's FDI in the United States has increased by 8.0% from 2021, reaching $623.1 billion. United States-Mexico-Canada Agreement, Pub. L. No. 116-113, 134 Stat. 11 (2020).

[434] *WAEMU*, supra note 140, at art. 13.

of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.[435] At the multilateral level, the TRIM agreement is evidently still relevant. Furthermore, WTO members are pushing for an Investment Facilitation for Development Agreement (IFDA) that "seeks to facilitate investment and increase global flows for foreign direct investment, especially to developing economies and least-developed countries, to foster sustainable development"[436] and the Multilateral Investment Court (MIC).[437] At the African regional level, the ECOWAS investment code[438] is a relevant tool for investments within the WAEMU since all the WAEMU member states are also members of the ECOWAS. The Pan African Investment Code[439] and the OHADA Uniform Acts[440] also exist. Some WAEMU countries have already ratified these International Investment Law instruments or entities.[441] To circumvent the inherent lack of protection in the WAEMU treaty, wise and informed foreign investors would think to invest within the WAEMU area through joint ventures with the WAEMU nationals. American investors can feel confident knowing that a Bilateral Investment Treaty has been established between the WAEMU and the United States, providing a framework for investment protection and promoting mutual economic growth.[442]

4. Tariffs

Free trade agreements come with numerous advantages, and one of their core benefits is the provision of low or zero tariff concessions for "substantially all

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435 *See generally About Us*, *supra* note 418; *About ICSID*, *supra* note 419; Foreign Arbitral Awards, *supra* note 419.

436 Rashmi Jose, *Tough Road Ahead to Integrate Investment Facilitation Agreement Into World Trade Organization System*, IISD: INT'L INST. FOR SUSTAINABLE DEV. (Jan. 11, 2024), https://www.iisd.org/articles/policy-analysis/integrating-investment-facilitation-agreement-wto.

437 *See* Kathleen Mpofu, *Harmonising International Investment Law with International Law Through the Framework of the Multilateral Investment Court (MIC)*, AFRONOMICSLAW (Feb. 8, 2024), https://www.afronomicslaw.org/category/analysis/harmonising-international-investment-law-international-law-through-framework.

438 *See* ECOWIC, *supra* note 420, at arts. 2–8.

439 *See generally Draft Pan African Investment Code (PAIC)*, AFR. UNION COMM'N (Dec. 2016), https://au.int/en/documents/20161231/pan-african-investment-code-paic.

440 *See generally Uniform Acts*, ORG. FOR HARMONIZATION BUS. L. IN AFR., https://biblio.ohada.org/index.php?lvl=cmspage&pageid=6&id_rubrique=129 (last visited Feb. 24, 2025).

441 For instance, Côte d'Ivoire ratified the ICSID (International Center for Settlement of Investment Disputes) and the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. *2023 Investment Climate Statements: Côte d'Ivoire*, *supra* note 415. WAEMU member states are part of MIGA, which allows foreign investors to obtain guaranteed coverage for their investments. *About Us*, *supra* note 417.

442 *See* Agreement Between the Government of the United States of America and the West African Economic and Monetary Union (WAEMU) Concerning the Development of Trade and Investment Relations, U.S.-W.A.E.M.U., Apr. 24, 2002, T.I.A.S. No. 02-406.

trade."[443] These concessions are crucial to the essence of such agreements and make them attractive to countries looking to increase trade and boost economic growth. However, there are often exceptions to the low or zero tariff rule within a Free Trade Area. Certain goods may be specifically excluded, or their eligibility may be conditional. Rules of origin account for most of the exceptions, but there could be other exceptions that are specially designed. The following developments will unfold how tariffs are managed under (a) the USMCA and (b) the WAEMU.

5. Tariffs within USMCA

The United States-Mexico-Canada Agreement (USMCA) has effectively created a North American Free Trade Area, as defined by GATT Article XXIV:8,[444] encompassing the territories of Mexico, Canada, and the United States.[445] Hence, as a general principle, each of the three nations has consented to extend national treatment towards goods,[446] encompassing a general principle of zero tariffs for products originating from the other two nations.[447] Nonetheless, chapters 4 and 5 of the USMCA relating to the "Rule Of Origin"[448] and "Origin procedures," as well as each country's "Tariff Schedule Appendix 1" under Chapter 2 and Chapter 3 "Agriculture," establish exceptions and requirements to benefit from the general rule of zero tariffs and exclusions. Three key exceptions to the zero-tariff rules relate to (i) manufacturing, (ii) agriculture, and (iii) textiles and apparel products.

a. Manufacturing

Some of the most significant changes and exceptions in the manufacturing industry under the USMCA relate to the production of automobiles and vehicles (cars, trucks, and their parts). The automotive sector must comply with new and rigorous rules of origin to qualify for zero-tariff treatment.[449]

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443 *Comparative Advantage*, *supra* note 12.

444 In a Free Trade Area, duties and trade restrictions must be eliminated for "substantially all trade" among the FTA members. GATT, *supra* note 55, at art. XXIV(8)(a-b).

445 *USMCA Treaty*, *supra* note 232, at art 1.1.

446 *Id.* at art. 2.3.

447 *Id.* at art. 2.4 (U.S, MX, and CA Tariffs Schedules).

448 The USMCA's rules of origin for products are complex and detailed. It includes 16 regulations and 185 pages of product-specific rules in Annex 4-B. The rules are more rigorous than those of NAFTA, and there is also a 33-page Appendix to Annex 4-B that outlines rules of origin for cars and trucks. *See generally id.* at Annex 4-B, Appendix, art. 2.

449 USMCA Chapter 4 imposes stricter North American content requirements on various manufactured goods and their components, including chemicals, plastics, rubber, leather goods, handbags, footwear, wooden items, paper products, glass, ceramics, and metals. The agreement also has sector-specific annexes for industries such as chemicals, cosmetics, communications technology, energy performance, and medical devices. *See generally USMCA Treaty*, *supra* note 232, at Annex 4-B.

The new rules of origin provide higher "Regional Value Content" (RVC) and "Labor Value Content" (LVC) requirements for vehicles.[450] In addition to extending RVCs to core parts in a vehicle, such as batteries, engines, and steering systems (Appendix to Annex 4-B),[451] the USMCA stipulates two essential criteria. First, at least 70% of the steel and aluminum used to produce automotive products must originate in North America.[452] Second, at least 75% of the content of passenger automobiles and light trucks must come from North America.[453] The LVC requires workers who earn at least US$16 per hour to make 40% of passenger vehicles and 45% of pickup or cargo vehicles.[454] Commentators think these measures aim to procure economic advantage and benefits to the U.S. market and workers and shield them from Mexico's unfair competition stemming from more relaxed labor regulations.[455]

b. Agriculture

The USMCA maintains zero tariffs on all food and agricultural products previously exempted from tariffs under NAFTA. However, it addressed many agricultural issues, particularly Tariff Rate Quotas (TRQ) exceptions.[456] For example, the USMCA grants the United States a larger share of the Canadian dairy, poultry, and egg market at 3.6%.[457] As a consideration, the United States provided expanded access to Canadian dairy, sugar, and sugar-containing products, and U.S.

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450 Mary E. Burfisher et al., *NAFTA to USMCA: What is gained?* (IMF, Working Paper No. 2019/073, 2019), https://www.imf.org/en/publications/wp/issues/2019/03/26/nafta-to-usmca-what-is-gained-46680.

451 Ludovic Arnaud, *From NAFTA to USMCA: revisiting the market access – policy space trade-off*, 29 NEW POL. ECON. J. 356, 365 (2024).

452 *USMCA Treaty*, *supra* note 232, at Annex 4-B-1 (this is the applicable general rule); s*ee also id.* at Annex 4-B (exceptionally, certain categories of tariff shifts require 50% or 60% North American content).

453 The new rule now requires more local production of goods than the NAFTA agreement, which required only 62.5% of goods to be produced locally. Arnaud, *supra* note 451, at 365.

454 *United States–Mexico–Canada Trade Fact Sheet: Rebalancing Trade to Support Manufacturing*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/rebalancing (last visited Mar. 13, 2025).

455 The provisions of USMCA Article 32.2 are designed to shift production of autos and auto parts to the United States, benefitting the big three U.S. automakers. The United States also has the right to impose national security tariffs on Canadian and Mexican vehicles and automotive components imported into the United States if they exceed certain quota limits. These two quotas will set a precedent for managed trade in autos and auto parts. *USMCA Treaty*, *supra* note 232, at art. 32.2.

456 TRQs are tariff-rate quotas that permit a certain amount of product to enter duty-free, but any imports exceeding the quota face a high tariff. The United States, Mexico, and Canada have TRQ arrangements for products such as peanuts, sugar, beef, dairy, eggs, and poultry. Thomas J. Schoenbaum, *The Art Of The Deal And North American Free Trade: Advantage For The United States?*, 14 OHIO STATE BUS. L.J. 65, 85–86 (2020).

457 *See* Evans, *supra* note 34, at 838.

tariffs on cotton, peanuts, and peanut products imported from Canada will be eliminated after five years.[458] However, Chapter 3 of the agreement, "Agriculture," includes two bilateral annexes[459] that preserve existing tariff rate quotas (TRQs) between the United States and Canada and between Mexico and the United States.[460]

c. Textiles and Apparel

Chapters 4 and 5 of the USMCA introduce new rules and origin procedures for textiles and apparel goods. These rules restrict the use of non-North American inputs in the textile and apparel trade. They also mandate that sewing thread, pocketing fabric, narrow elastic bands, and coated fabric used in finished apparel must be made in North America for such products to be eligible for zero tariff benefits. The rules also improve customs enforcement and monitoring.[461]

6. Tariffs within WAEMU

The WAEMU is a Customs Union. As we discussed earlier, the Customs Union has two main features. Firstly, it promotes trade liberalization among member states by eliminating tariff and non-tariff barriers. Rules of Origin are the paramount tool for trade liberalization and tariff preferences or exemptions. Secondly, it enforces a Common External Tariff to regulate trade with non-member countries.[462] Furthermore, considering GATT Article XXIV:5, the shared external tariff must be established and synchronized among member states in a manner that is not excessively disproportionate or unjust compared to any previous tariff concessions of a "customs territory" before the union's creation.

Trade Liberalization Schemes, Rules of Origin, and the Common External Tariff are implemented through the Common Trade Policy of the Union (CTPU), established primarily by Articles 76 to 90 of the WAEMU Treaty and its additional

458 *United States-Mexico-Canada Trade Fact Sheet Agriculture: Market Access and Dairy Outcomes of the USMC Agreement*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/market-access-and-dairy-outcomes (last visited Mar. 13, 2025).

459 Annex 3-A is titled "Agricultural Trade Between Canada and the United States," and Annex 3-B is titled "Agricultural Trade Between Mexico and the United States." *See USMCA Treaty*, *supra* note 232, at ch. 3, art. 3.11.

460 *Id.* at art. 3.A.2; *see also* Schoenbaum, *supra* note 456.

461 A committee for textile and apparel matters is established under the USMCA agreement, which also includes updated standards for inspection and enforcement. *USMCA Treaty*, *supra* note 232, at ch. 6, art. 6.8.

462 GATT, *supra* note 55, at art. XXIV(8).

protocols.[463] The additional Protocol No. III/2001 has specifically established the WAEMU Rules of Origin.[464] However, the WAEMU Trade liberalization schemes, Rules of origin, and CET have been harmonized with and superseded by those of ECOWAS.[465]

First, in principle, products from the WAEMU/ECOWAS Free Trade Area are granted tariff preference and exemption if considered "originating" based on the ECOWAS Rules of Origin.[466] Generally, local products[467] are not subject to duty and import taxes within the ECOWAS and the WAEMU. Nonetheless, tariff preferences or exemptions for processed products may require more specifications.[468] Article 16 determines how to establish proof of community origin. The required documents are a certificate of community origin issued by an appropriate authority of the exporting Member State and the invoice declaration of community origin.[469] These regulations require two levels of approval. First, the firm producing the goods must be approved as eligible in a member State. Second, the product must be approved based on the origin criteria, meaning it must be deemed admissible. In other words, the firm and the product must receive approval for the goods to comply with the regulations. Import duty and tax exemptions are supposed to be decided at the community level and applied uniformly by member states. In practice, this is usually not the case. Tariff protection levels vary between member States due to differences in import duty and tax exemptions.[470] Also, the ROO is not properly enforced; certificates of origin take too long to be issued and are often disputed. In Mali and Côte d'Ivoire, disputes over certificates issued by

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463 Trade Policy Review, *Report by the Member Countries of the West African Economic and Monetary Union (WAEMU)*, WTO Doc. WT/TPR/G/362/Rev.1 (Feb. 27, 2018), https://do
cs.wto.org/dol2fe/pages/ss/directdoc.aspx?filename=q:/wt/tpr/g362r1.pdf&open=true.

464 Additional Protocol No. III/2001 established the WAEMU rules of origin, which have been in force since January 1, 2003. It was revised by Additional Protocol No. 01/2009/CCEG/UEMOA.

465 The ECOWAS CET was adopted in the WAEMU zone on September 25, 2014, through Regulation No. 07/2014/CM/UEMOA amending Regulation No. 02/97/CM/UEMOA adopting the WAEMU common external tariff.

466 According to ECOWAS Rules Of Origin (Article 3), Article 38 of the ECOWAS Revised Treaty outlines that products wholly obtained or significantly processed in one or multiple member states are considered to originate from the community. Similarly, products made from materials wholly obtained or significantly transformed in two or more member states are considered to originate from the member state where the final processing or transformation occurred. Supplementary Act A/SA.2/01/10 Fixing Community Rules of Origin and Procedures Applicable to Goods Originating in the Economic Community of West African States (ECOWAS) art. 3, Dec. 22, 2018, https://etls.ecowas.int/wp-content/uploads/2020/10/sup-act-fixing-rules-origin-2018-eng.pdf.

467 *Id.*

468 *Id.* at arts. 5–6.

469 *Id.* at art. 16.

470 *See Report by the WTO Secretariat on WAEMU*, *supra* note 414, at 46.

other countries often lead to the application of the CET on imports from other WAEMU members.[471]

Second, the ECOWAS common external tariff (CET) has been applied within the WAEMU zone since January 2015 to replace the WAEMU CET that was in effect since 2004, except for Guinea-Bissau, which adopted it in October 2016.[472] The innovation is a five-band tariff system with zero, 5%, 10%, 20%, and 35% bands. However, in 90% of the tariff lines, the ECOWAS CET is like the WAEMU CET. The only difference is that, unlike the WAEMU CET, which has four bands, the ECOWAS CET has five bands, with a rate of 35% applicable to 130 tariff lines. The average rate of the ECOWAS CET is 12.3%, compared to 12.1% for the WAEMU CET. The ECOWAS CET is ad valorem based on the 2012 version of the Harmonized Commodity Description and Coding System (HS) for its 5,899 tariff lines.[473] However, it exceeds the WTO binding rates for some member States, except for Guinea-Bissau and Togo. Additionally, the member states have many other duties and taxes that conflict with WTO tariff line limitations.[474] Indeed, the ECOWAS and the WAEMU member States bound their tariffs at the WTO separately, some before the establishment of these regional economic communities, and failed to harmonize the CETs and Other Duties and Charges (ODC) with WTO-bound tariff schedules afterward.[475]

7. Synthesis and Assessment

The USMCA and the WAEMU have the general principle of zero tariffs on products from their free trade area. However, tariff variations within the WAEMU due to the non-harmonization of duties and tax exemptions are an anomaly to the WTO rules and standards regarding the functioning of the Customs Union. Indeed, Customs Unions must equally eliminate duties and trade restrictions concerning "substantially all" trade among members and apply substantially the same duties and other regulations of commerce toward third countries.[476] Also, according to GATT Article XXIV:5, "the duties and other regulations of commerce imposed in Customs Unions in respect of trade with WTO contracting parties not parties to such union or agreement "shall not *on the whole* be higher or more

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471 Malian authorities claim this application is due to non-compliance with transit product regulations by coastal nations, like Côte d'Ivoire. Manuela Goretti & Hans Weisfeld, *Trade in WAEMU: Developments and Reform Opportunities* 1–24, 9 (IMF, Working Paper No. 08/68, 2008), https://www.imf.org/external/pubs/ft/wp/2008/wp0868.pdf.

472 *See Report by the WTO Secretariat on WAEMU*, *supra* note 414, at 7.

473 85 tariff lines at 0% for category 0 for essential social goods; 2,146 tariff lines at 5% for category 1 for basic raw materials and capital goods; 1,373 tariff lines at 10% for intermediate goods; 2,165 tariff lines at 20% for end consumer goods; and 130 tariff lines at 35% for "goods specifically for economic development." *Id.* at 39.

474 *Id.* at 41.

475 *Id.*

476 GATT, *supra* note 88, at art. XXIV(8)(a).

restrictive than the *general incidence* of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union." The WAEMU countries still have numerous duties and trade restrictions among members, as exemplified by Mali enforcing the CET in trade with the WAEMU member States.[477] Furthermore, unlike the USMCA, in which countries seem to comply strictly with their schedules regarding tariffs and taxes under the agreement, within the WAEMU, despite the free trade theoretically implemented by member states, a vast array of additional domestic taxes and levies must be paid when crossing borders.

While the USMCA fixed the ROO disputes in NAFTA with new specifications, reinforcements, and concessions, the WAEMU faces alarming ROO enforcement issues. Also, the discrepancies between the WAEMU member states' WTO-bound tariffs and the ECOWAS CET create enforcement of different duties toward third countries and are sometimes "on the whole higher or more restrictive than the general incidence of the duties and regulations of commerce applicable" before the formation of the WAEMU.[478] Nonetheless, it would be tougher for the WAEMU countries to renegotiate the agreement to specify or enhance its ROO as NAFTA was, since the ROO applicable to the area is the ECOWAS ROO. That would mean amending the ECOWAS ROO, which would require an agreement between the eight countries forming the WAEMU and the seven other countries' members of ECOWAS that may have different and diverging interests and could be reluctant to amend the treaty. The same issue may arise regarding the ECOWAS CET enforcement within the WAEMU area. It is an absolute abnormality to the WTO/GATT rules that a CET should be applied between member States of a Free Trade Area because they disagree on ROO enforcement. Another WTO/GATT-related issue is that harmonization with the states' WTO-bound tariff schedules has not been conducted alongside the successive stages of the introduction of CETs. Member States within ECOWAS are currently engaged in conversations regarding this matter.[479] Also, concerning the other duties and charges, which are not part of the CET and aggravate the violation of the WTO-bound tariff schedules, the WAEMU recommended reducing or abolishing them in its 2015 trade monitoring report.[480]

The overlapping of two regional integration Free Trade Agreements may be a problem for the WAEMU in pursuing and strengthening its regional integration independently. Tariffs within the WAEMU create great uncertainty, could be burdensome, and deter foreign direct investment. The USMCA sunset clause establishes an expiration after 16 years and allows the treaty to be reviewed every six years, allowing parties to extend the agreement.[481] Amending the WAEMU and inserting such a clause could be a solution to ensure that problems are regularly and effectively addressed without amending the ECOWAS free trade agreement.

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477 Goretti & Weisfeld, *supra* note 471, at 10.
478 *Report by the WTO Secretariat on WAEMU*, *supra* note 414, at 41.
479 *Id.*
480 *Id.* at 42.
481 *See USMCA Treaty*, *supra* note 232, at ch. 34, art. 34.7.

Besides tariffs and foreign direct investment, the problems to be solved will also concern those of the modern era, such as sustainable development.

B. Modern-Era Sustainability-Related Issues Assessment

Nowadays, sustainability is at the heart of trade to mitigate its adverse effects.[482] The U.S. Environmental Protection Agency (EPA) defined sustainability as "[e]verything that we need for our survival and well-being depends, either directly or indirectly, on our natural environment. To pursue sustainability is to create and maintain the conditions under which humans and nature can exist in productive harmony to support present and future generations."[483] The debate regarding the involvement of the WTO in sustainability concerns has been raging for decades.[484] Thus, countries addressed this unsettled matter by "linking" trade and sustainability with non-trade provisions in their Free Trade Agreements.[485] The two main focuses of academic research on sustainability issues related to trade tend to revolve around (1) environmental concerns and (2) labor rights.[486]

1. Trade and the Environment

While trade is becoming freer, and countries and corporations are relentlessly looking for more trade opportunities to improve growth and economic performance, its adversarial effect on the environment must be mitigated through "greener" RTAs. Over the past 60 years, international trade has significantly increased in importance.[487] Trade liberalization of goods and services is crucial for many countries worldwide.[488] However, global trade has environmental effects stemming from the massive production of merchandise. Perceptible impacts of adversarial nature can be observed in the ecological disturbance that arises from the extraction and consumption of natural resources (such as fish, timber, and coal), as

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482 Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law Of Trade Adjustment*, 43 GEO. J. INT'L L. 797, 798–99 (2012).

483 *Learn about Sustainability*: *What is Sustainability*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/sustainability/learn-about-sustainability (last visited Feb. 17, 2024).

484 *See generally* Schafer, *supra* note 19.

485 *Id.*

486 *Id.*

487 Global merchandise trade was worth over USD 17.58 trillion in 2020, a significant increase from the USD 6.3 trillion in 2002. CHRIS WORLD & SANFORD GAINES, TRADE AND THE ENVIRONMENT, LAW AND POLICY 3 (3d ed. 2023).

488 Exports constitute about 30% of GDP for some countries, including Mauritania, Mozambique, Canada, Finland, and Italy. *Id.*

well as in pollution resulting from the processing of raw materials and manufacturing of goods.[489] This leads authors to question whether there is "environment and trade congruence or conflict."[490]

In 1991, the Tuna/Dolphin I case launched the trade and environment controversy. In this case, the panel of trade experts determined that the U.S. trade policy aiming to regulate tuna fishing and protect dolphins was contrary to the GATT.[491] In subsequent years, other GATT panels and their successor, the WTO, made rulings that deemed other trade restrictions based on the environment impermissible.[492] Some observers opposed that view and considered trade liberalization and environmental protection goals congruent and aligned. Therefore, a year after Tuna/Dolphin I, world leaders signed the Rio Declaration on Environment and Development to integrate environmental aspects into global trade. However, this perspective was still not unanimous among the international trade community. In 1998, the Shrimp/Turtle[493] dispute accentuated the debate over implementing environmental-related provisions into the WTO/GATT multilateral trade system.[494] Countries no longer rely on the WTO to resolve the issue permanently. Instead, they devised a solution to incorporate environmental regulations into their Regional Trade Agreements. They offer organizational frameworks for environmental protection to countries that often share common airsheds, watersheds, and ecosystems. These frameworks help in adopting common approaches to environmental protection.[495] The United States called the tune with NAFTA, which pioneered such "Green" RTAs.[496] NAFTA's side agreement, the North American Agreement on Environmental Cooperation (NAAEC), was the precursor of environmental provisions in RTAs.[497] Nowadays, these kinds of RTAs are proliferating and are the norm. However, resolving the tension between trade rules and environmental regulation is not their primary aim. Instead, they establish

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489 WORLD & GAINES, *supra* note 487, at 3.

490 *Id.*

491 WORLD & GAINES, *supra* note 487, at 3.

492 *Id.*

493 WTO Appellate Body in Shrimp/Turtle implicitly ruled that trade-restrictive measures based on environmental-related issues are eligible for exception and can withstand WTO challenges: "We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)." Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 133, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter *Import Prohibition of Certain Shrimp*]. The Shrimp/Turtle takeaway is that Article XX(g) may be invoked to justify measures to protect those resources that exist, at least for some part of the resource's life history, in the territory of the party invoking the Article XX exception. *Id.*

494 *Import Prohibition of Certain Shrimp*, *supra* note 493.

495 *Id.*

496 *Id.*

497 North American Agreement on Environmental Cooperation, 1993, Ca.-Mex.-U.S., 32 I.L.M. 289.

institutions to address environmental matters, rules to enforce environmental laws, and opportunities for citizen engagement.[498] How do (a) the USMCA and (b) the WAEMU address environmental protection concerns in trade? What (c) assessment can we do?

2. Environmental Protection under USMCA

Tailored to improve NAFTA, the USMCA also strengthens its environmental protection. Some authors designated it as possibly the "greenest Trade Agreement ever."[499] The USMCA mirrors most of NAFTA's provisions relating to the environment while making substantive innovations.[500] NAFTA's environmental side agreement (NAAEC) has been integrated into USMCA Chapter 24, "Environment." USMCA Chapter 24 covers certain matters related to water, coastal areas, plastic pollution, wetlands, contaminated lands, fisheries, forests, genetic resources, ozone layer depletion, and genetically modified organisms. These matters were not previously covered in NAFTA. Typically, the USMCA covers 30 environmental concerns that were not explicitly addressed in NAFTA.[501] Additionally, the USMCA maintains a complementary side agreement on environmental protection: the Environmental Cooperation Agreement (ECA).[502] Finally, the USMCA does contain three environmental provisions that have never been included in any previous PTAs. The first relates to increased wildlife trafficking enforcement (24.22,7,b). The second innovation relates to reducing marine litter (Article 24.12). The third is contained in the USMCA's ECA, which introduced a trade regime pertaining to food waste.[503]

3. Environmental Protection under WAEMU

The environmental protection under the WAEMU treaty seems relegated to the second plan.[504] This assertion is demonstrated through two considerations.

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498 North American Agreement on Environmental Cooperation, *supra* note 497.

499 Noemi Laurens et al., *NAFTA 2.0: The Greenest Trade Agreement Ever?* 18 WORLD TRADE REV. 659, 675 (2019); The United States Trade Representative (USTR) even asserts that NAFTA parties "have agreed to the most advanced, most comprehensive, highest-standard chapter on the Environment of any trade agreement." *Id.* at 660.

500 *Id.* at 664.

501 Laurens et al., *supra* note 499, at 666.

502 Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada, July 1, 2020, T.I.A.S. No. 20-701.

503 Laurens et al., *supra* note 499, at 675.

504 Yacouba Savadogo, *La protection communautaire de l'environnement dans le cadre de l'UEMOA : enjeux, portée et perspectives* [*Community environmental protection within the framework of UEMOA: issues, scope and prospects*], UNIVERSITE DE LIMOGES [UNIV. OF LIMOGES] 1, 102 (Nov. 4, 2019), https://www.researchgate.net/publication/350544541_la_pr

First, the analysis of the main text of the treaty illuminates that environmental protection is not given priority. Indeed, environmental protection is slightly mentioned and may only be inferred from Articles 3, 4(d), 79, and 100 combined reading. Article 3 refers to the respect of the African Charter on Human and Peoples Rights' of 1981, which declared, in Article 24, that the right to an agreeable and healthy environment is as important as fundamental human rights.[505] Article 4(d) enumerates harmonization in "national sectoral policies" related to specific areas, including the environment.[506] Article 79 authorizes prohibitions and restrictions to trade justified by, among other things, "the protection of life and health of humans, animals and preservation of the environment."[507] Second, Article 100 requires that "the Union shall take into account the results of the African subregional organizations attended by its Member States." Hence, environmental protection policies furthered by other organizations such as the ECOWAS or the African Union (AU) must be followed by the WAEMU countries.[508] Lastly, the WAEMU additional protocol II regarding WAEMU sectoral policies, which goes further than the main treaty regarding environmental protection, specifies only five goals through its Articles 9 to 12 contained in Chapter IV, "Harmonization of the Environment."[509] These five goals concern combating desertification, protecting natural resources and biodiversity, improving the environment in rural and urban areas, using renewable energies (particularly solar energy), and controlling coastal erosion.[510]

C. Synthesis and Assessment

The USMCA contains an entire chapter devoted to addressing environmental issues, whereas the WAEMU does not. The WAEMU's environmental-related provisions are scattered throughout the text and are imprecise. The USMCA called the tune regarding "green" RTAs, while the WAEMU is not one of them and must tend to become one since environmental protection and justice are now vital for humankind.[511] Even if the USMCA does not address important environmental concerns that other RTAs do[512] and has a few "missed opportunities" to enhance environmental protection,[513] it undoubtedly has robust mechanisms and provisions addressing environmental concerns that may

otection_communautaire_de_l'environnement_dans_le_cadre_de_l'uemoa_enjeux_portee_et_perspectives.

505 Savadogo, *supra* note 504, at 103.

506 Treaty Establishing the West African Economic and Monetary Union, O.J. WAEMU L-19, 1994, No. 1, art. 4(d).

507 *Id.* at art. 79.

508 *Id.* at art. 100; *see also* Savadogo, *supra* note 504, at 191–96.

509 *WAEMU*, *supra* note 140, at ch. IV, arts. 9–12.

510 *Id.* at art. 10.

511 Schafer, *supra* note 19.

512 For instance, "climate change," "global warming," or "greenhouse gases" are not explicitly mentioned in the USMCA. Laurens et al., *supra* note 499.

513 *Id.*

arise in trade. It is sustainability-oriented. Contrarily, the WAEMU treaty's environmental protection is extremely weak. Even if the spirit of the treaty tends to consider environmental issues, the letter is clearly and unequivocally insufficient.[514] It has not adapted to our modern challenges regarding environmental regulatory schemes in trade. The WAEMU's additional protocol explicitly lists only five goals to attain regarding environmental harmonization. The protocol does not precisely state whether this list is exhaustive. Moreover, a school of thought affirms that environmental policies adopted as sectoral policies are ineffective because environmental issues are transversal.[515] The first recommendation would be for the WAEMU countries to amend the treaty, enhance environmental-related provisions, or pass additional acts, regulations, or protocols to bridge the environmental regulatory gap. Nonetheless, the initial treaty signed in 1994 was amended in 2003, and no reform toward improving environmental regulations has been made. The question remains whether environmental issues are part of the WAEMU agenda. Also, Article 100 of the treaty makes the WAEMU consider other subregional organizations' regulations and policies that can be useful tools. However, this may be a double-edged sword. It may help to improve the legal framework regarding environmental policies by borrowing environmental regulations, but it may also create conflicts between the WAEMU's domestic regulations and the other subregional organizations' rules. The USMCA may represent an interesting model for the WAEMU regarding environmental policies to consider or experiment with, since it is deemed the "greenest trade agreement ever." Nonetheless, as we expressed above, is the WAEMU fully prepared to undertake such extensive commitments about environmental regulations? Furthermore, does it have the financial and technical means to monitor sophisticated regulations? Who might provide help and resources? These questions must be answered at some point because the Union must catch up on international trends regarding environmental protection through RTAs. Some actions have been taken through recommendations and derivative law. However, they are not efficient enough, and reforming the treaty seems to be the best option.[516]

1. Trade and Labor Rights

Labor rights are seen as part of "human rights" since labor rights abuses may relate directly to human rights abuses.[517] Nonetheless, whether labor rights and trade linkage further human rights protection is unclear.[518] RTAs are incentives for the "race to the bottom" in the job market. They create an "off-shoring" phenomenon where jobs or corporate activities are relocated to countries with lower wages and less strict labor standards to reduce labor costs while taking advantage

514 *See* Savadogo, *supra* note 505, at 465.
515 *See* Savadogo, *supra* note 505, at 465.
516 Savadogo, *supra* note 505, at 465.
517 Meredith Kolsky Lewis, *Human Rights Provisions In Free Trade Agreements: Do the Ends Justify the Means?* 12 LOY. U. CHI. INT'L L. REV. 1, 5 (2014).
518 *Id.*

of nonexistent or preferential tariffs within the RTA.[519] It then appears that the motivation for incorporating labor provisions in Free Trade Agreements (FTAs) is to safeguard the interests of workers in developed countries rather than ensure the protection of workers' rights in developing or least developed countries. Hence, developed nations frequently convey contradictory signals regarding their commitment to upholding human rights through labor rights protection. Thus, as for the environmental provisions, the legal literature is not unanimous in the debate over the linkage of labor rights provisions and trade through RTAs.[520] However, the opportunity that RTAs may represent to advance labor concerns and mitigate trade adversarial effects has been somehow acknowledged.[521] Thus, we will examine labor protection under (a) the USMCA and (b) the WAEMU before (c) synthesizing and assessing their efficiency to advance the sustainability agenda in trade.

2. Labor Protection under USMCA

The "sucking sound" predicted[522] after NAFTA negotiations and entry into force became a reality when labor concerns arose, with American manufacturing workers losing millions of manufacturing jobs to Mexico as a result of NAFTA.[523] The defunct NAFTA had a side agreement relating to labor protection named the North American Agreement on Labor Cooperation (NAALC) with "Labor Principles," as emphasized by its Annex 1, relating to freedom of association and the protection of the right to collective bargaining, prohibition of forced labor and child labor, the elimination of employment discrimination based on race, religion, age, sex, or other grounds, and the guarantee of equal pay for men and women.[524] It turned out to be ineffective in preventing NAFTA from harming U.S. workers. Then, these 11 principles were re-conducted, revamped, and enhanced under the USMCA. The USMCA innovations in labor protection can be seen in four different aspects: the coverage, the level of commitment, additional commitments, and the enforcement mechanisms.[525]

First, USMCA Chapter 23 coverage mostly mirrors the eleven "Labor Principles" list clarified in the NAALC Annex 1.[526] However, the initial eleven principles have been synthesized into five main areas in Article 23.1, "Definitions," and Article 23.3 on "Labor Rights."[527] These are the protection of freedom of association and the right to collective bargaining; the elimination of all forms of

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519 Davies, *supra* note 222.

520 Maria Anna Corvaglia et al., *Labour Rights Protection and Its Enforcement under the USMCA: Insights from a Comparative Legal Analysis*, 20 WORLD TRADE REV. 648, 648 (2021).

521 *Id.*

522 LIGHTHIZER, *supra* note 186, at 215.

523 *Id.*

524 Corvaglia et al., *supra* note 520, at 654.

525 *Id.*

526 *Id.*

527 *Id.*

forced or compulsory labor; the abolition of child labor and labor protections for children and minors; the elimination of discrimination in respect of employment and occupation; and the protection of acceptable conditions of work with regard to minimum wages and occupational safety and health.[528] In addition, USMCA Article 23.2 recalls and emphasizes the agreement's commitment to the international standards of labor rights, specifically the 1998 ILO Declaration on Rights at Work and the 2008 Declaration on Social Justice for a Fair Globalization. Moreover, the USMCA covers additional labor concerns, including ensuring acceptable working conditions and minimum wages, recognizing the vulnerability of migrant workers in Article 23.8, eliminating discrimination based on sex, promoting gender equality in the workplace in Article 23.9, and safeguarding the rights of migrant workers.

Second, the level of commitment under the USMCA is embedded in Article 23.3 and Article 23.4. USMCA Article 23.3 mandates adopting and maintaining national labor protection regulations and complying with the 1998 ILO Declaration on Rights at Work, and Article 23.4 binds the parties to refrain from weakening or derogating from their labor regulations in the scope of trade and investment.

Third, additional commitments are laid out in USMCA Chapter 23. One of the main innovations regarding the parties' commitment is USMCA Article 23.6's ban on importing goods produced using child labor or forced labor. USMCA Article 23.7 highlights the importance of creating a peaceful and safe atmosphere for workers by avoiding violent, intimidating, or threatening behavior.

Fourth, USMCA Article 23.9 creates an obligation of non-discrimination in the workplace, especially against women. Discrimination based on sexual orientation, gender identity, or caregiving duties is also prohibited. This includes implementing policies to prevent employment, wage discrimination, and sexual harassment. Finally, the USMCA presents two crucial enforcement mechanisms for labor rights violations. The USMCA established a difference between the violation of labor commitments set forth in USMCA Chapter 23 and the provisions, detailed in Annex 23.A, imposed on Mexico. If the terms of USMCA Chapter 23 are violated, the provisions of USMCA Chapter 31, "Dispute Settlement," can be invoked. However, if the violation concerns the obligations outlined in Annex 23.A, the Rapid Response Mechanism under Annex 31-A[529] is the mechanism through which a remedy will be available.

3. Labor Rights Protection under WAEMU

Despite some initiatives, Sub-Saharan Africa (including West Africa) is still the region with the highest number of child laborers.[530] Not surprisingly, the

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528 *Id.*

529 *USMCA Treaty*, *supra* note 232, at ch. 31, Annex 31-A.

530 *Eliminating the Worst Forms of Child Labor in West Africa by Strengthening Sub-Regional Cooperation Through ECOWAS*, U.S. DEP'T. LAB. https://www.dol.gov/agencies/il

region is also one of the most affected by forced labor.[531] Hence, in designing free trade agreements in Sub-Saharan Africa, one should be mindful of the necessity of tackling forced and child labor for sustainable development. Unfortunately, the WAEMU treaty does not address child labor and labor rights protection or violation in the main treaty or its additional protocols. Articles 91 and 92 of the treaty slightly address employment through the abolition of nationality-based employment discrimination,[532] the residential right (or right of establishment) in a member State for employment,[533] the right of "migrant workers and their successors of continuity enjoyment of benefits that may be available under successive periods of employment in the territory of all Member States."[534] No other provisions in the treaty provide protection or enforcement of labor standards or protection within the WAEMU area.

4. Synthesis and Assessment

The USMCA shows an elaborate and comprehensive landscape of labor rights protection with narrowly designed enforcement mechanisms, while the WAEMU treaty undoubtedly fails to establish strong regulations and robust instruments for labor protection and rights violations. The absence of a labor chapter or section in the WAEMU treaty may be motivated by the willingness to allow member states to regulate labor issues through domestic law, as we have seen for investments. However, this approach is intrinsically flawed in a Free Trade Area, specifically for Customs Unions, since it fails to provide harmonized legislation, standards, monitoring, and enforcement of a critical issue for sustainable development. The WAEMU treaty may lean on other regional entities' rules, like the ECOWAS investment code, which provides, for instance, "Labour and Employment Standards"[535] and prohibits child labor[536] to regulate child labor or

ab/eliminating-worst-forms-child-labor-west-africa-strengthening-sub-regional (last visited Feb. 24, 2025). *Child labour*, UNICEF, https://data.unicef.org/topic/child-protection/child-labour/ (last updated July 2024); *Child Labour: Global estimates 2020, trends and the road forward*, UNICEF (June 9, 2021), https://data.unicef.org/resources/child-labour-2020-global-estimates-trends-and-the-road-forward/.

531 Leigh Gardner, *Slavery, Coercion, and Economic Development in Sub-Saharan Africa*, 97 BUS. HIST. REV. 199, 199 (Sept. 25, 2023); *Combating forced labour and discrimination in Africa*, ILO, https://www.ilo.org/global/topics/forced-labour/wcms_082041/lang--en/index.htm (last visited Feb. 24, 2025).

532 Treaty Establishing the West African Economic and Monetary Union, O.J. WAEMU L-19, 1994, No. 1, art. 91(1).

533 *Id.* at arts. 91(1)–92.

534 Treaty Establishing the West African Economic and Monetary Union, *supra* note 532, at art. 91(3)(b).

535 ECOWIC, *supra* note 420, at art. 30.

536 "Member States shall in consultation with investors design employment schemes in accordance with existing ECOWAS Social Security and Labour/Employment Policy, in particular to . . . not use child labour and to support efforts for the elimination of all forms of child labour…" *Id.* at art. 30(3)(vi).

labor rights protection or violation. Nonetheless, the risk of overlapping inconsistent domestic and regional regulations is present. The WAEMU member States may face many legal or economic risks, including conflict between their domestic law and other regional laws that could lead to discrepancies and anomalies in enforcement, as we have seen regarding internal tariffs.[537] Another risk is the difference in treatment that the WAEMU countries may receive from other countries like the United States or the EU—with robust regulations towards child labor, forced labor, or sustainability—regarding each country's compliance with sustainable standards in producing goods or services. Also, the international standards for labor rights that the ILO sets are paramount to achieving regional integration and sustainable trade within the WAEMU. The treaty, which has not been amended since 2003, should be aligned with the modern trends in labor rights.

V. CONCLUSION

Free trade benefits countries more than protectionism and trade barriers. The multilateral trade system represented by the GATT/WTO has proven very effective for a long time. However, governments also negotiate specific trade agreements. RTAs have benefited the multilateral trade system but have also eroded it in some regards. The debate surrounding the coexistence of RTAs as stepping stones or building blocks for the multilateral trading system is still active.

The USMCA is a Regional Trade Agreement in North America that replaced NAFTA and was implemented in 2020. The agreement is praised because it provides a better deal for Americans and creates a supportive policy environment for jobs, supply chains, and trade resilience. Nonetheless, the USMCA's nature is questioned. It has some inconsistent provisions with the WTO multilateral system as it does not formally qualify as a Customs Union but has more profound—or higher—collaboration than basic Free Trade Areas.

The birth of the West African Economic and Monetary Union (WAEMU) has resulted from many experimental attempts to reach a functioning regionalism in Africa and West Africa. Unlike European trade agreements, African regional trade agreements are multidimensional, encompassing economic and non-economic objectives and formal and informal regimes. The WAEMU's efforts towards free trade through the abolition of visas and entry requirements are hindered by numerous checkpoints that hinder the free movement of goods and persons crossing other member countries' borders. Compliance with Regional Trade Agreements is critical to enhancing economic growth through the flow of goods, services, capital, and people necessary for development. The drafting of African Regional Trade Agreements and West Africa's economic dependence on colonial powers and currencies are inconsistent with the anticolonialism posture and impair trade and economic growth. These impairments to trade are perceptible regarding Foreign Direct Investments, tariffs, and modern-era issues such as sustainability, where the WAEMU treaty is undoubtedly outdated and ineffective.

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537 *See* Goretti & Weisfeld, *supra* note 471, at 8.

Analyzing both treaties showed that the WAEMU treaty may learn from the USMCA to fill many of its free trade, foreign investment, and sustainability gaps. It needs a profound redrafting and amendment to encompass crucial problems like sustainability through the lens of environmental and labor issues. Also, the treaty has myriad significant flaws and incongruities, such as applying the CET to member-State countries. Furthermore, the cohabitation and overlapping of the WAEMU treaty with other sub-regional trade agreements, such as ECOWAS, can make it dysfunctional or inconsistent with the multilateral system. Therefore, clarifications or remedies must be taken to comply with the WTO rules and delineate the specific spheres of action of these different treaties harmonizing the one that must be harmonized. The WAEMU treaty, as an effective regional integration, needs to be perfected, and even if it is still perfectible, the USMCA illustrates how modern and effective RTAs look. The WAEMU's next amendment, after more than two decades since the last one, can take inspiration from the USMCA. The feasibility, technicalities, and instrumentalities of such major improvements are issues that should be addressed. However, they are not impossible. Additionally, the WAEMU cannot escape the global trend toward sustainability since all member-states are members of the United Nations and committed to the UN 2030 Agenda and the SDGs. Thus, more efforts must be made toward compliance with and achievement of these goals through the WAEMU regional integration.