



AFRICAN CONTINENTAL FREE TRADE AREA: Policy and Negotiation Options for Trade in Goods



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

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ACRONYMS

AfDB	African Development Bank
ARIA	Assessing Regional Integration in Africa reports of UNECA
AU	African Union
AUC	African Union Commission
COMESA	Common Market for Eastern and Southern Africa
CFTA	Continental Free Trade Area
EAC	East African Community
ECOWAS	Economic Community of West African States
IGOs	Intergovernmental Organizations
FTA	Free Trade Area
GATT	General Agreement on Tariff and Trade
GTAP	Global Trade Analysis Project
HATC	High Level African Trade Committee
HS	Harmonized Commodity Description and Coding System
NTMs	Non-Tariff Measures
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
RECs	Regional Economic Communities
RTA	Regional Trade Agreement
ROO	Rules of Origin
SADC	Southern African Development Community
TF	Trade Facilitation
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
WTO	World Trade Organization

INTRODUCTION

Trade has been the motor of economic, social and political integration of African countries for many centuries prior to the establishment of Africa's first regional body, the Organization of African Unity (OAU), in 1963. The OAU strived towards boosting intra-African cooperation and integration in the economic field at the continental level. It saw the formation of several regional economic communities that were created first with a view to consolidating the economic space of a particular region to harness potential benefits of such integration; and secondly, these would serve as the pillars or building blocks for eventual formation of a continental economic community. In 1980, the OAU adopted the Lagos Plan of Action for the Economic Development of Africa 1980-2000, articulating a regional development plan for Africa that included the formation of an African Common Market.

While several programmes and institutional creation proliferated, the level and rate of implementation of trade integration programmes of many regional economic communities (RECs) faltered. Weak implementation at the RECs level meant that efforts towards building up the continental community also wavered. With a view to reviving and launching the continental integration project, the OAU Abuja Treaty Establishing the African Economic Community was adopted in June 1991.¹ It articulated the formation of a continental free trade area as a stepping stone toward the realisation of the African Economic Community. Momentum towards implementing this objective gathered speed with the formation of the African Union (AU) in 2002, replacing the OAU. AU member States paid greater attention to continental integration. In fact, Article 3 in the AU's Constitutive Act, establishes that the third objective of the AU is to "accelerate the political and socio-economic integration of the continent".

Subsequently, the AU decided to concentrate the process of fostering continental economic integration through trade integration. At the 2012 AU Summit, Heads of State and Government adopted a Decision (Assembly/AU/Dec.394 (XVIII)) on the Establishment of a Continental Free Trade Area (CFTA) by the indicative date of 2017 and endorsed the Action Plan on Boosting Intra-Africa Trade (BIAT) which identifies seven areas of cooperation namely trade policy, trade facilitation, productive capacity, trade related infrastructure, trade finance, trade information, and factor market integration. Then in June 2015, at the twenty-fifth Summit of the African Union, held in South Africa, African Heads of State and Government agreed to launch negotiations on the creation of the CFTA by 2017 through negotiations on the liberalization of trade in goods and services. This initiative presents major opportunities and challenges to boost intra-African trade.

In order to multiply the benefits of the CFTA and promote developmental regionalism in Africa, a comprehensive vision of trade and development needs to be in place. Expanded markets for African goods and services, unobstructed factor movements and the reallocation of resources should promote economic diversification, structural transformation, technological development and the enhancement of human capital. The CFTA must be ambitious in dismantling barriers and reducing costs to intra-African trade and in improving productivity and competitiveness. It must provide for governments to involve non-state actors, especially private sector, civil society and academia, in the discussions on the intent, content and design of CFTA so that the resulting agreement can create opportunities for businesses to exploit and bring about benefits to ordinary citizens.²

CHAPTER 1: BOTTOM UP OR TOP DOWN INTEGRATION

One of the key issues in relation to the achievement of African continental integration was the relative priority that should be given to integration of the continent as a stand-alone strategy, a top-down process, or through the integration of the different African regional economic communities, a bottom up process. The Lagos Plan of Action and the Abuja Treaty embraced a bottom-up process with the formation of RECs which would then become the stepping stones for African continental integration. Deep integration is envisaged in terms of a single common market, and economic and monetary union.

Article 6 of the Abuja Treaty provided for the establishment of the African Economic Community in six stages over period not exceeding thirty-four years. Basically the first stage would involve a strengthening of existing RECs and establishment of new RECs in regions where they do not exist. The second stage would involve each REC stabilizing tariff barriers, and non-tariff barriers, customs duties and internal taxes. The third stage would involve at the level of each REC the establishment of a free trade area through the gradual removal of tariff barriers and non-tariff barriers to intra-community trade and the establishment of a customs union by means of adopting a common external tariff. The fourth stage would involve coordination and harmonization of tariff and non-tariff systems among the various RECs with a view to establishing a Customs Union at the continental level by means of adopting a common external tariff. The fifth stage would see the establishment of an African Common Market through the adoption of common policies in several areas; harmonization of monetary, financial and fiscal policies; and the application of the principle of free movement of persons as well as the provisions herein regarding the rights of residence and establishment. The sixth stage would involve the consolidation and strengthening of the structure of the African Common Market, and setting up of a pan-African Economic and Monetary Union including setting up of African Monetary Union, a single African Central Bank and a single African Currency.

While the Abuja Treaty continues to set the overall framework and ambition for African integration, the AU Assembly of Heads of State and Government decreed, in 2012, the decision to boost intra-African trade and fast-track the Continental Free Trade Area (CFTA). So the AU decided, for now, to emphasize the creation of the continental free trade area, leaving aside the common market, and economic and monetary community. This may have risen from practical considerations of the difficulties involved in harmonizing trade and economic policies of African countries and existing RECs. The aim was that “the CFTA should be operationalized by the indicative date of 2017, based on a framework, roadmap and architecture, with the following milestones:

1. Finalization of the East African Community (EAC)/the Common Market for Eastern and Southern Africa (COMESA)/Southern African Development Community (SADC) Tripartite FTA initiative by 2014.
2. Completion of FTA(s) by Non-Tripartite RECs, through parallel arrangement(s) similar to the EAC-COMESA-SADC Tripartite Initiative or reflecting the preferences of their Member States, between 2012 and 2014.
3. Consolidation of the Tripartite and other regional FTAs into a Continental Free Trade Area (CFTA) initiative between 2015 and 2016.
4. Establishment of the Continental Free Trade Area (CFTA) by 2017 with the option to review the target date according to progress made.”

Finally, the AU Assembly tasked the AU Commission (AUC) to oversee the process and report on developments. It also tasked the AUC, in collaboration with the African Development Bank (AfDB), UNECA and other relevant agencies, to take appropriate measures, including studies, technical support to RECs and sensitization of member States and partners, for the effective implementation of the CFTA roadmap.

As can be noted from the milestones above, the AU Heads of State and Government seeks a rapid integration consolidation process. The CFTA is an important pillar and driver for Africa's growth and development in the period ahead for the following reasons, among others:

- It is a key aspect for the realization of Africa's Agenda 2063: The Africa We Want, aimed at building a prosperous and united Africa. In this regard also, it could help improve prospects for African countries to implement the United Nations 2030 Agenda for sustainable development and achieve the sustainable development goals (SDGs);
- It will bring about a consolidation of African economic integration process through harmonization or coordination of FTAs of RECs;
- It will set the basis for the formation of a continental wide economic space that would be boon for businesses;
- It would widen the internal market demand available to African countries to weather global economic crises as witnessed during the 2008-2012;
- It would, as a mega-regional agreement, build up Africa's economic clout in dealing with emerging mega-regional trade agreements in other parts of the world as well as Africa's engagement in trade negotiations at the global level such as in the WTO.

A key challenge facing the AU in establishing the CFTA is the need for coherence from among the multitude of RECs on the continent, which results in many countries with overlapping membership in several RECs.³ Overlapping trade agreements have been a reason for the weak implementation of regional integration schemes in Africa⁴ and the limited trade effects of the agreements. For a country to administer set sets of rules, often conflicting in some instances, can be an impediment to realizing trade gains from preferential market access. These can also create confusion about integration goals. Tavares and Tang (2011) suggest that the complexities created by overlapping memberships risk slowing down trade liberalization within the integration area and hampering the effect on integration. Their study shows that more than 25 per cent of national policy makers think that overlapping agreements make it hard to meet intended integration commitments, while 23 per cent find agreement overlaps as a reason for low programme implementation. In overlapping RECs the complexity is caused by multiple and different tariff regimes and non-tariff barriers, which maybe a challenge for multi-REC members. As regards FTAs, the existence of several rules of origin can cause additional difficulties including in terms of trade diversion.

With a view to address the problem of proliferation of RECs, the AU currently recognizes only eight (8) of the continent's RECs. This arose from a strategic examination on the rationalization of RECs. The process started with the 2006 Banjul AU Summit, which was followed by the July 2007 Accra Summit, at which the AU Assembly finally decided to adopt a Protocol on Relations between the African Union and the Regional Economic Communities.⁵ This protocol is intended to facilitate the harmonization of policies and ensure compliance with the Abuja Treaty and Lagos Plan of Action time frames. It has thus set the framework for the addressing the issue of overlapping RECs and initiated the momentum to stop further proliferation of RECs in Africa. The eight recognized RECs are the following:

1. Arab Maghreb Union (UMA).
2. Common Market for Eastern and Southern Africa (COMESA).
3. Community of Sahel-Saharan States (CEN-SAD).
4. East African Community (EAC).
5. Economic Community of Central African States (ECCAS).
6. Economic Community of West African States (ECOWAS).
7. Intergovernmental Authority on Development (IGAD)
8. Southern African Development Community (SADC).

CHAPTER 2: REQUIREMENTS FOR ESTABLISHING FTAS IN GOODS

The CFTA is a free trade agreement among African countries, most of which are members of the World Trade Organization (WTO). The CFTA must be consistent with WTO rules relating to FTAs. Multilateral rules on the creation and management of FTAs, both for trade in goods and services, are set out by the WTO. The main elements of these agreements that control preferential trade amongst members are as follows⁶:

1. Article XXIV of GATT 1994.
2. Addendum to Article XXIV and its updates.
3. The Understanding on the Implementation of Article XXIV of GATT 1994.
4. Article V and V bis of GATS.
5. Decision on Differential and more favourable treatment reciprocity and fuller participation of developing countries (The Enabling Clause, Decision of 28 November 1979).

These regimes of the WTO provide the various legal framework and options for any FTA/RTA that African States would be a member of and would need to invoke and notify WTO members as soon as the negotiations on the agreement have been concluded. As the CFTA needs to be consistent with one of these legal regimes, it is important for African trade negotiators and policy makers to bear in mind the appropriate regime they would seek to invoke and appropriately set the liberalization benchmarks. As regards RECs which have done so, the following is the case: COMESA, EAC and ECOWAS were notified under the Enabling Clause; and SADC was notified under GATT Article XXIV.

The Doha Round of trade negotiations, underway since 2000, includes a mandate for negotiations aimed at “clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.” Some progress has been made any many proposals submitted but, like the entire agenda, there is limited substantive progress on reaching common understandings areas where disciplines need to be clarified and improved, taking into account the developmental dimension. The African, Caribbean and Pacific (ACP) Group of States submitted a proposal to improve the development dimension of WTO rules and special and differential treatment relating to regional trade agreements.⁷

Consideration of notified RTAs in the WTO is conducted by the Committee for Regional Trade Agreements (CRTA) for GATT Article XXIV agreements and GATS Article V agreements, and by the Committee for Trade and Development for Enabling Clause agreements. In December 2006, as part of Doha Round negotiations, WTO members established on a provisional basis a transparency mechanism for regional trade agreements, providing for early announcement of any RTA and notification to the WTO.⁸ As per its provisions on early announcement, it seems that AU member States would need to inform the WTO secretariat of the ongoing effort to negotiate the CFTA draft agreement, and notify the WTO once member States have signed and ratified the agreement. Upon notification of the operational CFTA, WTO members would review its conformity with relevant WTO rules.

2.1: Trade in goods

Article XXIV of the GATT defines a free-trade area as an agreement among a group of two or more *customs territories* 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. The concepts used in this definition are of differing levels of clarity. The concept of a “customs territory” is, of course, not controversial: GATT defines it 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. The meaning of “duties” is also clear as duties are the charges levied by customs authorities at the border when the good is imported i.e., tariffs.

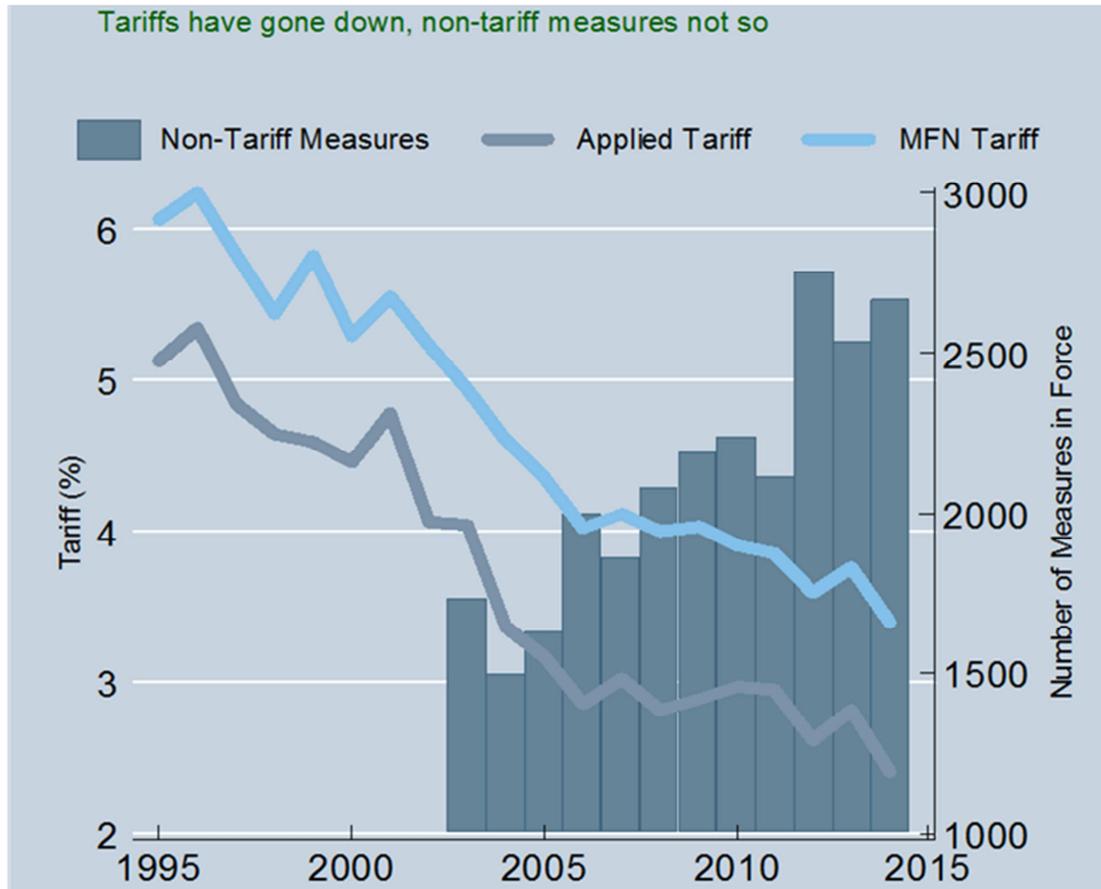
The concepts of “other restrictive regulations of commerce” and “substantially all the trade” are more difficult. They remain largely undefined in formal terms; with much debate around them both within, and outside of, the WTO. However, many practitioners seem to agree that “substantially all the trade” does not mean “all the trade” i.e., 100 per cent liberalization. Similarly, and over the five decades since the conclusion of the first free-trade agreements in the 1950s, the gap between “substantially all” and “all” has narrowed considerably. The calculation of “substantially all the trade” today covers not only trade flows but also the number of tariff lines involved and sectors covered. In fact, recent applications in FTAs/RTAs of the *Understanding of the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* reinforce the trend towards a more ambitious interpretation of comprehensiveness – reaching 90 per cent of trade and beyond in certain cases, and also requiring that no sector be excluded from liberalization.

The question of the ambit of “other restrictive regulations of commerce” also remains uncertain. In general, it can be taken to refer to non-tariff barriers (NTBs), although a common classification of non-tariff barriers is yet to be established, and there is also a distinction between non-tariff measures (NTMs) and non-tariff barriers. It has been increasingly evident that as average tariff levels decline with multilateral, regional and unilateral reforms, NTMs have been rising in importance and increasingly have an impact on restricting international trade (see Figure 1). Thus a greater focus on NTMs and NTBs, though difficult to conduct, must be undertaken to enhance market access and entry conditions on the border and within the border. An international classification system on NTMs⁹ has been defined by UNCTAD and several integrational organizations that can serve as the typology of NTMs for RTAs like CFTA members to consider in negotiations on addressing NTBs. Based on this classification, UNCTAD also has collected and compiled country data on NTMs that can be useful in policy formulation and trade negotiations.¹⁰

The Enabling Clause, adopted by the members of the GATT as part of the Tokyo Round of multilateral trade negotiations, enables developed countries to accord more favourable treatment to developing countries without according such treatment to other countries. It is, therefore, a departure from Article I of the GATT (Most-Favoured-Nation Treatment). The Enabling Clause also applies to preferential trade arrangements between developing countries, enabling them to be more flexible in terms of sectors covered and tariff elimination or reduction than would be possible for agreements under Article XXIV of GATT. For example, the ambition of liberalization under Article XXIV of GATT is high with the bar set by the requirement of liberalizing substantially on the trade among parties. In comparison, no such requirement on the extent of liberalization is established under the Enabling Clause.

Practice has shown that despite great ambition shown at the *start* of trade liberalisation efforts (multilateral and preferential), the results of many such efforts has been diminished by *exceptions, exclusions and sensitivities* raised in the negotiations and reflected in the resulting agreements. While there is need for such sensitivities to reflect for example differences in economic size, such exceptions in case of developing countries FTAs, like the CFTA, these could have the unintended effect of undermining the liberalization of trade. Such derogations thus should be carefully targeted to benefit the economically weaker member States, and sunset clauses could be established to ensure that such carve-outs expire after an adjustment period.

Figure 1 : Trends Tariffs versus NTMs



Source: UNCTAD calculations based on UNCTAD TRAINS and WTO I-TIP data

2.2: Rules of Origin

Another important concept of free trade agreements, included with GATT Article XXIV, is that tariffs have to be eliminated in respect *only* of goods originating in the customs territories making up the FTAs. Thus rules of origin (ROO) for products traded have to be defined for the FTA to enable the easy identification of such goods. ROOs are like a passport for a product to enter an FTA and circulate without being imposed a duty. Negotiating them, however, can be and has been quite challenging on a technical level. It is important to ensure that the technical construction of the ROOs respect the policy decisions of member States regarding the FTA.

The provisions in an FTA on goods for ROO have several main functions. They define:

- The class of goods that will be considered as originating in the other party or parties of the FTA and therefore eligible for preferential tariff treatment. These are goods that are *wholly obtained, wholly produced or substantially transformed*;
- The method to be used for assessing whether a product has undergone *substantial transformation* in the FTA region and thus can be classified as originating;
- The conditions under which goods will not be considered for preferential tariff treatment, usually because they have undergone *insufficient processing* or *insufficient operations* in the exporting economy, or have merely been trans-shipped from another economy;
- The method needed for claiming preferential status, i.e., through the presentation of a *certificate of origin*, through *self-certification* or through other agreed means; and

- The options available to the importing economy to withdraw preferences if it suspects, or has established, that goods entering its territory were falsely claimed to have originated within the FTA. Among these options is a suspension or denial of preferential tariff treatment.

ROO tend to be highly complex because of attempts to make them precise to deter non-FTA originating products to exploit the preferences granted, and to eliminate, as much as possible, room for dispute between the parties. However, in practice, the more conditions a good has to satisfy to qualify for preferential market access, the less likely it is that it will indeed qualify for preferential treatment. It would require robust institutional and entrepreneurial capacities to monitor and implement such ROOs. Similarly, if the complexity of the rules of origin is such that disputes over its origin become a normal occurrence, importers and exporters will also be less likely to seek to benefit from them. When this happens, the FTA as a whole loses some of its effectiveness. This is particularly critical in the case of manufactured goods, most of which do include components/raw materials from third-party sources.

ROOs can, and have, also been used for protectionist purposes. For example, although the tariff on a good may have been eliminated, onerous value-added or processing rules may render the zero tariffs virtually without any commercial value; nullifying the benefits and effectiveness of the FTA. Similarly, issues like *de minimis* and tolerance rules in ROO calculation can also have a trade-dampening effect.

One other point to mention is that the *Common Declaration with regard to Preferential Rules of Origin*, an annex to the *WTO Agreement on Rules of Origin*, lists certain requirements for the rules of origin used in FTAs, including the “clear definition” of headings/sub-headings to which preferential tariffs are applied, the calculation methods in the ad-valorem criteria, manufacturing/processing operations and others.

Another factor for consideration is the dispute settlement processes to be integrated into the CFTA. The reason for this is that they can have a trade restricting effect, particularly if they diverge too far from the WTO’s process. It is also in this area where the capacities and experiences of African countries differ and this needs to be taken into account in the CFTA.

Within the African context, UNECA (2013) has undertaken a review of the ROOs applied in a number of African RTAs. It has found that:

- In ECOWAS, intra-trade among members in products produced in the region including agricultural and livestock products, fishery products from the sea, rivers or lakes, mining products, artisanal handicrafts and industrial goods require a certificate of origin to be traded freely in the region. The certificate is given to *wholly produced goods* if 60 per cent of the local content of the total quantity of raw materials used originate from the ECOWAS region. The *non-wholly produced goods* can qualify for preferential treatment with a value addition of at least 30 per cent of the ex-factory price of the finished goods, with cumulation allowed.
- ECCAS requires a 40 per cent minimum raw materials content or 30 per cent value addition to obtain preferential treatment.
- COMESA applies a 40 per cent local content in its material-content rule, 35 per cent in its value-added rule; with a 25 per cent exception for “goods of particular economic importance” to trading members. The cumulation of ROO is also part of the COMESA regime, promoting industrial integration.
- More complex ROOs are applied in SADC, by virtue of being product specific, with low import content and high value-added requirements.

The CFTA, like other FTAs, would require ROOs to enable goods originating and produced in Africa to circulate freely without paying duties. As the CFTA builds upon RECs, it is logical to

expect that CFTA ROO would be crafted through an harmonisation of the existing ROOs of RECs, or building upon the them. This approach may involve a complex exercise. Another approach would be to construct a new set of ROOs for the CFTA, drawing upon common features of ROOs among existing RECs. The lessons learnt from the experience of construction the ROO for Tripartite FTA between COMESA, SADC and EAC would be useful.¹¹

It is also necessary to consider that African States have been conducting FTA negotiations with various non-African partners. The regime for these ROOs in these FTAs will surely have an impact on the CFTA's own. This is particularly true with regard to the Economic Partnership Agreements (EPAs) between the EU and African countries and RECs. The multiplicity of ROOs can be barrier to conducting trade so the need to ensure coherence between CFTA ROOs, REC ROOs, EPA ROOs and others is a critical issue for success of CFTA and for the CFTA to play an important role in boosting intra-African trade and fostering agricultural development and industrialization in Africa.

2.3: Trade Facilitation

More than a century and a half ago, the French classical liberal economist Frederic Bastiat (as quoted in El Beshbishi 2013) observed the following:

“Between Paris and Brussels obstacles of many kinds exist. First of all, there is distance, which entails loss of time, and we must either submit to this ourselves, or pay another to submit to it. Then come rivers, marshes, accidents, bad roads, which are so many difficulties to be surmounted. We succeed in building bridges, in forming roads, and making them smoother by pavements, iron rails, etc. But all this is costly, and the commodity must be made to bear the cost. Then there are robbers who infest the roads, and a body of police must be kept up, etc. Now, among these obstacles there is one which we have ourselves set up, and at no little cost, too, between Brussels and Paris. There are men who lie in ambush along the frontier, armed to the teeth, and whose business it is to throw difficulties in the way of transporting merchandise from the one country to the other. They are called Customhouse officers, and they act in precisely the same way as ruts and bad roads”

It is clear that trading in goods between countries, including between neighbouring countries, can be affected by trade facilitation (TF) measures including transportation, security, and customs clearance. The ease of conducting trade transactions and thus ensuring efficient and effective delivery of goods from production to sale and consumption, as well as minimizing costs for businesses is affected by TF measures. The United Nations Economic Commission for Europe (2003) has produced a definition of TF that covers the following elements:

- the agreement of sale between the buyer and seller;
- the processing of the agreed commercial documentation;
- compliance with health, safety and other regulations and standards;
- the fulfilment of the required customs and other documents and procedures at the time of border crossing;
- the efficient movement of the goods from the seller's to the buyer's premises;
- compliance of the goods with the buyer's requirements;
- payment for the goods; and
- disposal of goods and end products.

This definition reflects the myriad ways in which TF can positively impact trade flows, while improving efficiencies of trade-related processes and procedures that support trade. Assessment of TF measures and impact on trade has been undertaken by many intergovernmental organizations (IGOs) and research bodies. Indeed, UNCTAD, WTO, World Bank, OECD, and the

UN regional economic commissions have, among others, produced a series of studies detailing the benefits of TF (particularly the WTO's TF Agreement) to businesses globally.¹² UNCTAD (December 2015) noted that TF is increasingly important for developing countries participation in global value chains.

The TF "gaps" that impede intra-African trade include poor transport infrastructure and linkages as one of the main impediments, as highlighted in UNECA ARIA IV. Similarly, the analysis revealed that given the wide differences still existing in TF and ROOs regimes, the trade and transport initiatives of Africa's RECs remain "a work in progress". It thus concluded that harmonisation of the regulatory frameworks for TF is paramount, and that building on best practices from current applied REC regimes, using enhancing elements such as ICTs, can be the point of departure for CFTA negotiations in this respect.

UNECA ARIA V's econometric analysis concluded that with enhanced TF the CFTA would boost intra-African trade to the tune of 21.9 per cent of total trade of Africa by 2022 (from 2010 levels), compared to 15.5 per cent without it. Similarly, Mevel and Karingi (2012) calculated that "although a CFTA would significantly contribute to increasing trade and its sophistication within the African continent, the removal of strictly tariff barriers would not be sufficient to double the share of intra-African trade at the horizon 2022. This goal could only be achieved if complementary non-tariff measures aiming at easing trade, such as, decreasing the length of customs procedures and port handling, are adopted."

2.4: Non-tariff measures and barriers

It has been noted that as tariffs are eliminated in trade agreements, and as rules on transparency and openness begin to impact trade, non-tariff measures (NTMs), some of which can constitute non-tariff barriers (NTBs) have risen in use as noted previously, often as tools of protectionism against imports (see Figure 1) NTMs are policy measures, other than ordinary customs tariffs, that can potentially have an economic impact on international trade in goods, changing quantities traded, or prices or both and thus increase or decrease trade.¹³ WTO, UNCTAD, ITC and other organizations have examined and developed tools to address NTMs. As mentioned previously UNCTAD, in consultation with several international organizations, has developed a comprehensive typology of NTMs and is collecting data on these measures. UNCTAD's database on NTMs called TRAINS covers 56 countries accounting for 80 per cent of world trade. It is the most comprehensive NTMs data base containing more than thirty-eight thousand measures.¹⁴ The information in the database covers a broad range of policy instruments, including traditional trade policy instruments such as import prohibitions, quotas or price controls, export subsidies, export restrictions, as well as regulatory and technical measures that stem from important non-trade objectives, related to health and environmental protection, namely Sanitary and Phytosanitary (SPS) measures and Technical Barriers to Trade (TBT)).

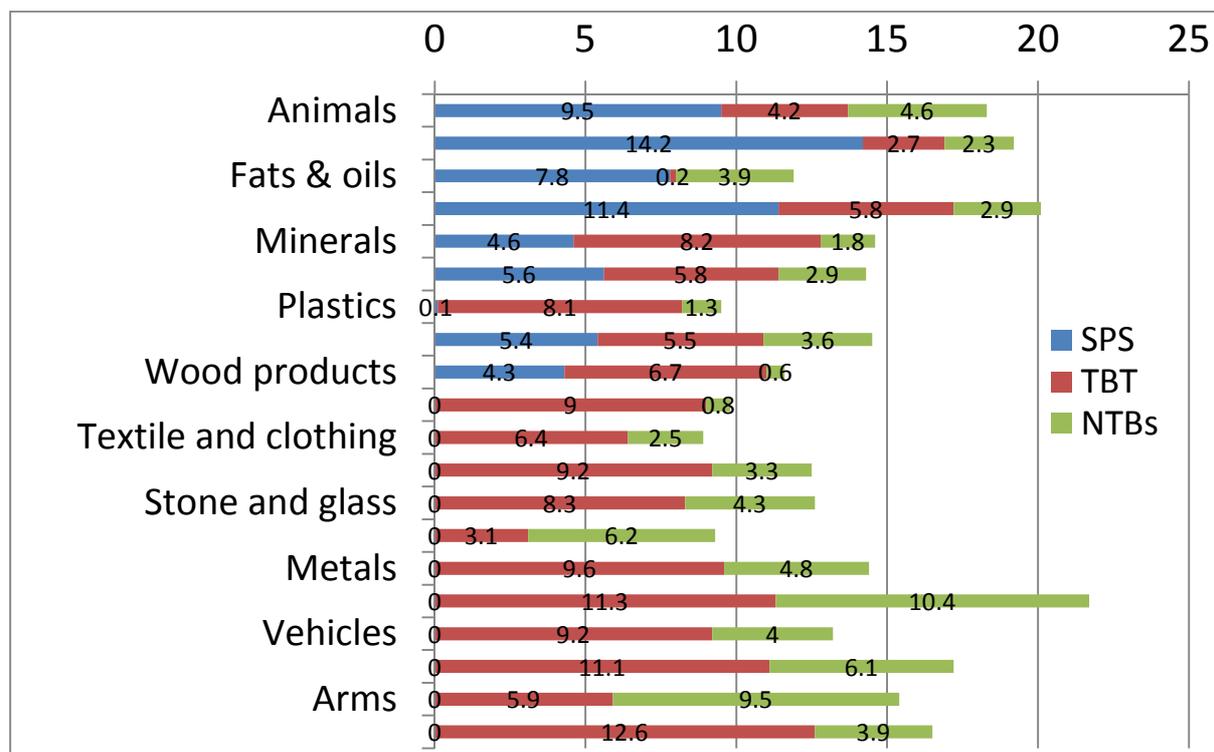
The following broad conclusions emerge from a review of NTMs and NTBs:

- NTMs/NTBs can serve genuine national public policy objectives when firmly grounded in health, environment and other WTO-compatible rationales, but become unnecessary, even harmful, obstacles to trade when they are used to restrict trade for "political economy" reasons. (WTO, 2012).
- Usage criteria in NTM/NTBs are still vague, making the contestation of their validity difficult. The TBT and SPS Agreements of the WTO have a built-in "post-discriminatory" bias; potentially affecting trade flows before action against them can be taken by partners.
- Despite the increase in transparency mechanisms and the sophistication of new NTM/NTB databases, many developing and least-developed country governments still struggle to deal with their negative effects.

- NTM/NTBs are still prevalent across Africa’s regional groupings, despite positive efforts made in reporting and monitoring mechanisms. Although some effort has been made on eliminating them at the REC level, many are still in place.
- Adoption of “international production standards” for African trade is not a panacea, given the differences in production and consumption patterns in Africa from those applied in developed economies (the latter which tend to be the source of said standards).

NTMs/NTBs matter in intra-African trade. As with the trend globally, NTMs have a significant impact on intra-African trade (see Figure 2). Hence, efforts enhancing regulatory convergence of trade regulations or elimination of NTMs need to follow in parallel to the process of liberalizing market access conditions. Efforts at harmonisation and equivalence of pan-African standards are essential, but not easy to achieve. This issue is of particular importance for health and safety standards in foodstuffs, a potential major item in the CFTA’s trade volume. In fact, the challenge remains to improve the quality of regulation to remove non-tariff barriers to goods trade and deliver competitive markets while achieving essential public policy objectives relating to issues such as health and safety, protection of agriculture from pests and disease, and effective control of borders.

Figure 2: Estimations of NTMs Ad Valorem Equivalents (AVEs) for Africa



Source: Cadot, Gourdon, Asprilla, Peters, Knebel (UNCTAD, 2014).

Harmonisation and equivalence take on a particular importance if the services portfolio is to be included in the CFTA. Information and risk analysis tools are important in this respect, and many IGOs are available for consultation. The opening up to trade in services as well as goods to enable new opportunities for export diversification to be exploited and to ensure the efficient provision of essential services inputs that are necessary for increased trade and especially to allow cross-border production networks to flourish. This agenda is of particular importance to small and landlocked countries and is essential to bringing more balanced gains in the CFTA, containing – as it will - large coastal countries that have a significant potential to increase production and trade in manufactures.

Since handling NTM/NTBs is not an easy endeavour, harmonising and eliminating them will require long-term policy reform and institution and capacity building programme across the continent, possibly with the support of development partners and relevant IGOs. UNCTAD, for example, is working with several RECs in identifying the NTMs/NTBs and developing systems to identify and remove NTBs, as well as promote mutual recognition or convergence.

2.5: Other areas of importance

It is important that a number of other trade-related issues are addressed by the membership of the AU. Their importance is drawn from the fact that many are included in African FTAs with non-African parties. Some of the salient issues are highlighted below.

Often misunderstanding arises due to varying interpretation of the text of the FTA, especially in the aftermath of negotiations. Hence, in order to avoid misunderstandings of interpretation, extra-time should be given at the outset of negotiations to clear definitions of various concepts in the agreement that allow for simplified and *unified* interpretations of the texts of the CFTA.

Given the tight deadlines set by the AU Heads of State and Government for the negotiation and launch of the CFTA, i.e., by an indicative date of 2017, and given the repeated impetus provided by them for the integration process as a whole, it may be useful to set up a negotiation timetable with achievable targets, and engage political (both executive and parliamentary) players on a constant basis. This will be of major importance for bringing the CFTA into force within reasonable deadlines.

Intellectual property rights are an essential element of the negotiating “mix”, particularly if services are to be included in the CFTA. Good practice in other current FTAs has shown that such inclusion would encourage R&D and artistic exchanges to a larger degree among their memberships.

The area of competition policy and law can be a useful addition to the CFTA agenda. It becomes of particular importance when large transnational African corporations enter small markets, and provides important guarantees against monopolistic or oligarchic tendencies within the CFTA. It becomes particularly important in a liberalized environment.

Experience in FTA implementation has shown that adequate mechanisms for consultation and dispute settlement are of paramount importance. Despite the fact that most African countries are members of the WTO and are generally acquainted with its dispute settlement mechanism, they have not been users of said mechanisms. A simple, clear and law-based mechanism could be set up under the CFTA to allow for reasonable discussions and speedy resolutions of any potential disputes arising from the implementation of the CFTA.

Every FTA gives its members the right not to apply the provisions of the agreement in specified circumstances by invoking general or security exceptions. In the WTO, such provisions are provided in GATT Articles XX (General Exceptions) and XXI (Security Exceptions) for trade in goods and GATS Articles XIV (General Exceptions) and XIV *bis* (Security Exceptions) for trade in services. Such exceptions would be expected under the CFTA, and even a more detailed list of exception provisions that may be negotiated among the membership.

As with every agreement among States, a review mechanism to oversee and, as necessary, adjust the terms of the CFTA is essential. The review mechanism would designate the bodies to undertake such a review, review timetables and quantitative objectives. However, given the tendency towards excessive committee creation, it may be advisable to keep the number of such bodies to a minimum.

In keeping with multilateral norms of negotiation, “special-interest technical negotiating groups” may help speed up the overall negotiation. In all cases, plenaries for all member States should be scheduled after such groups arrive at draft understandings, to allow for maximum transparency and interaction by all.

Since practically all African countries are members of, or observers to, the WTO, special attention must be given to the compatibility of negotiated outcomes in the CFTA with the obligations/commitments undertaken under the WTO. Similarly, the coherence between CFTA and Africa-EU EPAs (and other current and future reciprocal FTA arrangements with Africa’s main trading partners) should be ensured. In fact, if the CFTA is to be more “integral” than these FTAs, then the starting point of CFTA market access and rule-making negotiations should be current rights/obligations under these agreements.

As the AU Heads of State and Government have mandated the AU Commission to plan and oversee the CFTA negotiating processes, and given the manpower and other shortages the AU Commission has to deal with (particularly in the area of trade), it is advised that suitable new resources be made available to the AU at the earliest possible time to backstop the CFTA negotiations. As a top trade and development priority for Africa, the necessary and adequate resources must be provided to the AUC to efficiently and effectively support AU member States to fashion a comprehensive agreement, implement it and along the way adjust it to reflect lessons accumulated.

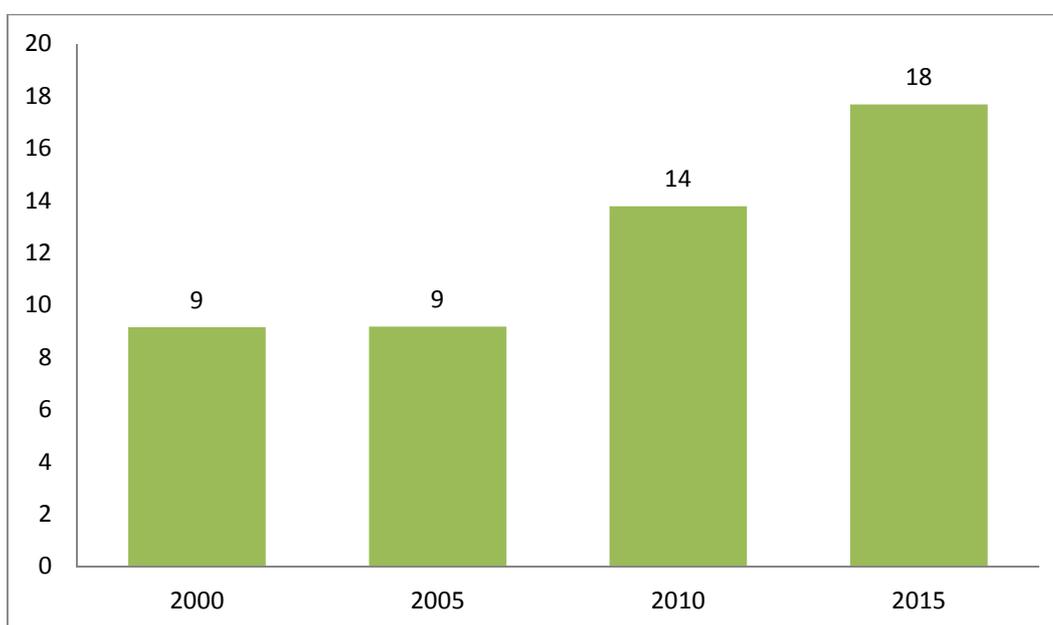
CHAPTER 3: INTRA-AFRICAN TRADE IN GOODS

3.1: Trade Flows in select RTAs and across Africa

Much analysis has been undertaken on evaluating intra-African trade flows and the potential impact of the CFTA by UNECA, the IMF, the World Bank, and UNCTAD. This chapter, therefore, builds on the econometric and analytical work recently done by these bodies, and draws the appropriate conclusions. One such study is by Mevel and Karingi (2012) with very interesting findings. They used a MIRAGE CGE model to calculate potential intra-African trade flows with, and without, the CFTA and the potential trade flows under a continental customs union. The liberalization of trade under the CFTA without addressing complementary TF measures and without removing non-tariff measures produced the following findings:

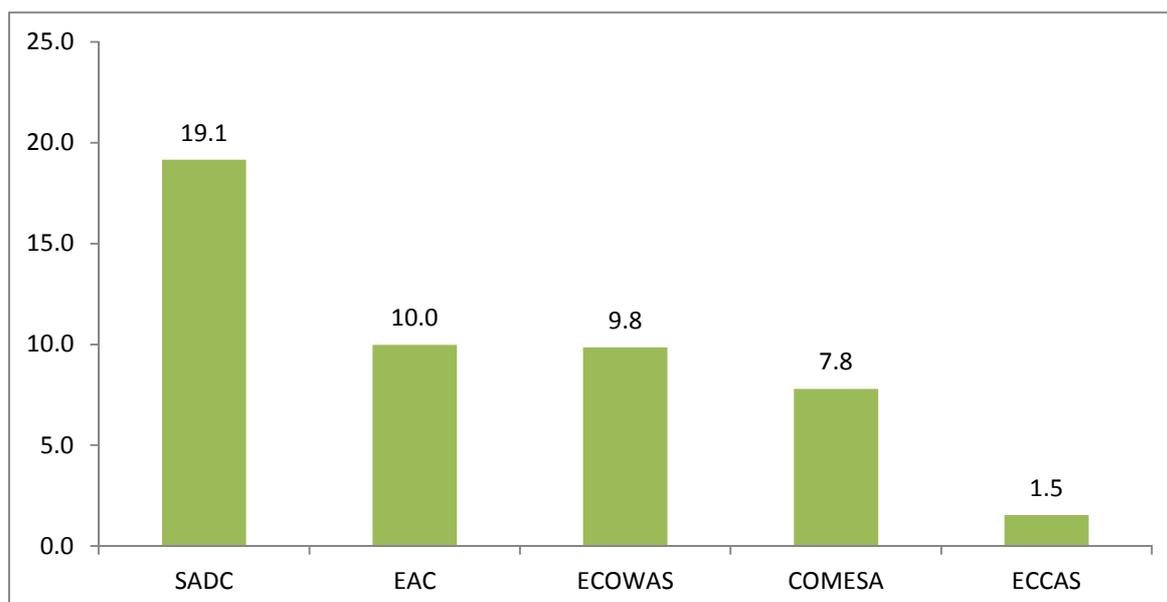
1. Intra-African trade in goods remains low, at around 10 per cent of total trade of Africa in 2010. Such trade is limited by a relatively high applied tariff protection rate, at about 8.7 per cent, with heterogeneous tariff structures that range much higher in many cases. UNCTAD's recent data shows intra-African trade share rising from about 9 per cent in 2000-2005 to 14 per cent in 2010 and reaching 18 per cent in 2015. This shows some dynamism which brings positive news for boosting intra-African trade that could come from the CFTA, although more detail examination of the composition of such trade is needed. In terms of the performance of intra-regional trade among RECs, there is some variance with the highest level of trade occurring in SADC as the figure 4 below demonstrates.

Figure 3: Share of intra-African merchandise in total African exports, 2000-2015 (in per cent)



Source: UNCTADstat

Figure 4: Share of intraregional trade in selected RECs (2014, in per cent)



Source: Forthcoming, African Development Bank/UNCTAD study on Regional Integration and Non-Tariff Measures in ECOWA.

2. The CFTA would add US\$ 17.6 billion (2.8 per cent) to Africa's overall trade with the world (compared to a 2022 baseline scenario without it), stimulating Africa's exports by US\$ 25.3 billion (or 4 per cent). The highest positively impacted sectors would be agriculture and food, with a projected growth of 9.4 per cent over the 2022 baseline scenario. Industrial exports would see a boost of US\$ 21.1 billion, a very respectable 4.7 per cent higher than the 2022 baseline.
3. Intra-African trade is expected to rise by US\$ 34.6 billion (52.3 per cent above the 2022 baseline), if agriculture/food, industrial goods and services are included, with the highest impact being in industrial goods (at US\$ 27.9 billion, or 52.3 per cent above the baseline). Intra-African trade in agricultural and food products would increase by US\$ 5.7 billion (53.3 per cent over the baseline), with services rising by US\$ 1 billion (31.9 per cent over the baseline). Overall, intra-African trade would rise from 10.2 per cent of total trade in 2010 to 15.5 per cent by 2022. Although a positive overall outlook, it still short of the stated goal of doubling the trade within 10 years.
4. CFTA implementation would negatively impact customs revenue resources, but would augment real income for Africa by US\$ 296.7 million (or 0.2 per cent) as a result of stimulated exports. Real wages for African workers would rise too over the 2022 baseline, with unskilled agricultural workers seeing the largest rise.
5. Customs clearance procedures and SPS and TBT requirements more than triple the number of days goods stay at customs (both as exports and imports), compared to the OECD average of 10.6 days.
6. Market diversification, both for exports and imports, is very limited, due to a relatively small number of export items (mostly primary products). However, for those economies on the continent that have a more diversified production base, the "local" (African) market for manufactured products is more important in their overall trade.

If improvement in TF is realized within the CFTA, a further US\$ 85 billion would be added to intra-African trade. This would represent a significant 128.4 per cent increase over the 2022 baseline. That would certainly achieve a more-than-doubling of intra-African trade in 10 years, rising to 21.9 per cent of Africa's global trade by 2022. Given the current level of intra-African trade share at about 18 per cent of total African goods exports, the expected doubling of intra-African trade could raise it even up to or beyond 30 per cent.

The significance of the findings is that tariff liberalization in goods will lead to only partial expansion in intra-African trade. Realizing a larger impact on boosting intra-African trade requires tariff liberalization of goods trade to be accompanied by the removal of non-tariff barriers, reform of services sector and improvement of trade facilitation measures. With an holistic reform of market access and entry conditions among African countries through the CFTA, the continent can expect to see the share of intra-African trade in total trade of Africa to rise significantly, doubling within 10 years.

3.2: Applicable ROOs, Trade Facilitation and NTMs

As noted previously, the various RECs in Africa apply different methodologies in the area of ROOs, and would require substantial effort to be harmonised given the limited timespan decreed by the AU Summit for the various stages of economic integration towards the CFTA. It is, therefore, proposed that in the process of creating the CFTA – a “clean slate” approach is undertaken, whereby fresh ROOs, particularly for the substantially-transformed goods are negotiated rather than trying to harmonize existing ROOs. It is also proposed that the cumulation of ROOs is given special attention, given their large potential positive impact on the integration effort.

Annex D.1 to the *International Convention on the Simplification and Harmonization of Customs Procedures* (the Kyoto Convention) concerning rules of origin defines the “substantial transformation criterion” as “the criterion according to which origin is determined by regarding as the country of origin the country in which the last substantial manufacturing or processing, deemed sufficient to give the commodity its essential character, has been carried out”. It sets out three main methods for the ascertaining of “substantial transformation” namely:

- by a rule requiring a change of tariff heading in a specified nomenclature, with lists of exceptions, and/or;¹⁵
- by a list of manufacturing or processing operations which confer, or do not confer, upon the goods the origin of the country in which those operations were carried out, and/or;
- by the ad valorem percentage rule, where either the percentage value of the materials utilized or the percentage of the value added reaches a specified level.

It is suggested that the CFTA ROOs on substantially-transformed goods apply all three methods to furnish the criterion for substantial transformation. This does not necessarily mean that the criterion is especially onerous since it may simply reflect the production process that is necessary in any specific case/product.

It has been noted that some FTAs seek to minimise the problem of shortfalls from thresholds through permitting cumulation. This is particularly apt in the case of the CFTA, since the long-term target is deep economic integration. This also means that value-added content from two or more economies can be combined to make up the regional value content. The more members contribute to the cumulative ROOs, the better the CFTA will be in achieving the said target. In all areas, product-specific restrictions on ROOs could be avoided.

Trade facilitation, as noted previously, is the *sine qua non* of regional integration under the CFTA. A renewed vigour needs to be injected into the continental efforts already under way in this area, using the resources available from inter-governmental organisations and financial institutions at the continent's disposal. The African Development Bank, the World Customs Organisations, UNCTAD and the WTO have programmes that address specific elements of the TF issue, including single window and harmonised system applications in customs and clearance. UNCTAD's automated systems for customs data (ASYCUDA) is emerging as a global standard for automated customs clearance. About 41 African countries already have adopted and are applying ASYCUDA. It would enhance coherence among African countries to opt for similar customs clearance system.

In the area of NTM/NTBs, the picture is much more complex. An approach to addressing NTMs/NTBs could be considered that starts with identifying and collecting information on NTMs and compiling them in a database. This implies agreement on a classification of NTMs. The classification of UNCTAD and several integration organizations can be used. The data could be stored in the UNCTAD TRAINS database as well as a database to be developed within the AUC. This action would provide transparency on NTMs in African countries affecting intra-African trade. It would also help to promote greater convergence among African countries on non-tariff trade measures affecting trade, such as TBT and SPS measures. It may even facilitate countries to accept each other's regimes through mutual recognition agreements. UNCTAD has undertaken some analyses on reducing regulatory distance between African countries in terms of NTMs.¹⁶

A subsequent approach on NTMs, as and when CFTA member States agree, would be identify, collect and seek remedial actions on NTBs that arise as traders move goods across borders. Such a mechanism exists for example for Tripartite countries through a web-based platform (<http://tradebarriers.org/>) supported by TradeMark Southern Africa. It is a regional mechanism where exporters can complain about non-tariff barriers and the concerned countries try to resolve the issue. Under this mechanism as of November 2016, out of the 543 complaints that were posted, 490 had been resolved. That is roughly 90 per cent. Such a mechanism could be established at the continental level in the AUC in support of the CFTA.

3.4: Tariff Liberalization Options

At the outset of any tariff-reduction negotiations, it is essential to agree on the base from which tariffs are to be removed. In order for the CFTA to have a real impact on trade, it makes sense for all tariff reduction discussions to use the currently applied tariffs, rather than bound tariffs, as their starting point. Similarly, agreement is needed on the latest Harmonized Commodity Description and Coding (HS) System applicable, to integrate the largest number of "new products" into the tariff reduction mix. In order to avoid going through the 9000 + six-digit headings of the HS system, it is useful to adopt a "formula" method. The practical proposal in this regard could be the following:

- Agree that all existing tariffs bound at zero will stay that way, and that they will not be considered further in the negotiations; raising them would in any case become troublesome because other WTO members could seek compensation, thus initiating an unrelated negotiation and/or dispute;
- Agree that all tariffs bound above zero, but with an applied rate of zero, will be eliminated from the entry into force of the agreement .i.e, reduced to zero;
- Agree that all tariff lines for goods entering at zero under temporary concession schemes, autonomous tariff quotas and the like, will also be eliminated from the entry into force of the agreement; and
- Agree that all applied tariff rates of 5 per cent or less will be eliminated on entry into force of the agreement.

This approach is not a panacea. Economies (and negotiators) differ in their outlooks and capacities. However, such an approach, where it seems practical, will in many cases remove the greater part of tariff lines from further consideration. The negotiators can then direct their attention to the remaining tariffs.

No single approach to tariff elimination is correct. Much depends on the sectors in which the tariffs are to be eliminated. Sometimes higher tariffs are concentrated in one or two sectors, such as textiles, clothing and footwear and agriculture. Some economies prefer in their negotiations to group tariffs into roughly similar levels and then identify a suitable method for eliminating them. The result of such an approach may be a phase-out schedule. It is important, however, to note that WTO rules require that no entire sector is exempt from liberalisation.

It is recognized that trade liberalization can, in the short run, create gains for some industries and sectors, and losses for others. A forthcoming study by UNCTAD on the CFTA reaches a similar finding.¹⁷ It estimates costs and benefits of the CFTA in goods and its distribution among member States by using GTAP simulations. The results indicate significant welfare gains, output and employment expansion, and intra-African trade growth in the long-run. In the short-run, however, countries are likely to bear some tariff revenue losses which may not be distributed uniformly across the African continent. Unequal sharing of costs and benefits, in turn, may hinder the negotiation processes and implementation of the agreement if sufficient flanking measures and flexibilities that ensure more even allocation of burdens and benefits among African Union member states are not put in place. The burden of adjustment can also be reduced with introduction of complementary policies to internal trade liberalization. This can include an adjustment plan for re-training of employees and re-tooling of industries to new growth areas. Such a plan would need to take account of the investment cycle of an industry. Such a structural adjustment plan could be presented for finance to IGOs and international financial organizations for consideration.

The focus of the negotiations at all times must, however, always be on the elimination of tariffs within the CFTA. This is particularly important in preparing the phase-out of tariffs within the continent. African States, therefore, need to agree that the tariff applied on a certain date is their starting point. This can be the date on which the governments agreed to launch negotiations. They also need to agree that the tariff will go to zero in a prescribed number of steps. These steps need not be equal, but the normal procedure is to make the first reduction on the day the agreement enters into force. The parties are usually free to eliminate tariffs faster than specified in the agreement either unilaterally or upon request.

The Understanding on the Interpretation of Article XXIV of GATT explains that the “reasonable length of time” for liberalizing tariffs on substantial trade under an FTA is to be understood as exceeding ten years only in exceptional cases. Good practice would therefore suggest that phasing out of tariffs, to the extent that it is needed, is done within ten years and earlier if possible. The period depends on sensitivity of sectors to be liberalized with the liberalization of most sensitive sectors normally back-loaded. No matter what the timetable adopted by the parties, it should be specified clearly in the agreement or the schedules attached to it. Doing so can prevent many minor disagreements. Most agreements also specify the starting point and the starting rate for each item subject to a phase-out, the dates on which specified reductions will occur, and the dates on which the tariff will have been eliminated.

The CFTA should, therefore, include as a matter of good practice a provision enabling accelerated phase-outs, either as a unilateral action or because of a request from the other party. This may sound overly ambitious at the time of the negotiations, but in many cases acceleration turns out to be surprisingly easy once the phase-outs are under way.

Various suggestions on tariff liberalization modalities under the CFTA, consistent with the vision set by African States for boosting intra-African trade, can be considered. UNCTAD, in a technical note, made the following suggestions which can be considered by African CFTA trade negotiators as they engage in establishing operational modalities for CFTA market access negotiations on trade in goods.¹⁸ The CFTA tariff cut would be based on 100 per cent linear cuts in principle. An "100% cuts" refers to the extent to which the base rate is reduced. Any positive initial duties irrespective of their level (e.g., 10% or 50%) would be reduced to zero per cent, i.e., face a reduction by 100 per cent.

The objective under CFTA, like under any RTA, is tariff elimination as distinct from tariff reduction. So the non-linear "formula" approach such as the "Swiss formula" as used in WTO's industrial goods negotiations, or linear cut formula other than 100 per cent cut, is not relevant as these formulae do not eliminate initial tariffs but only reduce them (with a harmonizing effect in the case of Swiss formula). Rather, the general modality of CFTA is the 100 per cent linear cut applied across-the-board combined with various arrangements for staging, exclusion or limited liberalization as applied to different products.

What matters for the efficient conduct of the negotiations appears to be to identify the modalities for "tariff elimination schedules" as different tariff lines would be subject to different tariff elimination patterns over different time periods. Several different categories of treatment are conceivable for different products. Excluded categories would include: (i) complete exclusion (i.e., no liberalization); and (ii) subject to tariff reduction only and not elimination (with or without a transition period). Covered categories would include: (iii) subject to a longer transition period; (iv) subject to shorter transition period, and; (v) immediate elimination (i.e., zero tariffs at the entry into force). Categories (i) and (ii) would encompass "sensitive products" which are basically excluded fully or partially from the liberalization, and categories (iii), (iv) and (v) are those subjected to liberalization.

Accordingly, two stages of negotiations of modalities can be distinguished. The first stage would be to determine the overall level of ambition or exclusion; that is to determine how many products and how much trade should be assigned to (i) and (ii) (e.g., 10 per cent of tariff lines and import value which would mean liberalization coverage of 90 per cent). The second stage would be to determine different tariff phase-in arrangements ("staging") and assign different tariff elimination approaches to different products on a line-by-line basis. At this stage, a template of tariff elimination schedules, or "modalities", would prove to be useful and be expected to be the focus on the negotiation in the second stage.

3.5 Harmonisation of Macro-economic Policies

The 1991 Abuja Treaty on the African Economic Community is one of the most ambitious economic integration documents ever signed on the continent. The high level of ambition stems from articles 3, 4 and 5. For example, Article 5(1) requires member states to: "undertake to create favourable conditions for the development of the Community and the attainment of its objectives, particularly by harmonising their strategies and policies. They shall refrain from any unilateral action that may hinder the attainment of the said objectives". At the same time, Article 3.2 (e) states as one of the principles of the AEC: "The harmonisation of national policies in order to promote Community activities, particularly in the fields of agriculture, industry, transport and communications, energy, natural resources, trade, money and finance, human resources, education, culture, science and technology;

Although the CFTA is but one stage towards the deeper integration envisioned in the Abuja Treaty, it is absolutely vital that the macro-economic policies applied by the CFTA's member States do not "clash" and act in different directions. In fact, one test of the usefulness of FTAs is whether they promote regional economic policy integration. Negotiators must remain aware in all cases that the agreement they are drafting should result in an easier trading environment. If they do not succeed in this, the business community probably will not persist in struggling with its complexities. More likely, it will simply ignore the agreement, and an opportunity to enhance growth and integration will then have been lost.

FTAs affect business in another important way. Many businesses have established long-term relationships with suppliers and buyers in other economies. Often, considerable investment has gone into developing these relationships. If it happens that a business relationship coincides with the FTA, the relationship will probably become more valuable. If, on the other hand, another economy now enjoys a considerable margin of preference, the business may be forced to form a new relationship with a company within the FTA. The transaction cost of achieving this should not be underestimated. It may well be possible for the business partners to absorb small cost differences and continue their relationship. If, however, the margins of preference have a considerable commercial impact, companies may have to decide what the best way to proceed in their case may be. Either way there will probably lead to additional costs for the company.

An FTA is certain to increase competitive pressures on some businesses. Some goods produced by regional competitors will no longer have to face tariff barriers. This can force adjustments on producers in the importing economy. On the other hand, an FTA can also help domestic producers to become more efficient because some imported components will be less expensive than they were before the agreement entered into force. Both of these effects benefit the consumer.

Another important factor to take into consideration is always the fear – real or perceived – that richer or more powerful states will dominate the trade, or that the FTA will cede power to a supranational body over which local politicians and businessmen have little control. With this in mind, it becomes almost an imperative that the negotiation and implementation processes for the CFTA be transparent, inclusive and harmonious. The importance of the harmonisation element derives from the experiences of previously negotiated and implemented FTAs, particularly within the African and Asian contexts.

In order to reduce potential friction around the CFTA, much work will need to be done in the area of macro-policy harmonisation. The areas that are of top priority include non-tariff barriers to trade, including policies in the industrial, agricultural, fiscal, banking, investment, competition, ICT and telecommunications, transport, standards, SPS, labour markets, government procurement and IPRs. Similarly, an effort will also be needed to harmonise elements of national law as they relate to intra-CFTA trade, including the upgrade of legal institutions handling potential disputes arising from its implementation as well as competition policy and consumer protection legislations.

The AUC has begun some work in this area. Several integration initiatives are at various stages of implementation, including but not limited to, the Action Plan for the Accelerated Industrial Development of Africa (AIDA), the Agribusiness and Agro-business Development Initiative (AADI), the Minimum Integration Programme (MIP), and the Declaration on Development of Transport and Energy Infrastructure in Africa. What is now required is an intensification of these efforts, besides the launch of similar, accelerated and funded initiatives in the areas of trade facilitation, service trade development, the reinforcement of continental financial bodies (AFREXIM Bank and the African Investment Bank), continental value chains, and the integration of businessmen's associations.

CHAPTER 4: KEY CONSIDERATIONS FOR ACCELERATED CFTA NEGOTIATIONS

4.1: The Negotiating Mandate

Usually the first step to be addressed by States in any negotiating process leading to an FTA is for the countries to secure a negotiating mandate, through national consultative processes, and convey that to their negotiators. This mandate describes the objectives, scope and content of the agreement from the perspective of the country or regional body. In most cases, the initial mandate is defined fairly broadly since economies usually aim for comprehensive FTAs. In any case, the mandate informs the negotiators whether they can negotiate on goods, services and investment, and what their broad objectives in each of these areas should be.

Once the negotiations are under way and the ambit of possible outcomes becomes clearer, these negotiating objectives are then often refined through the repeat of the mandate process. In the course of a complex negotiation, this process may be repeated several times. In this way, the negotiating mandate gets redefined from time to time. Sometimes it gets broader as the negotiations proceed. What seems difficult at the start can turn out to be quite manageable later on. Most countries have processes of this kind, though the details will differ.

The national consultations are particularly important in gathering the views and interests of non-States actors such as the private sector, civil society and academia and workers. The non-State actors are, by virtue of their status, are not included in trade negotiations processes which are mainly intergovernmental (or government-to-government). Hence the importance of national consultative processes to garner the views of non-States actors is a prerequisite for them to own the outcomes of negotiations. Likewise, the negotiations conducted among member States could involve occasions or platforms where non-State actors are informed of progress made and provided an opportunity to provide suggestions on the draft agreement.

4.2: The Negotiating Team

The negotiating mandate is promoted by a country negotiating team that is assembled by the Government body responsible for trade negotiations. This can be done in more than one way. However, the overall approach taken by States tends to show many similarities. For example, they usually appoint a chief negotiator, drawn from the department or ministry responsible for that country's trade negotiations. This person then becomes responsible for progress on negotiating the entire agreement. He or she may also be the main conduit for contact with ministers, senior representatives of the private sector and heads of nongovernmental and intergovernmental organisations.

Whether the chief negotiator also takes charge of one or more subject areas, such as market access for goods, will depend on the magnitude and complexity of the negotiations and on the customary way of the country's management of negotiations. It is usual to appoint a deputy chief negotiator, especially when it is clear that the negotiations will be substantial.

The chief negotiator is usually assisted by lead negotiators who will look after one or more of the chapters of the proposed agreement. Services and investment sometimes have separate lead negotiators, partly because of the complexity of the subjects, and partly because domestic responsibility for these areas often does not lie with trade ministries. Services negotiations especially may impinge on the responsibilities of many ministries, such as education, justice, finance, communications and transport. An issue to be considered, however, is that an FTA is an instrument promoting international economic relations, and its contents have to be approached from that perspective.

National ministries in most cases have well-established channels of communication with the private sector which can be used to support the efficient conduct of the negotiations. No two negotiations are the same, and the number of lead negotiators and their responsibilities will depend largely on the substance of the negotiations.

Preparing for the negotiations and ensuring that positions are understood and the right arguments developed requires a major effort. This places considerable demands on the chief negotiator and his or her communications skills. Negotiating teams will need to be arranged around the lead negotiators. These teams usually consist of experts in their areas as well as generalist officers. The number and composition of these teams will probably change during the negotiations. This is because negotiations on some chapters finish early. In other cases, the teams have to deal with quite specific issues which call for the use of a different kind of expert.

Regardless of the necessity of such changes, a negotiating party should aim to keep the core members of negotiating teams unchanged as much as possible. This applies especially to leaders. Their ability to recall the negotiating history of the agreement will always be welcome, and at times it will be essential. The chief negotiator's position should change only when this becomes absolutely unavoidable. Achieving this desirability is made easier by the fact that free trade negotiations are typically concluded within two to four years, or longer.

Another important aspect of assembling a team is the need to ensure that it has funding for the conduct of the negotiations. Money will be required for intensive domestic and international travel by sometimes quite large teams. It may also be necessary to hire negotiating venues and to employ interpreters and translators. The budget cycle in most negotiating parties is, however, usually one year only. If this is the case, the negotiators must therefore ensure that their requirements are included in relevant funding bids.

In the case of regional FTAs, like the CFTA, which is supported by the AUC, there is need within the Commission to set up a CFTA negotiation team with a lead official to support the Commissioner of Trade and Industry in mobilizing the Commission to support member States in the negotiations. Such a structure already exists in the AUC which is an important achievement.

4.3: The Negotiating Process

Most negotiating processes consist of plenary (formal) meetings and many informal meetings. The plenary is normally used to adopt decisions and to keep the various teams informed of progress in other parts of the negotiations. Plenaries are not suitable for resolving difficult problems, but they can be used to explain to all participants in the negotiations where difficulties remain and what are the possible solutions to address them. The plenary discussions promote transparency of the negotiations. Plenaries could accordingly be kept focussed and take place as and when the need for arises. Plenaries occur less frequently than informal meetings.

It is usually much more convenient to have the specific issues of negotiations discussed in small groups of countries with a real interest in resolving them. Many issues in the negotiations will be difficult. Some will arise in the first meeting, and remain till the end of the negotiations.

Adequate time should be provided to negotiators to produce a quality agreement. If the timetable is too compressed, the danger exists that some important issues will not be considered adequately. The other side of the coin is that the expectation of ample time tends to encourage a feeling that there is plenty of time to negotiate hence delays occur. Experience has shown that the important negotiation issues to all parties need to be addressed for negotiations to proceed smoothly to a conclusive end with a balanced agreement.

As noted above, in addition to the formal negotiations process, opportunities need to be provided for involving non-state actors to inform negotiators of their concerns and interest.

4.5: The Negotiation Content

The parties to the negotiations usually start with developing a reasonable timetable for the negotiating sessions and a set of principles which will broadly govern the conduct and content of the negotiations. These principles have to be detailed enough to offer genuine guidance. At the same time, they have to be flexible enough to be able to accommodate easily any changes to plans may have been formed and adopted.

Where there is a disagreement over including an issue in the negotiations, it is almost invariably better to start with agreeing that everything is on the table. It may well be that in some cases agreement to complete negotiations on a given issue is in the end not possible, and that the parties then decide to leave things for resolution at a higher (political) level. Such a body is the High-Level African Trade Committee (HATC) in the case of the CFTA. That decision should, however, be made only after other available options have been explored thoroughly. This is where chief negotiators play a key role.

4.6: The CFTA as a “supra-regional” agreement

In many ways the CFTA is to be an *innovative and ground-breaking* supra-national and supra-regional arrangement. It is a mega-regional agreement of over 50 countries. It is thus proposed that a more direct approach is applied to the CFTA negotiations; an approach that would, in some ways, start from a clean slate, with a clear directive as to the level of ambition. This is particularly important in view of the results of trade impact studies reviewed previously.

Given the short time available for negotiating and implementing the CFTA, within the indicative date of 2017, it is proposed that:

- a. The negotiating mandate issued by the AU Heads of State and Government could endorse a comprehensive and deep liberalization agreement covering substantially all the trade in goods, trade in services, and complementary supportive policy areas. The mandate should include the removal of customs/border obstacles, including the adoption of unified customs documentation and clearance process based on the single window approach. It should institute the enhancement of trade facilitation measures as an essential back-up support to liberalization of trade.
- b. The mandate should also address specifically technical barriers to trade and sanitary and phytosanitary barriers. Greater convergence on these policies will help to mollify their potential trade distorting effects, and instead bring about a positive impact on intra-African exports in agriculture, food and industrial products.
- c. Services trade in the CFTA has to be included from the start, not only to allow for potential trade-offs in market access all parties in agriculture and industry, but also to allow a more efficient use of the continent’s resources in critical areas such as road building, financial services, transport and logistics, and ICT. It is also important to include services in the CFTA, to facilitate further work on the issue of labour mobility within the continent.
- d. In order for the CFTA to play a deep economic integration role, African states should look into incorporating investment and competition regimes into the mandate. This will provide not only clarity for the relevant national business communities, but will also provide a safety-net against potential negative abuses of the CFTA by transnational corporations,

- e. As RECs would form the basic pillar from which the CFTA would be constructed, the inclusion of RECs in CFTA negotiations is necessary.

4.7: Inclusiveness and Transparency of Negotiations

Citizens, businesses and organisations outside the government will be affected by the CFTA. It is, therefore, important that in line with best practices in the field, the negotiating mandate should include direction on the processes of inclusiveness and transparency. This is to guarantee the maximum engagement by all parties affected by the negotiation, and minimise potential resistance by them and by parliaments at the conclusion of negotiations. Some of the bodies that will have to be consulted or may wish to be consulted, and who is included in negotiating teams depends on the conditions in a particular country. The following are some, in alphabetical order, that should be consulted:

- Agricultural producer and farming associations.
- Chambers of commerce and industry.
- Consumer bodies.
- Education and training providers.
- Importer and exporter associations.
- Specific-industry associations.
- Intellectual property associations.
- Professional associations.
- Standard-setting bodies.
- Parliaments, their committees and members.
- Media and information resources.
- State/Departmental/County institutions.
- Special-interest NGOs, particularly those working in the field of environment, labour rights, and women/youth.
- Academia.

The range of groups approached in this way will obviously depend on the countries concerned and the type of agreement envisaged. If, for example, the aim is an agreement limited to goods, the range of services providers that need to be consulted is narrower than would be the case in an agreement covering goods and services. But in the case of a genuinely comprehensive agreement, as is the case with the CFTA, the range of possibly interested organisations and individuals will be large, and will require an important effort to manage.

It is also advisable that a public-relations/media/information effort is deployed throughout the negotiation process, with frequent updates to keep interested parties “in the loop”. It also requires that a feedback process is instituted to allow negotiators to have a “feel” for potential pressures from local parties.

Indeed, and in the CFTA context, the African Trade Forum, one of the organs of CFTA architecture adopted by the AU Summit, is already operational. At its Second Session that was jointly organized by the AUC and UNECA in Addis Ababa in September 2012, it made important recommendations on the implementation of the consultative processes within the CFTA that are in line with the proposals above.

4.8: Leadership Roles and the AU

The AU and its secretariat, the African Union Commission, have been given the role of managing the CFTA process, with little available resources; human, financial and legal. The AUC is thus both the organiser and the arbiter of technical success in the CFTA process, and thus substantial new resources will need to be furnished by member States and development partners to

the AUC. The AUC in turn will have to review its current structures to address the expected new load of managing the CFTA negotiations.

This issue becomes of great importance in view of the proposed oversight structure approved by the Heads of State and Government in the “Strategic Framework for the Establishment of the CFTA”. The HATC, being composed of Heads of State and Government, is not expected to be available on a regular-enough basis to resolve expected conflicts in the negotiations. This role will fall, by default, to the AU’s Trade and Industry Commissioner and the secretariat team; the latter requiring substantial support from new, experienced and knowledgeable personnel.

4.9: Retaining Policy Space for Regional Development

There is no doubt that intra-African movement of goods and persons have been ongoing for many years, and that they have produced new production and trade structures, built over a period of time. It is also clear that these efforts predate the creation of the current RECs, and that these structures, mostly trans-border in nature and built on traditional relations among families and tribes, are a positive building block for regional integration efforts.

The entry of the CFTA will have to provide some “policy space” and special and differential treatment at the regional level to allow these structures to be accommodated by its rules, but also to allow CFTA-plus regional efforts to continue. Indeed, it is hoped that this extra-REC integration could pave the way for the entry into force of a real economic community of African States. Many of projects at the level of RECs may or may not be fully part of the larger pan-African projects, but can add a critical sub-regional development, integration and peace-making component which benefit the AU.

This may be particularly useful for trans-state agriculture and irrigation projects, as well as industrial and infrastructure ones. The latter must, however, benefit from a harmonisation effort in macro-economic policy reform, so as not to create distortions in the private sector investment markets.

4.10: Negotiations Timetables and Targets

FTA negotiations can last from two to four years or more. The WTO Doha Round of negotiations, which includes further liberalization of trade in goods, started in 2000 and has not yet concluded in 2016. The Trans-Pacific Partnership agreement took about 10 years to negotiate and though concluded, it remains to be ratified by all parties. Negotiations on the Free Trade Area of the Americas took over 9 years and ended in failure. The negotiations of ambitious South-South FTA indicate a minimum of 4-5 years of negotiations. So negotiations may take longer due to the level of ambition of the original negotiating mandate, and the number of countries involved.

In the case of the CFTA, the current timetables and time targets may need to be reviewed. This basically stems from the fact that African economies are at such level of variation in terms of development, macro-economic policy regimes, infrastructural development, and others which may not allow the conclusion of the negotiations in 2-4 years. This will certainly require a serious introspection by the Heads of State and Government at their earliest convenience. Given all of the above, it may be more realistic to expect the CFTA negotiation in goods to take about 2-4 years to complete. This time period would be more in tune with experience and best practices from the field.

CONCLUSIONS AND SOME SUGGESTIONS

The negotiations on a CFTA agreement will be a mammoth task. Other mega-regional FTAs attempted in the past have shown that the process to be challenging, onerous and expansive as well as lengthy. African countries thus need to be focused on the main vision of boosting intra-African trade as a means to eradicating poverty and fostering sustainable and inclusive development of African consistent with African's 2063 agenda and global goals enshrined in the 2030 Agenda for Sustainable Development and Sustainable Development Goals. Negotiating the detailed agreement is critical to ensure a development-oriented, balanced, comprehensive and modern agreement that can foster structural transformation, create jobs and reduce poverty. The lessons from the global food, fuel and financial crises have lighted the need to build up resilient economies and strengthen internal sources of growth to back up economies. Thus the creation of an economic space and market for African countries is in keeping with the challenges of building economic resilience. The global community is also faced with the challenge of climate change and environmental degradation associated with current patterns of production and consumption, augmented by huge population expansion. All countries have agreed to work together to foster more environmentally and climate friendly development paths. The building of the CFTA and complementary policies necessary to unleashed the potential of the CFTA should also take into consideration the need for sustainable productive processes. With these challenges in mind that can affect momentum on the CFTA, this chapter concluded with some suggestions to ensure sustained focus on the CFTA.

1. The role of AUC

The AUC plays the critical role of the secretariat for the negotiations by AU member States of the CFTA. It thus needs to be well equipped with resources both in terms of technical expertise and finance to backstop the negotiations and service the formal plenary meetings of official AU bodies supervising the negotiations.

Given the immensity of the task, it would be useful for the AUC and African countries to seek further support from other development-friendly and Africa-attuned IGOs. This support, if it is to play a more useful role in the process, should be integrated into the CFTA mandate in a more precise and quantifiable way.

Of particular relevance will be UNECA (which is in constant support of the AU); UNCTAD, with its experience in the areas of developmental regional integration, policy advice in policy for trade and economic/social development, investment, finance, technology, and trade facilitation including customs reforms; the African Development Bank (and the World Bank in support), with its capacity and macro-economic reform programmes (particularly in the area of TF); the IMF (with its potential for support/advice on macro-economic policy reform and harmonisation), and the WTO as the global repository of trade-related legal frameworks that govern all RTA/FTA formation and implementation.

Also the International Trade Centre (ITC) can provide the private-sector/business oriented inputs that can help business communities better integrate in the CFTA framework.

2. RECs and the CFTA

There is no doubt that the entry into force of the CFTA will have an impact on Africa's RECs as they are currently structured. For long the RECs have been the conduit of regional liberalisation and integration in Africa. The CFTA will supersede RECs in terms of the trade integration role.

It is, therefore, useful in order that the RECs do not become an obstacle to the CFTA that African States review the role of RECs to reflect new realities. Specifically, the RECs' mandate could

be modified to allow them to play more important roles in the area of macro-economic, fiscal and financial policy harmonisation at the sub-regional level, as well as the implementation of sub-regional integration, development and environmental projects that are “off the radar” at the pan-African level.

This mandate review will, understandably, require new inputs for the AU Heads of State and Government following a thorough review by the AUC.

3. Dispute settlement

Recognising that the negotiation of the CFTA will require mammoth effort on the part of African States, it would be a sad situation if implementation disputes would hinder fuller implementation of the agreement. FTA implementation disputes are known to be, as with most trans-national disputes, both costly and long-winded, and can produce uncertainty for businesses, both trading and investment.

It is imperative, therefore, that the CFTA incorporate adequate mechanisms to prevent and resolve disagreements in an expeditious manner, such as through consultation, mediation or arbitration, avoiding duplication with the WTO dispute settlement mechanism where appropriate. These mechanisms should be easy to use, inexpensive (compared to WTO mechanisms), and quick in their response to the parties. Above all, AU member States will be required to make important contributions in terms of legal frameworks (both legislative and operational), as well as to instil a sense and culture of good governance and rule of law in their operators.

4. Drafting a Balanced Agreement

The drafting of the CFTA can of course be approached in more than one way. The method chosen in a particular negotiation will depend to a considerable extent on the approach to the negotiations taken by the chief negotiators. The main challenge is to produce a reliable text reflecting the outcome of the latest stage of negotiations.

Negotiations of FTAs are rarely conducted in formal, plenary negotiations. The main purpose of formal meetings is to keep all parties informed of the latest developments in the negotiations, and to take decisions on moving forward. It is the norm, therefore, to create technical negotiating groups for various aspects of the agreement, especially when the subject matter requires expert knowledge. These negotiating groups then work to draft texts of the agreements, most often in the form of chapters, but sometimes their task does not exceed one or two articles. This is good negotiating practice, and it needs to be supported with good drafting practice.

It is useful that, once the negotiations are under way, and as early as possible in the negotiations, parties should establish clearly how the CFTA approvals system will work, with deadlines whenever possible. It is also imperative that the CFTA text conform to certain conventions including frequent consultations with each party’s legal advisors, since legal drafting problems and concepts are much easier to deal with earlier, rather than, in the final stages. Parties should also ensure that the chief negotiators and the legal advisors at least receive the latest version of the text soon after each negotiating session, regardless of the amount of text in square brackets, that article numbering is not changed (since other parts of the text will contain cross-references), and that, if an article is deleted, it retain its number and could simply be marked as “deleted”.

Verification or “legal scrubbing” of the text should only begin after the negotiations are terminated, and should not be too difficult since the text will have been kept in good order throughout the negotiations. The first step is to ensure that the text conforms to each negotiating teams understanding of what has been agreed. Once this has been done, notes can be compared. It would be agreed NOT to introduce new negotiating proposals at this stage, but the

parties may sometimes agree that clarity would be served by the insertion of an additional article that would not, however, disturb the balance of the agreement.

At this stage it becomes important to finalise the mechanisms for consulting and implementation of the agreement. These mechanisms are necessary, but it is worth bearing in mind that the greater the number of mechanisms, the more difficult it may become to look after all them.

At the end of all of this, the point is reached where the CFTA agreement passes over to political and parliamentary processes for approval and ratification, after which implementation of the CFTA starts with AU member States and supported by the AUC.

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ENDNOTES

¹ http://www.au.int/en/sites/default/files/treaties/7775-file-treaty_establishing_the_african_economic_community.pdf

² See for further discussion, *The Continental Free Trade area: Making it work for Africa*, UNCTAD Policy Brief No.44, December 2015.

³ For a discussion of challenges and opportunities for the CFTA, see UNCTAD, 2015, "Building the African Continental Free Trade Area: Some Suggestions on the Way Forward (UNCTAD/DITC/2015/1)

⁴ Yang, Yongzheng and Gupta, Sanjeev (2005), *Regional Trade Agreements in Africa: Past Performance and the Way Forward*, IMF Working Paper (WP/05/36).

⁵ Decision on the Protocol on Relations between the African Union and the Regional Economic Communities (RECs), Assembly/AU/Dec.166 (IX)

⁶ See at http://www.wto.org/english/tratop_e/region_e/region_e.htm

⁷ *Developmental aspects of regional trade agreements and special and differential treatment in WTO rules: GATT 1994 Article XXIV and the Enabling Clause* (TN/RL/W/155), Communication by the Mission of Botswana on behalf of the ACP Group of States, 28 April 2004.

⁸ WTO, Transparency mechanism for regional trade agreements: Decision of 14 December 2006 (WT/L/671).

⁹ International Classification of Non-Tariff Measures: 2012 Version (UNCTAD/DITC/TAB/2012/2).

¹⁰ UNCTAD's database on NTMs can be accessed online at the following address: <http://i-tip.unctad.org/>

¹¹ For further discussion see, for example, Peter Draper, Cynthia Chikura and Heinrich Krogman, 2016, *Can Rules of Origin in Sub-Saharan Africa be Harmonized? A Political Economy Exploration*. German Development Institute Discussion Paper 1/2016.

¹² Please refer to among others the following web resources:

http://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm,

<https://openknowledge.worldbank.org/discover?query=trade+facilitation&scope=%2F&submit=Go>,

<http://www.oecd.org/trade/>, <http://www.uneca.org/search/node/trade%20facilitation>.

¹³ See UNCTAD, 2015, *Addressing Regulations and Non-Tariff Measures to Strengthen Regional Integration and Sustainable Growth: A Technical Note* by UNCTAD Secretariat, available at: http://unctad.org/en/PublicationsLibrary/ditc2015misc2_en.pdf

¹⁴ To access this database, go to the following hypelink: <http://i-tip.unctad.org/>

¹⁵ Change-in-tariff heading method (also known as change-in-tariff classification method) says that the product in question has undergone sufficient manufacturing or processing if it falls into a category of a tariff classification different to the ones applied to each of the materials or components used; process-based method means that the good must have a undergone a specified manufacturing or processing path to qualify for preferential treatment; and value-added method which measures how much of the value of a good is due to processing or working in the exporting economy and compares it with a prescribed threshold usually known as the regional value content, or qualifying value content, expressed as a percentage in each case.

¹⁶ See UNCTAD, March 2015, "Non-Tariff Measures and Regional Integration in the Southern African Development Community" (UNCTAD/DITC/TAB/2014/5).

¹⁷ UNCTAD, November 2016 (forthcoming), "Implementing the CFTA: Adjustment, Challenges and Opportunities", Paper by Mesut Saygili.

¹⁸ UNCTAD, 2015, "Modalities for tariff negotiations towards a Continental Free Trade Area (CFTA): Some key issues for consideration", A Technical Note by the UNCTAD Secretariat. Available at: http://unctad.org/en/PublicationsLibrary/ditc2015misc3_en.pdf

