
**SOME ISSUES FOR CONSIDERATION BY THE EAST AFRICAN COMMUNITY
(EAC) IN THE NEGOTIATIONS TOWARDS THE ESTABLISHMENT OF A
CONTINENTAL FREE TRADE AREA (CFTA)**

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LIST OF ABBREVIATIONS

AEC – African Economic Community

AFDB – African Development Bank

AU – African Union

CFTA – Continental Free Trade Area

COMESA – Common Market for Eastern and Southern Africa

EAC – East African Community

EPA – Economic Partnership Agreement

EU – European Union

FTA – Free Trade Area

GATT – General Agreement on Tariffs and Trade

GDP – Gross Domestic Product

LAPSSET – Lamu Port Southern Sudan-Ethiopia Transport

MDG – Millennium Development Goal

REC – Regional Economic Community

RoO – Rules of Origin

SADC – Southern African Development Community

SGR – Standard Gauge Railway

SPS – Sanitary and Phytosanitary

TFTA – Tripartite Free Trade Area

UNCTAD – United Nations Conference on Trade and Development

US – United States of America

WTO – World Trade Organisation

1. INTRODUCTION

1.1. Abstract

This brief is aimed at advising the **East African Community (EAC)** on four key issues that it needs to expressly discuss and negotiate during the negotiations towards establishing a CFTA, as well as recommending the position that the EAC should take on each of those issues.

1.2. The EAC

The EAC was established through the EAC Treaty of 1999, and comprises six East African countries – Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda (which are referred to as Partner States). The EAC has made significant strides in its regional integration journey and currently has a customs union in place, is progressively implementing a common market and has also signed a Protocol for the establishment of a monetary union.

1.3. The CFTA

The CFTA is a regional integration initiative that was conceived and launched during the 18th Ordinary Session of the Assembly of Heads of State and Government of the AU that was held in Addis Ababa, Ethiopia in January, 2012. It is aimed at fast-tracking Africa's integration and development agenda as was envisaged when the Abuja Treaty was signed in 1991 with a view to establishing an African Economic Community (AEC). The indicative date that was given for establishment of the CFTA is the year 2017. However, as is often the case with Africa's integration initiatives, it appears unlikely that the CFTA will be established within that timeframe.

The establishment of the CFTA will lead to the creation of an enormous market consisting of the 54 African countries that have a combined population of over one billion people and an aggregate GDP of over US \$3.4 trillion.¹

African countries seek to establish the CFTA with four key objectives in mind. The first is to create a single continental market for goods and services, with free movement of business persons and investments, thus paving the way for accelerating the

¹ tralac - trade law centre for Southern Africa, *Continental Free Trade Area (CFTA) Legal Texts and Policy Documents* <<https://www.tralac.org/resources/by-region/cfta.html>> accessed 15th June, 2017

establishment of the Continental Customs Union.² Secondly, the CFTA aims to expand intra-African trade through better harmonisation and coordination of trade liberalisation and facilitation regimes and instruments across RECs and across Africa in general.³

The third objective of the CFTA is to resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.⁴ Fourthly, the CFTA also seeks to enhance competitiveness at the industry and enterprise level through exploiting opportunities for scale production, continental market access and better reallocation of resources.⁵

2. ISSUES FOR EXPRESS NEGOTIATION

The four key issues that the EAC needs to have negotiated in the CFTA negotiations are transport infrastructure development, rules of origin (RoO), sanitary and phytosanitary (SPS) policies as well as the impact of EPAs on the CFTA.

2.1. Transport infrastructure development

As currently envisaged, the CFTA is focused mainly on achieving tariff liberalisation and deregulation of services trade. However, despite being important objectives, tariff liberalisation and deregulation of services cannot create markets in and of themselves, especially in the many instances in African economies where critical markets do not exist.⁶ Moreover, they will not address the production and infrastructure restraints that African producers usually face.⁷

One of the main reasons why African countries seek to establish the CFTA is to boost trade amongst themselves. Bearing this in mind, it is worth noting that such trade cannot take place as anticipated when the transport infrastructure that is required to facilitate the free movement of goods and services across the continent is inadequate. According to the AFDB, investment in infrastructure has led to more than half of the

² Regions Refocus and Third World Network-Africa, *The Continental Free Trade Area (CFTA): Process and Political Significance* (April 2016) 2

³ *ibid*

⁴ *ibid*

⁵ *ibid*

⁶ *ibid*, 4

⁷ *ibid*

improvement in economic growth in Africa recently, and it has the potential to achieve much more.⁸

African countries must therefore prioritise the development of transport infrastructure to enable the CFTA achieve its objectives. This would entail expanding the road and railway networks, enhancing the port services and infrastructure as well as increasing and improving air transport infrastructure.

Not only will transport infrastructure development aid the success of the CFTA, but it will also contribute significantly to poverty reduction, human development and the attainment of the MDGs.⁹ *'Infrastructure development is a key driver for progress across the African continent and a critical enabler for productivity and sustainable economic growth.'*¹⁰

EAC countries have already embarked on ambitious transport infrastructure projects which are expected to spur growth and development in the region. A good example of this is the LAPSSET Corridor Program, which is Eastern Africa's largest and most ambitious infrastructure project involving Kenya, Ethiopia and South Sudan.¹¹ The project consists of seven key infrastructure projects starting with a new 32-berth port at Lamu in Kenya; a standard gauge railway (SGR) line from Lamu to Juba in South Sudan and to Addis Ababa in Ethiopia; inter-regional highways from Kenya's coast to Juba and to Addis Ababa; oil pipelines from Lamu to Juba and Addis Ababa; an oil refinery at Bargoni in Kenya; three international airports in Kenya; three resort cities in Kenya as well as the multipurpose High Grand Falls Dam along the Tana River in Kenya.¹² The first of the SGR in Kenya from Mombasa to Nairobi was recently commissioned in May 2017. Moreover, Rwanda, Uganda (eg the Kampala–Jinja Expressway) and Tanzania (eg the Chalinze Expressway) are also working on major transport infrastructure projects which are aimed at easing the movement of goods

⁸ African Development Bank Group, *Infrastructure Development* <<https://www.afdb.org/en/knowledge/publications/tracking-africa%E2%80%99s-progress-in-figures/infrastructure-development/>> accessed 15th June 2017

⁹ ibid

¹⁰ ibid

¹¹ LAPSSET, *What is the LAPSSET Corridor Program?* <<http://www.lapsset.go.ke/>> accessed 20th June 2017

¹² ibid

and persons within the region. The EAC Partner States have agreed on ten transit transport corridors which will constitute the EAC Road Network.¹³

Lastly, it is worth noting that infrastructure development is the first of the five pillars of the EAC's Vision 2050¹⁴ and is therefore an objective which is at the core of the REC's agenda. Accordingly, the EAC should ensure that this issue is expressly and adequately addressed during the CFTA negotiations.

2.1.1. Recommendation on this issue

The EAC should take a position that all the countries participating in the CFTA should make tangible commitments to invest a significant portion of their resources towards transport infrastructure development. This should include identifying particular projects that they will undertake, whether individually or in joint efforts, and laying out road maps for achieving the same.

2.2. Rules of Origin (RoO)

Rules of origin *'are like a passport for a product to enter an FTA and circulate without being imposed a duty.'*¹⁵ RoO are usually designed to primarily prevent trade deflection or *'imports sneaking through the back door'* in preferential trade agreements.¹⁶ They establish a framework according to which the origin of a product is determined. This is because trade products often consist of both local and imported inputs and this therefore requires rules that define how much transformation of imported materials must take place before a product can be considered to have the economic origin of the exporting country.¹⁷ Products that are wholly produced in the exporting country are automatically considered as *'originating'* whereas if both domestic and imported materials are used, *'substantial transformation'* must occur if the final products are to be considered as originating from the exporting country.¹⁸

¹³ East African Community, *Vision 2050: Regional Vision for Socio-Economic Transformation and Development*, (February 2016) 47

¹⁴ *ibid*, 44

¹⁵ Magdi A. Farahat, *African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods* (UNCTAD Report, 2016) 6

¹⁶ Ron Sandrey, *Rules of origin—looking outside the box* (tralac Working Paper No. USW15P03/2015, February 2015) 1

¹⁷ Eckart Naumann, *Tripartite FTA: State of Play on Preferential Rules of Origin* (tralac Trade Brief No. S11TB05/2011, March 2011) 1

¹⁸ *ibid*

Annex D.1 to the ***International Convention on the Simplification and Harmonization of Customs Procedures*** (the Kyoto Convention) on RoO defines substantial transformation 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'*.¹⁹ Substantial transformation can be determined using any one of three criteria: a specific processing requirement test; a change in tariff classification test; or a value addition or material content percentage test.²⁰ Countries are usually at liberty to apply any of these three approaches, thus creating the potential for conflict when it comes to agreeing on uniform RoO that will be applied in a preferential trade area.²¹

RoO can be either preferential or non-preferential. Non-preferential RoO are usually used for purposes other than determining whether products originate and qualify for a preference benefit. Preferential RoO are used to determine the preferential benefit in trade amongst members of FTAs or Customs Unions (CU).²²

The various RECs in Africa use different approaches for determining RoO, eg SADC uses a line-by-line/product-specific approach whereas COMESA uses a generic across-the-board basis for determining the origin of products.²³ In view of such differences in approach, it is therefore of paramount importance that uniform RoO for the CFTA be established, while noting that complex and overly restrictive RoO can limit the effectiveness of an FTA and consequently lead to stifling of trade and development.²⁴ There should be a harmonisation of the CFTA rules of origin, the rules of origin of the respective RECs, the EPA rules of origin and others to make the CFTA successful and for the CFTA to fulfil its anticipated role of increasing intra-Africa trade as well as fostering development and industrialisation in Africa.²⁵

¹⁹ Farahat, *African Continental Free Trade Area*, 15

²⁰ *ibid*

²¹ *ibid*

²² Lynette Gitonga, *Negotiating Rules of Origin In Africa* (Draft Paper, International Lawyers and Economists Against Poverty) 1

²³ *ibid* 2

²⁴ *ibid* 5

²⁵ Farahat, *African Continental Free Trade Area*, 8

Since only goods which originate from member states usually qualify for tariff exemptions and preferential treatment in an FTA, it is of vital importance that the RoO in the CFTA be negotiated and agreed upon at the earliest possible opportunity, otherwise liberalisation of tariff lines will not be of much significance.

In addition to the reasons indicated above, the issue of RoO is vital for the EAC to expressly have negotiated considering how the EAC has undergone painstakingly long negotiations on RoO in pursuing the implementation of the TFTA which aims to consolidate three RECs (COMESA, the EAC and SADC) into one preferential trade area. As at June 2017, the EAC is yet to ratify the TFTA despite having previously indicated that it would ratify the same in February 2017. Accordingly, the Partner States decided to push the ratification date to December 2017 to enable them resolve pending issues on RoO and tariff offers.²⁶ These protracted negotiations underscore the importance of RoO in an FTA framework. It is therefore advisable to avoid losing the gains that have been made during the TFTA negotiations when seeking to establish the CFTA rules of origin. Instead of beginning from scratch, the EAC should strive to incorporate the gains made in the TFTA RoO negotiations into the CFTA negotiations on RoO. The lessons learnt from the experience of setting up the RoO for the TFTA would be useful in the CFTA scenario.²⁷ This would help to avoid wasting valuable time and resources that have already been spent during the TFTA negotiations on RoO.

2.2.1. Recommendation on this issue

The EAC's position when the CFTA negotiations begin should be that the member countries immediately proceed to constitute a technical working group to start the process of negotiating the CFTA RoO, considering the lengthy period it usually takes to negotiate RoO between different RECs (as evidenced by the TFTA scenario). Ideally, the RoO should be negotiated and concluded before countries finalise the discussions on liberalising tariff lines. This would help to ensure that the benefits of trade liberalisation in the CFTA begin to be realised without undue delay since there

²⁶ tralac - trade law centre for Southern Africa, *Cape-to-Cairo free trade area closer* (23rd June 2017) <<https://www.tralac.org/news/article/11789-cape-to-cairo-free-trade-area-closer.html>> accessed 24th June 2017

²⁷ Farahat, *African Continental Free Trade Area*, 8

will be a clear framework in place on how to identify the goods that qualify for preferential treatment.

2.3. Sanitary and Phytosanitary (SPS) Policies

The primary basis for SPS measures in the international trade framework is to be found in the WTO's *Agreement on the Application of Sanitary and Phytosanitary Measures* which came into force in 1995 when the WTO was established. It is commonly referred to as the 'SPS Agreement'. Sanitary measures are aimed at protecting human and animal life and health whereas phytosanitary measures seek to protect plant life and health.²⁸ SPS measures are designed to protect animal or plant life or health within a sovereign territory from risks arising from the entry of pests and diseases, disease-carrying organisms, or disease-causing organisms.²⁹ Under the SPS Agreement, countries are allowed to take the necessary sanitary and phytosanitary measures for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of the SPS Agreement.³⁰ It is not in doubt that SPS measures are vital, but the same should not be abused and negatively impact on international trade. One of the requirements of the SPS Agreement is that SPS measures should not constitute unnecessary restrictions which are arbitrary or unjustifiable from a scientific standpoint, and a measure should not be a disguised restriction on international trade.³¹

Bearing the above in mind, it can therefore be appreciated that SPS policies and measures would expectedly have a significant impact on the international trade of plant and animal products, because every country would naturally want to protect the life and health of its citizens, animals and plants. SPS policies therefore have the potential to be a huge barrier to free trade between countries, thereby underscoring their importance in a multilateral trade framework such as the CFTA.

²⁸ Alfonso Torres, *Role of sanitary and phytosanitary measures within the context of Free Trade Agreements* (*Revista Colombiana de Ciencias Pecuarias*, March 2013) at p.43 Available from <http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0120-06902013000100007&lng=en&nrm=iso>. accessed 23rd June 2017.

²⁹ Abrie du Plessis, *The Sanitary and Phytosanitary (SPS) policies of the African Regional Economic Communities (RECs), and the way forward for the Continental Free Trade Area (CFTA)* (tralac Trade Brief, June 2017) 3

³⁰ *ibid* 4

³¹ Torres, *Role of sanitary and phytosanitary measures within the context of Free Trade Agreements*, at p.44

SPS policies and measures have been known to be an area for potential conflict in the international trade framework. A good example of this would be the protracted dispute between South Africa and the EU which began in 2010, regarding citrus fruits exported from South Africa to the EU. The bone of contention was whether or not citrus black spot on the peels of South African citrus fruit exports poses a risk to the orchards of the citrus-producing regions of the EU.³² South Africa's position was that it does not pose risk and that the SPS regulations were purely protectionist measures aimed at restricting competitive imports into the EU whereas the EU felt that fruits with citrus black spot can indeed infect EU orchards and pose a risk of infection to the citrus-producing areas in the EU.³³ Scientific research has since shown that although citrus black spot can result in a decrease in the value of the fruit, it does not pose a risk to human or animal health when consumed.³⁴ Nevertheless, this dispute led to the EU suspending the importation of citrus fruit from South Africa as the dispute persisted, which bore a significant impact on South Africa's trade whose citrus exports to the EU in 2013 amounted to approximately US Dollars 1.4 billion.³⁵

While South Africa was having the dispute with the EU on citrus fruit, it was concurrently having another dispute with Zambia regarding organic honey exports from Zambia to South Africa. In that case, South Africa had denied Zambia's honey exports access to the South African markets on the basis that the honey was not irradiated as required in terms of the South African honey regulations (Regulation Number 835).³⁶

It is of utmost significance that the EAC procures the express negotiation of SPS policies in the CFTA context, considering that Agriculture forms the backbone of the economies of the EAC Partner States, with the sector contributing to an average of

³² Willemien Viljoen, *Sanitary and phytosanitary measures: Citrus Black Spot and American Foulbrood Disease* (tralac - trade law centre for Southern Africa, 12th November 2014) <<https://www.tralac.org/discussions/article/6611-sanitary-and-phytosanitary-measures-citrus-black-spot-and-american-foulbrood-disease.html>> accessed 20th June, 2017

³³ *ibid*

³⁴ *ibid*

³⁵ International Centre for Trade and Sustainable Development, *South Africa involves WTO in citrus dispute with the EU* (20th October 2014) <<http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-involves-wto-in-citrus-dispute-with-the-eu>> accessed 20th June 2017

³⁶ Willemien Viljoen, *Sanitary and phytosanitary measures: Citrus Black Spot and American Foulbrood Disease* (tralac - trade law centre for Southern Africa, 12th November 2014) <<https://www.tralac.org/discussions/article/6611-sanitary-and-phytosanitary-measures-citrus-black-spot-and-american-foulbrood-disease.html>> accessed 20th June, 2017

36% of the region's GDP.³⁷ A significant proportion of the trade carried out by EAC countries consists of plant and animal products.

*'Agriculture is the most important sector of the African economy and will have to play a major role in alleviating poverty. It accounts for 65% of the continent's employment and 75% of its domestic trade. The products which fall under the SPS Agreement are almost always agricultural in nature.'*³⁸

This goes to show that SPS policies in the international trade framework therefore have the potential to either stifle or boost the EAC's trade, growth and development.

2.3.1. Recommendation on this issue

The EAC's position should be that SPS policies in the CFTA be made comprehensive enough to afford the necessary protection in the territories of member states, but they should not be overly stringent to the extent that they end up stifling intra-African trade and defeating the purposes of the CFTA. The African countries should bear in mind that in the EAC, the small-scale farmers dominate the agricultural sector, they occupy the majority of land and they produce most of the crop and livestock products.³⁹ The situation is similar in most other African regions. With this in mind, it should also be noted that most of these small-scale farmers lack the necessary inputs, technology and other resources to comply with very high standards of crop and animal production as is the case in the EU. Whereas ultimately the goal should be to achieve such high standards, African countries should be pragmatic and alive to the peculiar circumstances on the African continent, which would require that such standards be worked towards progressively. It therefore behoves the African countries to establish an SPS measures regime in the CFTA which is not overly stringent, because such a regime would not only lead to curtailing trade and development in Africa, but it would also pose an onerous administrative burden for most African countries due to inadequate monitoring and enforcement capacities.

Moreover, the CFTA should establish an extensive and compulsory dispute resolution mechanism (consultation, mediation, arbitration etc) for resolving SPS-related

³⁷ EAC Vision 2050, 60

³⁸ Abrie du Plessis, *The Sanitary and Phytosanitary (SPS) policies of the African Regional Economic Communities (RECs)*, 7

³⁹ *ibid*

disputes, given the general reluctance of African governments to formally declare disputes against each other.⁴⁰

2.4. Impact of Economic Partnership Agreements (EPAs)

This is an important issue that needs to be discussed and agreed upon during the CFTA negotiations because it bears a significant impact on the success of the CFTA. The EPAs that have already been concluded between some African countries and the EU as well as those that are underway are likely to impact negatively on the CFTA. The EPAs which have already been concluded grant duty-free and quota-free access for up to 80% of European goods to Africa's regional markets.⁴¹ Considering that most African countries lack productive capacity especially in the manufacturing industry, they are usually unable to manufacture goods more cheaply than most countries in the EU. Accordingly, if no tariffs are imposed on most imported EU goods as provided for in the EPAs, then these goods will greatly diminish the demand for goods and services originating from the African continent.⁴² This is especially the case in view of the '*national treatment*' principle of GATT which forbids discrimination between locally produced/domestic goods and those imported from other parties.⁴³

If the CFTA results in an African common market yet no changes are made to the terms of existing EPAs, then this may result in goods that enter African countries from the EU travelling throughout the continent, consequently harming goods that are produced in Africa.⁴⁴ In other words, the effect of the CFTA would be to simply expand the market for cheaper goods that are manufactured abroad, as opposed to stimulating productive capacity in Africa by increasing the demand for goods originating from Africa.⁴⁵

2.4.1. Recommendation on this issue

The EAC should take a position that the EPAs which have already been concluded need to be reviewed and amended as appropriate, to ensure that goods originating from the EU do not enter African countries duty-free and quota-free, thereby creating

⁴⁰ Abrie du Plessis, *The Sanitary and Phytosanitary (SPS) policies of the African Regional Economic Communities (RECs)*, 12

⁴¹ Regions Refocus and Third World Network-Africa, *The Continental Free Trade Area (CFTA)*, 5

⁴² *ibid*

⁴³ Article III of the General Agreement on Tariffs and Trade

⁴⁴ Regions Refocus and Third World Network-Africa, *The Continental Free Trade Area (CFTA)*, 5

⁴⁵ *ibid*

a disadvantage for goods originating from Africa. Tariffs should be imposed on goods which are produced in the EU and imported into African countries, to avoid jeopardising the success of the CFTA. In the alternative, quotas for goods imported from the EU need to be set. The African countries or RECs which are still in the process of negotiating and concluding EPAs with the EU should also incorporate these points into their negotiations.

3. CONCLUSION

The CFTA presents a unique opportunity for Africa to make significant progress in hastening the growth and development that was envisaged during the promulgation of the Abuja Treaty in 1991. If the African nations exhibit the necessary political will and commitment that is required to enable success of the CFTA, then the same is bound to bring substantial gains to the continent in terms of trade and development. Some of the benefits that may accrue to African countries with the establishment of the CFTA include enhanced food security through reduction of the rate of protection on trade in agricultural produce among African countries; reduced vulnerability of the African continent to external trade shocks; reduced dependence on foreign aid and external borrowing; increased rate of diversification and transformation of Africa's economy etc.⁴⁶

Besides the four issues that have been discussed in this paper which the EAC should have expressly negotiated in the CFTA context, there are other crucial issues which also merit sufficient discussion in the CFTA negotiations such as the removal of other non-tariff barriers to trade, dispute resolution mechanisms, other forms of trade facilitation, elimination of technical barriers to trade, trade remedies and so forth.⁴⁷

To enhance the success of the CFTA, African countries should also endeavour to also promote the free movement of people, as a catalyst for boosting intra-Africa trade.⁴⁸

⁴⁶ African Union, *Synthesis Paper on Boosting Intra-African Trade and Fast-Tracking the Continental Free Trade Area* (January 2012) 8

⁴⁷ Regions Refocus and Third World Network-Africa, *The Continental Free Trade Area (CFTA): Process and Political Significance* (April 2016) 3

⁴⁸ Prudence Sebahizi, *Scope of the CFTA Negotiations, Principles, Objectives and Institutional Framework* (Powerpoint presentation, Accra, 9th March 2016)

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