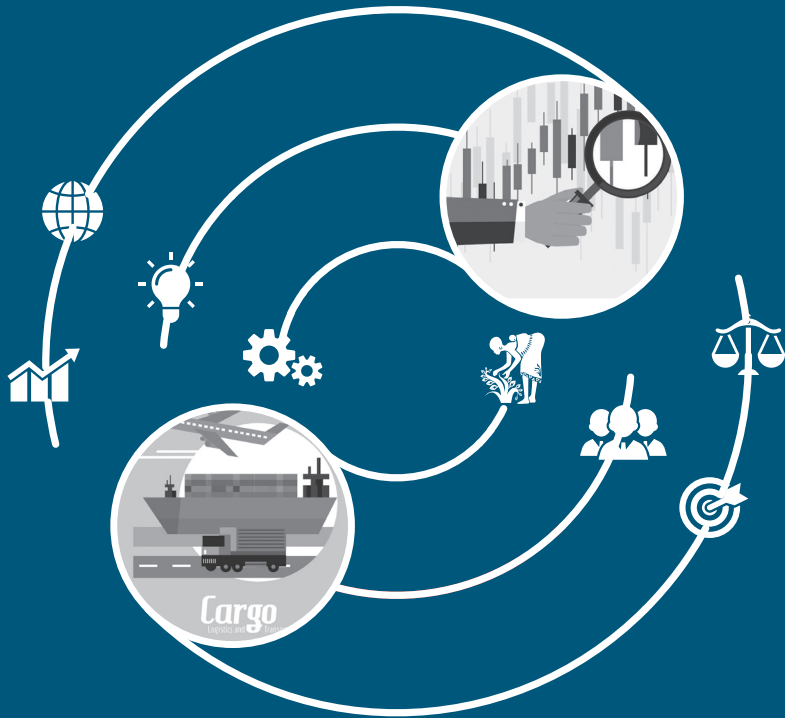


Scoping Study

Designing the Continental Free Trade Area (CFTA): An African Human Rights Perspective

Prof. James Thuo Gathii
May 2016



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Executive Summary

The African Union has committed itself to negotiating a Continental Free Trade Agreement (CFTA) with substantial trade liberalization commitments coupled with strong adjustment and compensatory mechanisms to attend to potential losses. Thus CFTA negotiations are premised on the importance of enhanced trade integration and the economic benefits it would produce, on the one hand, with an equally important commitment to equity, justice and fairness particularly where liberalization commitments undermine these values.

This scoping study is the result of a screening process that involved consultations with a broad cross-section of stakeholders within the African Union Commission, African Union Member States, the private sector, experts within the United Nations Human Rights System, groups directly affected, such as indigenous peoples and NGOs. It identifies three potential risks and offers preliminary recommendations to address them. It also identifies three proposals on institutional and structural mechanisms to facilitate monitoring, remedies and social protection.

The first potential risk identified is that since agriculture is not explicitly included within the scope of negotiations as a standalone agreement, it is likely that CFTA negotiations will fail to meet food and livelihood security goals. This would undermine the realization of the right to food as protected by the African Charter on Human and Peoples' Rights and the International Covenant on Economic, Social and Cultural Rights.

This exclusion of agriculture is surprising given the importance of agriculture on food security and poverty reduction particularly among Africa's least developed and net food importing countries. Agriculture underpins export earnings and rural development of many African countries. The importance of agriculture to African economies is also reflected by its strong impact on food security as well as its potential in helping meet Africa's goal of industrialization and in contributing to regional trade in intermediate goods.

Consistent with the African Unions' Agenda 2063 as well as the commitments to the right to food contained in the African Charter on Human and Peoples' Rights, this scoping study therefore makes a preliminary recommendation to expand the scope of CFTA negotiations to include ambitious liberalization in agriculture hedged with safeguards for vulnerabilities and sensitivities. Giving agriculture a prominent place within the CFTA consistent with its importance in African economies also requires the involvement of Africa's agricultural ministers, as well as other ministers whose portfolios are likely to be strongly impacted, from the onset of

negotiations to ensure policy coherence between trade, agriculture and other related issue areas important for rights protection.

The second potential risk identified is that commitments in the CFTA may undermine or eliminate existing decent work and quality jobs and/or fail to produce good quality and secure jobs that can provide adequate incomes and benefits that would give individuals and families social protection from hunger and poverty. In this respect, certain core labour rights such as freedom of association and collective bargaining, that have been considered to be at the cornerstone of development, and are necessary to ensure that all men and women are able to obtain decent and productive work in conditions of equality, security and human dignity ought to be a central consideration in the negotiations.

Labour rights are achievable only when there are strong and independent trade unions and employers organizations that are sufficiently positioned to engage in social dialogue;¹ they cannot meaningfully contribute to poverty alleviation in a prohibitive atmosphere.² In this connection, dialogue between social partners is essential if working conditions are to improve and principles of decent work satisfied. These partners promote development by contributing and representing the views of their members on economic and social policy issues.³

The African Union has already undertaken various commitments with respect to ensuring decent work and quality jobs. These commitments were set out in the African Union Agenda 2063, the African Charter on Human and Peoples' Rights and in the International Covenant on Economic, Social and Cultural Rights. Furthermore, the African Union Heads of State have also committed themselves to the 2030 Agenda for Sustainable Development, which includes promotion of decent work for all. Moreover, the creation decent jobs is also consistent with the National Employment Policies of African governments and is also reflected in their endorsement of a social protection floor approach to globalization. Recognizing the link between ensuring decent work and respecting core labour rights, many African Union Members have taken steps to coordinate efforts sub-regionally, as well as with the International Labour Organization, through various Memoranda of Understanding.

¹ The term "social dialogue" is defined by the ILO "to include all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy." See ILO, Social Dialogue: Finding a Common Voice, available online at <http://www.ilo.org/public/english/dialogue/download/brochure.pdf>.

² Mohammed Mwamadzingo, "African PRSPs-Unions Dialogue with World Bank and IMF," in ILO, Trade Unions and Poverty Reduction Strategies," Labour Education 2004/1-2 No. 134-135 at 24

³ International law and development policy acknowledge the crucial role played by non-State actors in the development and decision-making process. 65.

The preliminary recommendation made in this respect is that the CFTA should adopt strategies to create decent jobs, create social protection floors, raise productivity and facilitate the ability of the services sector to contribute to growth and employment.

The third potential risk area this scoping study highlights are the adverse consequences that may arise if the CFTA fails to deal with the insecurities that limit freedom of movement of individuals in the informal services sector, including small traders and temporary migrant workers who currently rely on time-limited individual work contract or service contracts among other restrictions that limit their ability to gain employment.

The preliminary recommendation identified to deal with this risk is to make commitments that help build more and better opportunities for the large number of skilled and semi-skilled workers in the services sector. Such initiatives should be complemented with an African Agreement on Labour Migration, consistent with AU process on labour movement. Such an agreement would guarantee the rights to enter and reside in another country; the right to equal treatment; the right to form labour unions and the right to collectively bargain for wages. To ensure that the CFTA is not used as a justification to depart from internationally protected labour rights or rights guaranteed under national law to discriminate against non-national workers in particular, a non-derogation clause should be included in the CFTA. Such non-derogation clauses that are increasingly used in FTAs, could for example provide that each African Union Member State shall strive to ensure that it does not waive or derogate from adherence to international labour laws pursuant to implementing the provisions of the CFTA. Countries that want flexibility in their service commitments such as Least Developed Countries (LDCs), need longer phase in periods to come into full compliance with CFTA obligations. In addition, the scoping study recommends ensuring transparency and efficiency in application processes for temporary movement of migrant workers and small traders. This goal is both an employment expansion strategy as well as a response to the massive wave of young Africans who are leaving the continent for Europe and elsewhere on dangerous voyages for search of better opportunities.

In light of risks to food and livelihood security as well as to employment arising from the foregoing three risks, this scoping study proposes that a human rights impact assessment (HRIA) be conducted to fully assess their likely impact and to give further guidance to all stakeholders at the front-end of the CFTA negotiating process.

Three proposals are made with regard to institutional and structural mechanisms for monitoring, remedies and social protection to supplement the proposed CFTA Monitoring and Evaluation Mechanism. This proposal is premised on the importance of having remedial mechanisms

that give stakeholders opportunities to protect, enforce their rights while providing remedies for their violation. The first is to include a Non-Tariff Barrier Mechanism to anchor ambitious liberalization of trade in goods. Achieving the objective of a mutually beneficial trade agreement among Member States of the African Union and increasing trade among African countries by 50% will require removal of the extremely large number of non-tariff barriers that characterize trade between African countries. The inclusion of a Non-Tariff Barrier Mechanism will build on the progress made in Africa's Regional Economic Communities and expand the participation of ordinary traders, particularly women and informal traders, in reporting Non-Tariff Barriers barring their ability to participate in intra-regional trade.

Second, recognizing that a critical element for the success of the CFTA will be the monitoring mechanisms established to ensure its implementation, it is recommended that the monitoring, reviewing and analyzing of all aspects of the implementation and impacts of the CFTA be added to the mandate of the African Peer Review Mechanism. The mechanism will provide signatories of the CFTA with an opportunity to make recommendations to the relevant African Union bodies – aimed at improving the implementation of reviewed provisions particularly those that may have adverse impacts on compensatory and adjustment mechanisms. This review process will also provide information for improving the provisions themselves through re-negotiations. An ex-post HRIA is also planned to increase the likelihood of compliance with human rights norms.

Third, since the CFTA must be designed to be beneficial to economies at different levels of development, it is recommended that it include the following compensatory mechanisms arising from losses due to CFTA liberalization commitments: a development fund from which funding to compensate for losses from liberalization commitments of the CFTA would come from; longer transition periods to adjust to import competition for countries that need them; appropriate times to harmonize national tariffs with the new CFTA tariff to level out revenue losses particularly for least developed country members; and mechanisms to ensure equitable sharing of gains from liberalization in a fair and proportionate way to African Union members.

Part One

Background, Objectives and Methodology

In January 2012, the African Union decided to fast-track the establishment of the Continental Free Trade Area, (CFTA), by 2017, with the main aim of boosting intra-African trade. The CFTA was launched in July 2015 and will cover preparatory, negotiating and finalization periods.

The first priority in the CFTA is to broaden Africa's economic and market space. It has other priorities such as addressing supply-side constraints, weak productive capacities and infrastructural bottlenecks. One significant concern will be how these negotiations will dovetail with the Economic Partnership Agreements (EPAs) between the European Union (EU) and the African member states in different regional configurations. Another concern is how value chains will be strategically developed across the continent to ensure that intra-African trade includes higher value products from less developed countries in the region.

The negotiations for the CFTA are conducted within assigned institutional arrangements that includes a CFTA Negotiating Forum. The African Union Commission (AUC) serves as the Secretariat to the CFTA negotiations and the process will be supported by the Continental Task Force (CTF). The CTF will provide resources and expertise to the CFTA Negotiating Forum. Political oversight will be provided by the African Union through its Department of Trade and Industry.

CFTA negotiations will be conducted in two phases. Phase 1 will cover concurrent negotiations on trade in goods and trade in services. Phase 2 will cover negotiations on investment, intellectual property rights and competition policy.

Phase 1 and Phase 2 negotiations will raise critical concerns around employment and agriculture. Employment is a huge challenge in African countries and Africa's demographic characteristics present a double-edged sword. On the one hand population growth can provide a market to drive business and investment as is popularized in the 'Africa rising' narrative. On the other hand, employment is a critical, cross-cutting issue that will require attention as internal markets in Africa are liberalized to boost production and trade.

On agriculture, Africa accounts for 60% of the world's reserve of arable land and holds large potentialities in cattle, fisheries and forestry. Over 65% of the African workforce is agriculture-based, with 70%–80% of Africans living in rural Africa dependent on agriculture for

nutrition and livelihoods. Africa's food production has risen significantly but this has been accompanied by growing food imports. Trade liberalization among AU member states within the context of the CFTA is expected to provide further incentives to boost agricultural production and productivity. Trade policies and agreements should be shaped in ways that recognizes the right to livelihoods and the right to adequate nutrition besides supporting rural development and employment creation.

Phase 2 negotiations will deal with investment and intellectual property that will also raise issues around right to health, particularly access to medicines and the impacts of investment liberalization. This scoping study does not extend to these rights.

Rationale for a HRIA

A HRIA is an instrument for examining policies, legislation, programs and projects and measuring their impact on human rights. The purposes of conducting HRIAs include prioritizing human rights in policy-making, strengthening accountability and empowering rights-holders. A HRIA of a trade agreement can be utilized as a tool to gather evidence of human rights impacts to advocate for policy change and influence negotiations. It is also a tool to encourage compliance with human rights obligations. As such, its utility includes preventing litigation around human rights issues and ancillary issues such as compensation and opposition to trade agreements. HRIA also highlights areas of concern and good practice in relation to human rights.

The four elements of the human rights framework are:

- Human rights should be the explicit subject of a HRIA;
- The process of the impact assessment should respect human rights;
- HRIA should contribute to developing the capacities of duty bearers and rights holders, and
- HRIA should involve human rights actors.

The rationale for an ex-ante HRIA of the CFTA is that while regional free trade agreements are generally designed with the aim of increasing cross-border trade and contributing to economic growth, it is increasingly recognized that obligations contained in trade agreements can have implications for the ability of governments to realize, protect and fulfill a range of human rights.

Undertaking an HRIA at the outset of the negotiation process provides negotiating countries with an evidence base and policy recommendations from which to develop effective and cohesive trade policy that is aligned with human rights and development commitments and priorities.

This human rights impact assessment provides a unique opportunity to present findings and analysis early on in the negotiations. Consultations must be broad and transparent with both private-interest and public-interest groups, and those directly affected, including human rights organizations and indigenous peoples. It emphasizes the need for participatory processes and stakeholder consultation to be integrated into the negotiations at the outset. The opportunity is also ripe in terms of the timing since the negotiation is not yet solidified. This has allowed for the planning and undertaking of this an ex ante assessment during this preparatory period of the negotiation process.

Steps undertaken towards a HRIA so far

In December 2014, the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Economic Commission for Africa (ECA) & the Friedrich Ebert Stiftung (FES) created Terms of Reference, (TORs), to explore a potential HRIA of the CFTA.

- January 2015 – March 2015: OHCHR, through in-house collaboration prepared an issues paper in line with the preparation step of a HRIA, spelling out substantive concerns that may be focused on and the methodological framework that may be adopted in a potential HRIA.
- April 16 – 17 2015: ECA, FES & OHCHR jointly organized a multi-stakeholder expert workshop on a potential HRIA of the CFTA in Addis Ababa. The meeting which had about 40 participants, including the AU, featured a validation, discussion of an issues paper and elaborated on future steps in the HRIA process. The workshop gave a green light in moving forward on a HRIA. Thereafter:
 - The ECA through the Africa Trade Policy Centre constituted a steering group consisting of OHCHR, FES and other relevant institutions and actors to coordinate the HRIA and to exchange information with key organizations and stakeholders.
 - The scoping assessment led by OHCHR was approved and Prof. James Gathii was appointed as a consultant.

- September 23 – 25 2015: The steering group and the consultant held consultations in Addis Ababa. The consultations were held with the Trade Division of the Department of Trade and Industry of the African Union Commission; the ECA and representatives of the private sector and civil society.
- September 28 – 29 2015: The steering group and the consultant held consultations on food security and livelihoods as well as on decent employment in Geneva. The consultations were held with the International Labour Organization; Members of the Committee on Economic, Social and Cultural Rights as well as a multi-stakeholder expert workshop attended by representatives of NGOs and International Organizations.
- October 2, 2015: The proposed HRIA was presented at the WTO Public Forum.
- October 3, 2015: Scoping Assessment commenced
- December 17, 2015: The Preliminary Scoping Assessment was presented at a NGO Forum Event titled “A Human Rights Perspective on the CFTA,” during the WTO Ministerial Conference in Nairobi, Kenya.

Once the scoping assessment is complete, the steering group will identify how best to seek funding for the HRIA and the next steps.

In June 2015, Assembly of the Heads of State and Government of the African Union approved the commencement of CFTA negotiations. The inaugural negotiating meeting took place in February 2016. The CFTA negotiations presently will be divided into three periods; a preparatory period (6-12 months after launch). The preparatory period will be followed by the negotiating period which should begin by mid-2016 to latter part of 2016. This will be concluded with the finalisation period of the CFTA from October to December 2017. If planned well, the HRIA could be completed by the time the preparatory period is concluded and the start of the negotiating period.

Objectives and Targets

In terms of methodology, a HRIA goes through seven key steps: Preparation, screening, scoping, analysis, recommendations, evaluation and monitoring, and preparation of the report. Methodologies for ex ante impact assessments of trade agreements are generally iterative starting with a preliminary, general assessment, which is deepened and narrowed. Many of the steps are also undertaken in parallel.

This screening and scoping assessment study is based on an extensive literature review and expert judgments. It builds on the work done by OHCHR, ECA & FES in this regard, including the Issues Paper and the outcomes of the multi-stakeholder validation/strategy workshop held in April 2015.⁴ Since it is not feasible to cover all trade and human rights issues in a HRIA, these stages are crucial to narrow and deepen the focus on the key issues.

The screening stage identified those trade measures in CFTA that are more likely to have significant impacts on the enjoyment of human rights and therefore warrant assessment. The issues paper pre-screened and looked at concerns around agriculture and employment which were further discussed at the multi-stakeholder workshop in April 2015 as well as consultations in September, 2015. For this reason the starting point for the screening were potential/draft provisions in agriculture and employment related chapters of the future agreement which will be most relevant and therefore subject to a HRIA and this should cover both Phase 1 and Phase 2 of the CFTA negotiations.

The present stage, the scoping stage, builds on many of the issues identified in the preparation stage with a view to setting the terms of reference for the rest of the assessment. This scoping study identifies and describes trade measure/s under assessment and a range of potential negotiation scenarios; an initial indication of the likely impacts and assessment priorities based on those likely impacts.

Since this is an ex-ante assessment, the final terms of the agreement are not clear so a range of negotiation and liberalization scenarios is identified- for example, different levels of reduction in tariff levels.

Scope and Methods of Work

Given the wide sectoral, regulatory and geographical scope of the CFTA the screening and scoping steps of the HRIA have been crucial in narrowing and deepening the focus. The recommendations from the expert workshop on a HRIA of the CFTA and the consultations in Addis Ababa and Geneva have been a major input.

The methodology comprised a combination of desk research, including an extensive review of the existing literature relating to HRIAs and trade agreements in Africa, literature on regional trade integration, agriculture, employment and trade, and semi-structured interviews with ex-

perts on HRIA and key stakeholders in Africa. The HRIA scoping assessment research also included determining the existence of similar HRIAs, the main achievements and their key challenges.

Two consultation trips were conducted during the consultancy period. Missions in Addis Ababa and Geneva were conducted and the consultant and the steering group met and consulted with relevant experts in the fields of trade, particularly regional trade arrangements, human rights, agriculture and employment.

⁴ United Nations High Commissioner for Human Rights, Issues Paper for a Potential Human Rights Impact Assessment of the Continental Free Trade Area in Africa, 2015-2017 available at http://www.ohchr.org/Documents/Issues/Globalization/IssuesPaper_Addis_Ababa2015.pdf

Part Two

Scoping and Preliminary Recommendations

First Risk Area

Ensuring Food Security through agricultural Liberalization

Potential Risk

Since agriculture is not explicitly included within the scope of negotiations as a standalone agreement, there is a risk that CFTA negotiations will fail to meet the African Union's commitments on food and livelihood security. This may undermine the realization of the right to food as protected by the African Charter on Human and Peoples' Rights as well as similar obligations in the International Covenant on Economic, Social and Cultural Rights. This would also be inconsistent with the goals the African Union has set for itself in poverty reduction targets, achieving food security and improving food security in Agenda 2063 and in the Comprehensive Africa Agricultural Development Programme, (CAADP) among others.

Currently the scope of CFTA negotiations covers trade in goods, services, investment, intellectual property rights and competition policy. Agriculture as a stand-alone agreement is not included. Yet, because agriculture, more than any other sector, has significant impacts on food security and poverty, particularly among Africa's least developed and net food importing countries, it deserves discrete attention. In addition, agriculture as a sector also underpins the export earnings and rural development.⁵ Agriculture should therefore be added as a stand-alone subject within the scope of CFTA negotiations.

The establishment of a Continental Free Trade Area by 2017 is designated as a flagship project of the African Union's Agenda 2063.⁶ In addition, the formulation of a Commodities Strategy to enable African countries to integrate into Global Value Chains and to promote vertical and horizontal diversification is an additional Agenda 2063 flagship project.⁷ Under Agenda

⁵ The African Union Commission, Agenda 2063: The Africa We Want, 37 (May 2014) (noting that agriculture "constitutes 37% of Africa's Gross Domestic Product, contributes 40% of Africa's total export value, and over 65% of the African workforce is agriculture based," id.)

⁶ See also African Union, Agenda 2063, Popular Version Final Draft, September 2015 at paragraph 72(j) committing to fast-tracking the establishment of the Continental Free Trade Area by 2017 as part of a programme to double intra-African trade by 2022.

⁷ See Key Agenda 2063 Flagship Projects, available at http://agenda2063.au.int/en/sites/default/files/04%20Agenda%202063%20Flagship%20Programmes_s.pdf

2063, the African Union has an aspiration of modern agriculture for increased production, productivity and value addition with a view to achieving 'Africa's collective food security.'⁸

Central to Agenda 2063 is the elimination of hunger, food insecurity⁹ and poverty.¹⁰ The African Common Position on Post 2015 Development Goals commits African countries to accelerated, stable, sustained inclusive economic growth that reduces inequality and eradicates poverty through initiatives such as improving small holder agriculture and livestock productivity; modernization and diversification of agricultural sectors; promotion of agricultural marketing and information flows; and sustainable agriculture including for fisheries.¹¹ This is consistent with the Sustainable Development Goals of ensuring a people and planet-centered, human rights-based, and gender-sensitive sustainable development.¹²

The Comprehensive Africa Agricultural Development Programme, (CAADP), which was endorsed by the African Union Summit in July 2003, aims to propel economic growth through development led by agriculture with an underlying purpose of eliminating hunger and reducing poverty and food insecurity. Under the CAADP, African countries committed to devoting 10% of their national budgets to agriculture and rural development. The CAADP aims at improving national and regional agricultural markets through goals such as fostering entrepreneurship and investing in agribusiness and in the agricultural value chain.¹³

There are risks of agricultural liberalization as well. If agricultural liberalization results in demand for more agricultural land, there is a danger that there land-related conflicts may rise

⁸ African Union, Agenda 2063, Popular Version Final Draft, September 2015 at paragraphs 10; 72(e) which also calls for the consolidation and modernization of African agriculture and agro-business)

⁹ African Union, Agenda 2063, Popular Version Final Draft, September 2015 at paragraph 13 (noting that Africa's Agriculture will be modern and productive, using science, technology, innovation and indigenous knowledge," and Para 72(e) calling for the complete elimination of hunger and food insecurity; reduction of food imports; raising intra-African trade in agriculture and food to 50% of total formal food and agricultural trade; expand the introduction of modern agricultural systems, technology, practices and training, including the banishment of the hand-hoe; development and implementation of affirmative policies and advocacy to ensure that at least 30% of agricultural financing are accessed by women and to economically empower women and the youth by enhancing access to financial resources for investment.)

¹⁰ Id. at Para 72 (e) calling for the eradication of poverty in the coming decades. See also Paras 9, 66(c) and (d), 67 stressing the need to eradicate poverty.

¹¹ African Union, Common African Position (CAP) On Post-2015 Development Agenda, (Adopted by the Heads of State and Government of the African Union, 31st January 2014) available at <http://www.nepad.org/sites/default/files/Common%20African%20Position-%20ENG%20final.pdf>

¹² United Nations, Sustainable Development Goals, 2015 available at <https://sustainabledevelopment.un.org/?menu=1300>

¹³ NEPAD, Agriculture in Africa: Transformation and Outlook, (2013) available at http://www.caadp.net/sites/default/files/documents/Resources/agriculture-food-security-and-nutrition/Agriculture%20in%20Africa_%20Transformation%20and%20outlook%20_English.pdf

particularly if there are insufficient safeguards to prevent such conflicts. Some of the most vulnerable groups in this regard are pastoralists, hunter-gatherers and other traditional communities with customary land tenure patterns. These indigenous groups already lead precarious lives in many cases in Africa since their governments frequently disregard their rights.¹⁴ In particular, encroachment on the lands of indigenous peoples would undermine their livelihood rights with regard to pastoralism, fishing as well hunting and-gathering. Further, such encroachment could also undermine their cultural livelihoods inconsistently with the framework the African Union has adopted.¹⁵

Liberalization of agriculture may result in adverse impacts on the ability of poor households and small-scale farmers to grow food for subsistence. In addition, although increases in prices of agricultural produce may rise and help reduce poverty among those who are able to have net sales of their produce, rises in prices may adversely affect other poor households including those who are net buyers of food or poor households in urban areas whose fixed or low incomes would undermine their ability to continue affording rising prices of food as a result of agricultural trade liberalization.¹⁶

Background

Intra-African agricultural trade liberalization is one of the major avenues through which the goals of poverty eradication, food security and eliminating hunger can be met. Currently intra-African trade in agriculture is severely limited by stringent non-tariff barriers, supply side constraints such as high transportation costs and trade policy constraints such as high tariffs. Liberalization also has the potential risk of adversely impacting the rights such as those to jobs in agricultural activities that become uncompetitive or because access to staple food and therefore the right to food is limited as a result of shifts from production of food to production of

¹⁴ See African Commission's Working Group on Indigenous Populations/Communities, DOC/OS(XXXIV)/345 available at (http://www.achpr.org/files/special-mechanisms/indigenous-populations/expert_report_on_indigenous_communities.pdf)

¹⁵ African Union, Department of Rural Economy, Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities, (2010) available at <http://rea.au.int/en/sites/default/files/Policy%20Framework%20for%20Pastoralism.pdf>

¹⁶ See for example, International Food Policy Research Institute, "Impact of Trade Liberalization on Agriculture in the Near East and North Africa," (2007) available at <http://www.ruralpovertyportal.org/documents/654016/100542/Impact+of+Trade+Liberalization+on+Agriculture+in+the+Near+East+and+North+Africa+-+Joint+IFAD+and+IFPRI+Executive+summary.pdf/ca3aaa4-adc0-403c-8610-c3d522774017?version=1.3> (detailing the adverse impacts of agricultural trade liberalization in North Africa). See also, McCorrison S, Hemming DJ, Lamontagne-Godwin, JD, Parr, MJ, Osborn J, Roberts PD (2013) What is the evidence of the impact of agricultural trade liberalisation on food security in developing countries? A systematic review. London: EPPICentre, Social Science Research Unit, Institute of Education, University of London.

commercial products such as biofuels for export.¹⁷ Yet, as we have already seen above, dealing with Non-Tariff Barriers, (NTBs), can also help address poverty eradication, eliminating hunger and achieving food security. This is common ground in Agenda 2063 as well as in Africa's regional and international human rights obligations. The potential for agriculture to help in the achievement of these goals, while acknowledging the risks to rights and finding ways to mitigate them, through enhanced intra-regional trade is very significant for a number of reasons.

First, African countries spend about USD 80 billion every year for food imports from the international food market at the expense of actual or potential regional food sources.¹⁸ Less than 3% of this amount remains within Africa. Even more, this 80 billion USD amount is extremely large relative to the 3 billion USD donors spend on food aid to Africa. Africa could recoup the huge revenue losses incurred in importing food by enhancing food trade in Africa through measures such as developing strong agricultural markets, reducing import tariffs, improved transportation and removal of non-tariff barriers.¹⁹ In addition, intra-regional trade in agriculture would help reduce the number of net-food importing

African countries. The Food and Agricultural Organization (FAO) lists 35 African countries as low-income food deficit countries for 2015.²⁰

Second, Africa could achieve its objective of industrial transformation by taking advantage of value addition of its agricultural commodities through manufacturing. An African Agreement on Agriculture would trigger industrialization which is a major objective of the African Union and has long been on the agenda of every member of the Union as well as the United Nations

¹⁷ See for example, European Commission, Assessing the Impact of Biofuels on Developing Countries From the Point of View of Policy Coherence for Development, Final Report, 2013 available at https://ec.europa.eu/europeaid/sites/devco/files/study-impact-assessment-biofuels-production-on-development-pcd-201302_en_2.pdf

¹⁸ The African Union Commission, Agenda 2063: The Africa We Want, 38 (May 2014). This accounts for 12% of Africa's food needs and it is projected to rise to 40% by the end of 2063.

¹⁹ High transport costs are often a significant percentage of the price of food because of poor roads which make transit times uncertain and which all contribute to poor agricultural supply chains in sub-Saharan Africa. Notably, a 50% decline in transportation costs in Mozambique increased that country's GDP by 7% and led to a rise in neighboring Malawi's agricultural GDP by 3%, see World Bank, "Africa Can Help Africa: Removing Barriers to Regional Food in Staples," in World Bank, Poverty Reduction and Economic Management: Africa Region, 32 (2012)

²⁰ The FAO classifies a country as a low income food deficit country when it has a per capita gross national income below the 'historical' ceiling used by the World Bank to determine eligibility for International Development Assistance and for 20-year International Bank for Reconstruction and Development terms as well as to countries included in the World Bank's Categories I and II. The second criteria is based on net food trade position averaged over the preceding three years and the third criteria is the self-exclusion criterion when countries meet the preceding two criteria and they specifically request to be excluded from the category. See FAO, Low-Income Food-Deficit Countries (LIFDC) – List for 2015, available at <http://www.fao.org/countryprofiles/lifdc/en/>

Economic Commission for Africa.²¹ There is great potential for developing regional value chains in Africa that will accelerate diversification and sophistication of their economies and as such lay the basis for participating in Global Value Chains which African countries currently participate in the lower rungs. Regional value chains are more important for African countries because here they would not face the constraints of decision-making and strategic dimensions of products that have inhibited their participation in Global Value Chains. Regional value chains have the potential to expand labour intensive industries that will generate new employment.²²

Recent research shows that countries that do not participate in high value Global Value Chains may nevertheless capitalize on their locational advantages in producing intermediate products thereby increasing production and creating employment.²³ This opportunity is illustrated by the fact that Africa imports 88% of its intermediate products (non-finished goods traded to be further processed before final use) because of 'manufacturing weakness and lack of linkages to the domestic or regional economy.'²⁴ Given the small share of African agricultural intermediates in areas such as rubber, cocoa, textiles, fuel products, food beverages, the potential for expanding trade in intermediates is large. Africa also needs stronger light and heavy manufacturing particularly given the availability of textiles, wood, paper, food beverages as well as the high demand for transportation, which forms ready demand for transport and machinery manufacturing.²⁵ Thus, merely linking into global value chains without creating more domestic value-added, output, incomes and jobs cannot be the end of trade and industrial policies.²⁶

Third, the share of agricultural and food products trade within Africa is a mere 20% of Africa's exports to Africa.²⁷ There is ample space for liberalizing trade in agriculture particularly given the extremely high level of import tariffs for food. For example, SADC countries have bound their tariffs under the Uruguay Round and set them at high levels, sometimes up to 100% or more almost all products.²⁸ Given the significant share of agriculture in African economies, this

²¹ United National Economic Commission for Africa, Economic Report on Africa 2015: Industrializing Through Trade, 2015

²² Id at 102

²³ Rashmi Banga, "Measuring Value in Global Value Chains," UNCTAD Background paper No. RVC-8 at page 28 (2013)

²⁴ United National Economic Commission for Africa, Economic Report on Africa 2015: Industrializing Through Trade, 118 (2015)

²⁵ Id. at 122–123

²⁶ Rashmi Banga, "Measuring Value in Global Value Chains," UNCTAC Background paper No. RVC-8 at page 28 (2013)

²⁷ Cheong, David, Marion Jansen, and Ralf Peters. Shared Harvests: Agriculture, Trade, and Employment. Geneva: International Labour Office, United Nations Conference on Trade Development, 283 (2013)

²⁸ Stevens, Christopher. "Food Trade and Policy in Sub-Saharan Africa: Old Myths and New Challenges." 21 Development Policy Review 121 (2003)

could be greatly enhanced through value-addition consistent with the goals of Agenda 2063. Value addition for exports from African to African countries is only 1.8 % of African exports so the potential for expanding it is quite high. Most intra-African exports come from countries such as Nigeria, Angola, Algeria, Egypt and South Africa – but these countries receive an even lower percentage of their exports from other African countries – 0.3%.²⁹

An African Agreement on Agriculture can also go a long way to address the high-entry barriers that prevent small farmers from participating in regional food, fibre and beverage trade such as technology, logistics, capital, fertilizers and seeds. Such measures are necessary to create vibrant agricultural markets as additional tools, (to liberalization), to help achieve food security goals. This would serve to level the playing field between African producers and established transnational agro-business firms that do not experience similar challenges getting market information, access to finance, standard weights and measures and good access to inputs and labour.³⁰ An Agreement on Agriculture would encourage the emergence of African owned and branded food industries and products in an effort to create commodity-based industrialization that would benefit rural farmers and encourage farmer owned industries.³¹ Further, regional trade is likely to most benefit smallholders because of the creation of markets where none previously existed. Without access to markets outside their immediate localities, these smallholders have no incentives to increase their investments. More open national and regional markets together with additional support would help smallholder farmers, including pastoralists and herders, to diversity beyond low income household production and as such to contribute towards poverty reduction.³²

Fourth, a major source of food insecurity is the lack of intra-regional trade in agriculture. Improving trade structures can help create food security all across the continent. Instead of primarily relying on foreign food sources to achieve food security, Africa could improve intra-regional trade in agriculture.³³ The risks to market opening in the agricultural sector ought to be mitigated with a variety of instruments including a special safeguard mechanism, further discussed below, as well as other instruments of social protection and adjustment funding discussed in another part of this report. This is because while enhanced regional trade may make

²⁹ United National Economic Commission for Africa, Economic Report on Africa 2015: Industrializing Through Trade, 2015

³⁰ Id. at 107

³¹ Id. at 109

³² World Bank, World Development Report 2008: Agriculture for Development, 2007

³³ The World Bank, "Africa Can Help Feed Africa: Removing Barriers to Regional Trade in Food Staples." Poverty Reduction and Economic Management: Africa Region 2 (2012).

food more readily available where it was not before, it could come with higher prices for some food.

Fifth, food prices are more un-stable in countries that restrict trade than in countries with open borders.³⁴ Studies in Africa have shown, for example, that prices for maize and cassava fall significantly when there are open borders.³⁵ Regional trade would be enhanced through removal of import and export bans³⁶ as well as price controls.³⁷ This would in turn help to ease global food price volatilities³⁸ as well as encourage higher agricultural production for intra-African imports.³⁹ In addition, competitive high quality transport and logistics services, (such as ware-housing, customs clearing and freight forwarding), may help lower transport costs and facilitate removal of unnecessary checkpoints since these costs and their attendant delays significantly reduce intra-regional trade.⁴⁰

Sixth, restrictive rules of origin and the highly segmented food and agricultural markets in Africa can be overcome through enhanced intra-regional trade. Rules of origin are important in intra-African trade because they determine whether or not a good receives preferential treatment with a free trade area or a customs union. Rules of origin may for example specify the minimum percentage of the value a good that must be added for a good to qualify for preferential treatment within a Free Trade Area. Where such rules are restrictive, they restrict trade and discriminate against goods from non-members of such a Free Trade Area. Restrictive rules of origin in food and agricultural products may shut out cheaper food sources and therefore undermine the ability of individuals and groups to have access to affordable food.

³⁴ Africa Can Help Feed Africa: Removing Barriers to Regional Trade in Food Staples." Poverty Reduction and Economic Management: Africa Region. The World Bank 32 (2012)

³⁵ P.A. Dorosh, S. Dradri and S. Haggblade, "Regional Trade, Government Policy and Good Security: Evidence From Zambia," 34 Food Policy, 350-366 (2009)

³⁶ Gillson, Ian, and Amir Fouad, eds. 2015. Trade Policy and Food Security: Improving Access to Food in Developing Countries in the Wake of High World Prices. Directions in Development. Washington DC: World Bank. 178

³⁷ Price controls are sometimes intended to benefit urban consumers or to release unwanted stocks. This creates unpredictability for farmers who then tend to diminish their productive capacities when governments lower prices. Thus being wary of government's subsidizing food, farmers reduce production and this in turn adversely affects food security. See "Africa Can Help Feed Africa: Removing Barriers to Regional Trade in Food Staples." Poverty Reduction and Economic Management: Africa Region. The World Bank, 7 (2012); World Bank, "Using Trade Policy to Overcome Food Insecurity" Global Monitoring Report: Food Prices, Nutrition and the Millennium Development Goals, 127 (2012)

³⁸ "Africa Can Help Feed Africa: Removing Barriers to Regional Trade in Food Staples." Poverty Reduction and Economic Management: Africa Region. The World Bank, 32 (2012)

³⁹ For example, Uganda's removal of export restrictions on agricultural products has resulted in higher agricultural production for export particularly to Kenya, see World Bank, "Using Trade Policy to Overcome Food Insecurity" Global Monitoring Report: Food Prices, Nutrition and the Millennium Development Goals, 127 (2012)

⁴⁰ Id. at 28

Obligations and Commitments

It is important to emphasize that paying particular attention to agriculture in the negotiations of the CFTA is supported by the already declared goals of the African Union in a broad range of commitments endorsed by its highest decision making body, the Summit, but also endorsed in broad consultations across the continent. These commitments are eliminating hunger, achieving food security and promoting regional trade in agriculture They are contained in Agenda 2063, the AU's 50 Year Vision. ⁴¹ The Framework Document and Popular Version of Agenda 2063 was adopted at the Summit of the African Union in January 2015.⁴² In addition, the African Charter on Human and Peoples' Rights, particularly as interpreted by the African Commission on Human and Peoples' Rights supports these goals as well.

These objectives of eliminating hunger, achieving food security and promoting regional trade in agriculture are also consistent with the interpretation of the African Charter on Human and Peoples Rights by the African Commission on Human and Peoples' Rights which has read the Charter to incorporate the right to food.⁴³ The Charter on Human and Peoples Rights has been signed and ratified by 53 of the African Union's 54 Members.⁴⁴ In addition, Article 14 of the African Charter on the Rights and Welfare of the Child explicitly guarantees the right to nutritious food and safe drinking water. Notably, Agenda 2063 endorses "the full implementation of the African Charter on the Rights of the Child."⁴⁵ In addition, the right to food is guaranteed in Article 11 of the International Covenant on Economic, Social and Cultural Rights, (ICESCR), which provides that everyone is guaranteed "an adequate standard of living for himself and

⁴¹ Agenda 2063 has been formulated through an inclusive and participatory process and is informed by the Constitutive Act of the African Union; the African Union Vision; the 8 Priority Areas of the Solemn Declaration; African Aspirations for 2063; Regional and Continental Frameworks and Member States National Plans.

⁴² Decisions, Declarations and Resolutions, Assembly of the Union, Twenty-Fourth Ordinary Session, 30-31st January 2015, Addis Ababa, Ethiopia, Assembly/AU/Dec.565 (XXIV) available at http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20546%20-%20568%20%28XXIV%29%20_E.pdf

⁴³ Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (where the Commission found the right to food is implicitly recognized under the African Charter's right to life, health and the right to economic, social and cultural development on the premise that the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation.

⁴⁴ Only South Sudan, which became an independent country in 2011, has not signed and ratified the African Charter on Human and Peoples Rights.

⁴⁵ African Union, Agenda 2063, Popular Version Final Draft, September 2015 at paragraph 54 (noting that Africa's Agriculture will be modern and productive, using science, technology, innovation and indigenous knowledge.)

his family, including adequate food, clothing and housing, and to continuous improvement of living conditions.” Forty-eight Members States of the African Union have ratified the ICESCR.⁴⁶

The United Nations Special Rapporteur to Food has defined the right to food as the right to “have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective fulfilling and dignified life free of fear.”⁴⁷ According to the Committee on Economic, Social and Cultural Rights in General Comment No. 12, States have an obligation to respect existing access to adequate food and not to take part in restricting such access; obligation to take measures to ensure that enterprises or individuals do not take any measures to deprive individuals of access to adequate food; the obligation to fulfill the right to food by proactively engaging in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security and the obligation to make sure that those unable to enjoy the right to adequate food are provided with food.⁴⁸

Preliminary Recommendations

Negotiating ambitious liberalization commitments will require coordination between trade and agriculture ministries at the national, sub-regional and regional levels. Agriculture has a prominent place within the CFTA. It will require the early involvement of trade and agricultural officials in order to ensure that the CFTA takes into account the centrality of agriculture in African economies. If ambitious liberalization commitments in agriculture are negotiated, then flexibility and special and differential treatment would be necessary to guarantee that these commitments in agriculture do not undermine food and livelihood security or rural development of low-income, resource poor farmers. Thus, a Special Safeguard Mechanism could be used to support ambitious market opening. Liberalization commitments could also be limited to products essential for food security or

⁴⁶ Claiming Human Rights, Guide to International Procedures Available in Cases of Human Rights Violations in Africa available at <http://www.claiminghumanrights.org/icescr.html> The latest African State to ratify the ICESCR is South Africa, see NGO Coalition for the OP-ICESCR, “South Africa Ratifies the ICESCR,” January 10, 2015 available at <https://www.escr-net.org/node/365752>

⁴⁷ UN Special Rapporteur on the Right to Food, available at <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx>

⁴⁸ Committee on Economic, Social and Cultural Rights, General Comment 12, May 1999.

products otherwise already enjoying very low tariffs. This would give traction to liberalization commitments.⁴⁹

Some of the important questions negotiators could consider include what products qualify for the Special Safeguard Mechanism; what criteria that would be used by an AU member to trigger the mechanism (for example would it be based on volumes or prices or a combination of the two)⁵⁰ and the remedies that it would create. A Special Safeguard Mechanism would allow countries to use it to stabilize domestic prices when faced with import surges or price depressions. The negotiations would examine ways to prevent trade diversion following the adoption of a Special Safeguard Mechanism. Here it is important to note the CFTA should avoid the pitfalls arising from the Special Safeguard Mechanism that led to the failure of the Tripartite FTA.

Another type of flexibility that could be considered to ensure food security is public stockholding. In the WTO Ministerial Conference in Bali, an agreement was reached to allow developing country members to pursue public stockholding programs for food security with respect to primary agricultural products that are the predominant staple in the traditional diet of a developing country member.⁵¹

⁴⁹ Chatterjee, Bipul and Sophia Murphy, “Trade and Food Security”, E15Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2013, www.e15initiative.org/. Notably, the Food and Agricultural Organization (FAO) has argued in favor of regional trade in agricultural products that constitute a significant weight in Africa’s food basket See FAO, Towards an African Common Market for Agricultural Products, 2008. FAO defines these foods as to Africa’s priorities in improving food security, livelihoods and rural development

⁵⁰ If it is volume based, then there might be a measure of volume of imports during any year, (e.g. based on total volume of imports, their share in total domestic consumption and growth in domestic consumption), when it exceeds a certain percentage of base imports which would then trigger imposition of an additional duty within agreed limits for example applied tariffs. This would give a net-food importing country the ability impose its applied duty plus the safeguard remedy.

⁵¹ Public Stockholding for Food Security Purposes – Ministerial Decision – WT/MIN(13)/38 - WT/L/913

Second Risk Area

Ensuring that regional Integration produces good quality Decent Work and good quality Jobs and expands Trade in Services

Potential Risk

That the commitments in the CFTA may undermine or eliminate existing decent jobs and/or fail to produce good quality and secure jobs that can provide adequate incomes and benefits that would give individuals and families social protection from hunger and poverty. This is particularly so because contemporary economic reform orthodoxies committed to market reform, including those of trade liberalization, come with a vision of flexible labour markets that give workers little or no choice in accepting or inducing work irrespective of the terms such work offers.⁵²

Labour market flexibility often comes with reduced job security and subjects labour and work to conditions generated by market forces such as pensions and collectively bargained for terms such as minimum wages and other terms and conditions of work. This would be inconsistent with the goals the African Union has set in the Agenda 2063 for Sustainable Development, the African Union's Agenda 2063 as well as the right to work as guaranteed in the African Charter on Human and Peoples' Rights as well as in the International Covenant on Economic, Social and Cultural Rights as illustrated below in the discussion on commitments and obligations. It would further run contrary to the African Union Members' commitments undertaken as ILO Members, through ratified as well as the ILO's 1998 and 2008 Declarations.

Background

The inclusion of agriculture in CFTA negotiations will focus attention on a sector that absorbs almost half of the workforce in Africa.⁵³ Trade integration in agriculture for countries with a large agricultural economy is more likely to experience a much more substantial immediate employment effect than countries with a 'regional comparative advantage in manufacturing or mineral fuels.'⁵⁴ Bringing agriculture to the center of the negotiations will therefore likely yield important dividends for food security, employment and structural transformation of African

⁵² See Kerry Rittich, "The Right to Work and Labour Market Flexibility: Labour Market Governance Norms in the New International Order," in Virginia Mantouvalou, (ed.) *The Right to Work: Legal and Philosophical Perspectives* 315 (2015)

⁵³ See ILO Convention No. 129 on Labor Inspection; ILO Convention Labor Convention No. 11 on the right of association and ILO Convention No. 99 on minimum wage fixing.

⁵⁴ Erik Von Uexkull, "Regional Trade and Employment in ECOWAS," in OCED, *Policy Priorities for International Trade and Jobs*, 423 (2012)

economies particularly if accompanied with value-adding agricultural production as we saw above. More openness to regional trade in agriculture and for goods and services should be designed to help unlock Africa's production patterns while impacting growth positively and therefore likely resulting in increased employment. The goal of the CFTA process in short should be to translating the growth created by integration into decent jobs.⁵⁵

High value employment is important to the realization of the social dimensions of the African Union's Agenda 2063.⁵⁶ These goals include: poverty eradication through investing in skills, improvement of incomes and creating jobs and providing basic necessities of life.⁵⁷ They are also reflected in National Employment Policies adopted by African countries. Commitments made in various parts of the CFTA could help meet these goals of creation of decent jobs through education, protection of worker rights and in general to heightening employment standards while strengthening labour market institutions and labour unions.

In addition, the African Union's Specialized Committee on Social Development, Labour and Employment has embraced the International Labour Organization's Social Protection Floor approach.⁵⁸ The Social Protection Floor Approach was developed pursuant to the adoption of a new Recommendation 202 of the International Labour Organization Conference in 2012. The objective of social protection floors is inter alia "to promote productive economic activity and entrepreneurship, with sustainable enterprises and access to decent employment opportunities."⁵⁹ Social protection floors aim to ensure that no one is living below a certain income level

⁵⁵ Economic Commission for Africa and African Union, *Economic Report on Africa 2013: Making the Most of Africa's Commodities: Industrializing for Growth, Jobs and Economic Transformation*, pp. 61–66 (Addis Ababa, 2013)

⁵⁶ African Union, *Agenda 2063 (Popular Vision)* aims to "guarantee the high standard of living as a right, An Africa of 2063 will be characterized by the fact that all its citizens would have affordable social security and where social protection is extended to all vulnerable sections of society. All its citizens shall be free from fear and want, and all public facilities and services will have provisions for people with disabilities. The Africa of 2063 will be a compassionate and caring society." See also First Session of the Specialized Committee on Social Development, Labour and Employment (STC-SDLE-1_ Addis Ababa, Ethiopia, 20-24 April 2015 (Draft Concept Note on the Theme Social Protection for Inclusive Development) available at <http://sa.au.int/en/sites/default/files/Draft%20Concept%20Note-%201STC-2015-English.pdf>

⁵⁷ African Union, *Agenda 2063 (Popular Vision)*

⁵⁸ See African Union to Focus on Social Protection for Inclusive Development, April 20, 2015 available at http://www.ilo.org/addisababa/media-centre/WCMS_361736/lang--en/index.htm

⁵⁹ Report of the Advisory Group, *Social Protection Floor For a Fair and Inclusive Globalization*, xxiii (2011). The ILO Global Jobs Pact defined social protection floor to include "access to health care, income security for the elderly and persons with disabilities, child benefits and income security combined with public employment guarantee schemes for the unemployed and working poor," ILO, *Recovering Form the Crisis: A Pact for Jobs*, 6 (2009) ILO Convention 122 makes provision to enable States to enact employment policies that promote job creation.

and that everyone should have at least access to basic social services⁶⁰. African countries have embraced many of the elements of social protection systems in their National Employment Policies.⁶¹

Social protection floors are particularly important in Africa for a number of additional reasons. First, trade diversification arising from liberalization is unlikely to be high in low-income African countries than it has been in medium income countries. Second, trade liberalization commitments may lead to decreased wages in the areas with substantial tariff reductions. Third, workers displaced by trade liberalization commitments may not be readily absorbed in other gainful employment, and may need adjustment assistance. This means that trade adjustment mechanisms and protection mechanisms and systems for employment must be considered alongside ambitious liberalization commitments.

Trade in services has increasingly become a major employment sector.⁶² African countries have ample opportunities for liberalizing trade in travel and transportation services in particular. Services have a 29.5% share of employment in Sub-Saharan Africa.⁶³ On a global level, services are the largest employer for women.⁶⁴ In North Africa, services provided 52.5% employment for women.⁶⁵ Negotiators will consider how to the CFTA can bring more women into high productivity services away from non-tradable, low productivity services such as small retail and personal services. In the transport sector, logistics and distribution services are likely to generate an increased number of new jobs as well as growth. These services are crucial for Africa's agriculture, including in agri-business and food trade. Thus commitments in the CFTA to integrate agriculture with a view to creating regional value chains would be strongly complemented by commitments in the services sector that would help in the provision of value addition and

⁶⁰ The social protection floors are a two-dimensional concept to ensure a "nationally-defined sets of basic social security guarantees". With these guarantees everybody should be protected against certain risks and vulnerabilities, over the life cycle. The ILO proposes to include the following guarantees in national social protection floors: 1. access to essential health care, including maternity care; 2. basic income security for children, providing access to nutrition, education, care and any other necessary goods and services; 3. basic income security for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; 4. basic income security for older persons. See, ILO, Social Protection Floors, available at <http://www.ilo.org/secsoc/areas-of-work/policy-development-and-applied-research/social-protection-floor/lang--en/index.htm>

⁶¹ For example, see Ministry of Employment and Labour Relations (Ghana), National Employment Policy (2014) (noting that the objective of the policy is "to adopt an inter-sectoral and integrated approach toward achieving full, decent, productive and freely chosen employment for all Ghanaians who are able and willing to work, thereby improving the conditions within the framework of equity, security and dignity," id. at 2 and 30–32 (summarizing principles underlying policy to include equity, adherence to the Constitution and International Labour Standards); also examining gender and decent work, id. at 20–21)

⁶² UNCTAD, The Impact of Trade on Employment and Poverty Reduction, TD/B/C.I/29 at page 14 (April 8, 2013)

⁶³ UNCTAD, The Impact of Trade on Employment and Poverty Reduction, TD/B/C.I/29 at page 14 (April 8, 2013)

⁶⁴ ILO, Global Employment Trends 2013: Recovering From the Second Jobs Dip (2013)

⁶⁵ UNCTAD, The Impact of Trade on Employment and Poverty Reduction, TD/B/C.I/29 at page 14 (April 8, 2013)

'linkage development' with other economic sectors.⁶⁶ In addition, the large informal services sector in Africa (which constitutes 50-80% of total employment) is crucial for "raising productivity and the contribution of the services sector to growth and employment."⁶⁷

Africa's services sector has a lot of economic potential especially because it is responsible for almost 'half of the continent's output'.⁶⁸ It has important employment implications, especially in countries where services account for as much as two thirds of the workforce.⁶⁹ The services sector accounted for exports and imports totalling \$271 billion in 2012.⁷⁰ The service sector also serves as a "cushion for the national economy at times of global economic shocks."⁷¹

But there is still an opportunity to generate even more growth, and trade and employment opportunities.⁷² For example, "logistics and distribution could greatly benefit Africa's agriculture, including agribusiness and food trade, as well as manufacturing."⁷³ It is therefore recommended that the CFTA focus on "how to move towards the provision of more sophisticated services where there is greater value addition and which offer opportunities for technology transfer and linkage development with other sectors of the economy."⁷⁴

Creating more sophisticated services that are effectively regulated and moving services into the formal sector can help Africa address some of the infrastructure services constraints it currently faces and "capitalize on opportunities for growth through international trade".⁷⁵ But achieving these goals will require the CFTA to focus on building "complementary relationships between the services sector and other sectors of the economy especially manufacturing."⁷⁶ Services and industries that have positive spillover effects for individual countries should also be a point of focus.⁷⁷ Botswana is a good example. It has "generated higher benefits from their diamond industry by promoting downstream linkages with cutting and polishing activities."⁷⁸

⁶⁶ UNCTAD, Economic Development in Africa: Unlocking the Potential of Africa's Services Trade for Growth and Development, 2-3 (2015)

⁶⁷ Id. at 21

⁶⁸ Economic Development in Africa: Unlocking the Potential of Africa's Services Trade for Growth and Development. Rep. 2015. Geneva: United Nations, 2015. Print. (2).

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id. at 115.

⁷² Id. at 2.

⁷³ Id.

⁷⁴ Id. at 2–3.

⁷⁵ Id. at 48.

⁷⁶ Id. at 118.

⁷⁷ Id.

⁷⁸ Id.

The CFTA could help catalyse proactive government policies that support the services sector so that it can produce more decent jobs.⁷⁹

Obligations and Commitments

Article 15 of the African Charter on Human and Peoples' Rights guarantees the right to "work under equitable and satisfactory conditions, and equal pay for equal work." Article 6 of the International Covenant on Economic, Social and Cultural Rights recognizes the right to work which "includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." The 2016-2019 MoU between the ILO and the United Nations Economic Commission for Africa commits the United Nations Economic Commission for Africa "to develop sustainable labour statistics in youth employment, social protection and labour migration in Africa."⁸⁰

The right to work obliges States to respect, protect and fulfil each person's access to work to earn one's living and the obligation to guarantee that this work can be freely chosen or accepted. With respect to CFTA negotiations, the duty to respect the right to work means negotiators should ensure that the commitments made do not destroy opportunities for individuals to earn their living. The obligation to fulfil the right to work means that CFTA commitments must provide individuals without work, the opportunity to earn their living through gainful employment. Thus, to fulfil this right to work, states are required to provide, facilitate, and promote the right in legislative, administrative, budgetary, judicial and by other means.⁸¹ For those whose work is likely to be adversely affected by trade commitments, States are obliged to ensure access to vocational guidance and training that would enable them to get alternative employment.

The creation of decent jobs is consistent with the African Union's Agenda 2063, the National Employment Policies of African governments, the Agenda 2063 Sustainable Agenda for Sustainable Development and the Sustainable Development Goals with respect to decent work, as well as their endorsement of a social protection floor approach to globalization.

Commitments made to liberalize services such as electricity, transport, communications, health education and water ought to be done in a way that is consistent with the respective rights to movement, health, education and water particularly in ensuring the availability and affordability of these services. They should also be consistent with the rights of governments

⁷⁹ Id. at 118–120.

⁸⁰ See ILO, ILO and UNECA sign a new MoU to support Labour statistics in Africa, February 10, 2016 available at http://www.ilo.org/addisababa/media-centre/pr/WCMS_450099/lang--en/index.htm

⁸¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 18 The Right to Work, 6th February 2006.

to regulate in these policy areas. Further such commitments ought to take into account disparate gender impacts so that they can help to redress discrimination in accessing these essential services.

Preliminary Recommendations

The CFTA should adopt strategies to create decent work and quality jobs, create social protection floors, raise productivity and the contribution of the services sector to growth and employment.

To meet the criteria of a strong commitment to liberalization while maximizing the opportunity for creating decent jobs, CFTA negotiators should guard against promoting flexible job markets which have been associated with violations of the right to work and in particular with reducing social protection systems such as unemployment benefits and social safety nets for the poor that have long been associated with work. To ensure workers' rights are not violated, CFTA negotiators should therefore aim:

- Not to reduce the scope of employment regulation which would make it easier to hire and fire workers;
- Not to introduce flexible part-time and fixed term contracts which would deny workers the opportunity to earn benefits such as healthcare paid by their employers;
- Not to consider reducing or lower the minimum wage for new entrants which would drive down worker wages and drive up profits for employers;
- Not to allow or encourage employers to shift work between periods of slow demand and peak periods since this would reduce employer obligations on overtime pay and in the process reduce employment security;
- Not to ease regulations on firing by cutting severance payments, easing or eliminating notice, and increasing the number of 'fair causes' for dismissal.

Negotiators would be encouraged instead to ensure a commitment to the International Labour Organizations conventions and recommendations including the core labour standards, as well as with international human rights with respect to prohibition of discrimination which is also prohibited by the African Charter on Human and Peoples' Rights; enabling freedom of association and collective bargaining. These rights are also protected by the African Charter on Human and Peoples' Rights, and prohibiting child labour which is also prohibited by the African Charter on the Welfare of the Child. These goals are consistent with the World Commission

on the Social Dimension of Globalization to the effect that, the “rules of the global economy should be aimed at improving livelihoods, security, and opportunities of people, families and communities around the world.”⁸² Although flexible part-time and fixed term contracts may seem consistent with the care responsibilities women undertake, this flexibility does not guarantee good quality decent jobs because they come with loss of benefits such as health care, pension and unemployment insurance.⁸³

In addition to creation of decent work and quality jobs, the CFTA would require negotiators to pay particular attention to making commitments that complement regional trade integration to help individuals adapt their skills⁸⁴ to overcome the changes new regional trade rules would: supplement rather than undermine African Union members efforts in building social protection systems as embodied in National Employment and other policies so that individuals have sufficient income security sufficient to live; create productive decent employment that would help individuals exit from poverty; create jobs for the youth and women in particular as a development priority;⁸⁵ create well-paying jobs in the exporting manufacturing sector and facilitate the creation of links between services sector and other sectors like manufacturing.

Decent jobs require dignified working conditions including the right to freely chose and accept work; adequate remuneration; equal pay for equal work; equal treatment and the right to safe and hygienic working conditions.

To create decent jobs, trade negotiators should seek to expand trade in services by agreeing to the national treatment (non-discriminatory treatment) of African Union member service providers undertaken through a positive list approach. Such an approach would allow countries to list only those service sectors they were willing to liberalize. By contrast, a negative list approach might be detrimental to employment in sectors that a government fails to list and in which competition spurred by liberalization might result in job losses. A positive list approach could also be complemented with an inbuilt review process that allows for roll-back if there are adverse impacts such job losses.

⁸² World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All*, Report of the World Commission on the Social Dimension on Globalization, 143 (2004)

⁸³ See UN Working Group on Discrimination Against Women in Economic and Social Life

⁸⁴ LO and UNCTAD (2014) on “Transforming economies – making industrial policy work for growth, jobs and development”. One of the authors and editors, Irmgard Nübler from the ILO, has written a highly interesting article on skills.

⁸⁵ UNECA, AUC & AfDB, *African Regional Report on the Sustainable Development Goals: Summary page 8* (Addis Ababa, 2015). Youth unemployment in Africa is the highest of all the regions in the world and for women this rate is nearly double that of men, see John Anyanwu, *Does Intra-African Trade Reduce Youth Unemployment in Africa?* Working Paper Series No. 201, African Development Bank Group, Tunis, 11–12 (2014)

Third Risk Area Informal Services Sector faces Insecurities in terms of Freedom of Movement

Potential Risk

The potential risk identified here is a failure of the CFTA to deal with the insecurities that limit freedom of movement of individuals in the informal services sector. This includes small traders and temporary migrant workers who currently rely on time-limited individual work contracts or service contracts that limit their ability to gain employment. The CFTA negotiations will not cover measures to facilitate the movement of African people engaging in informal services and trade (or, indeed, business persons).

Background

In West Africa, member states have adopted a West African Passport. In East Africa, Common Market commitments allow the free movement of persons and workers. Since the CFTA aims to build on the progress achieved in Africa regional economic communities, negotiations could use these existing commitments as a starting point. Ensuring commitments in the CFTA include the large informal services sector would strongly contribute to employment creation for temporary migrant workers (for example skilled or semi-skilled) who currently rely on time-limited individual work contracts or service contracts.⁸⁶

Migrants face vulnerabilities such as exorbitant recruitment fees paid to middlemen; debt bondage; dangerous border crossings; and trafficking which comes with violations of their rights. That is why it is important for trade agreements to incorporate the protection of the right of movement for those engaged in informal labour. Another way of achieving this goal is to pursue such measures in parallel with trade agreements, if they cannot be incorporated into the agreement itself. Trade can be a catalyst for addressing empowering migrants by ensuring options for legal migration that is safe and orderly so that they can successfully navigate the challenges they face in the informal economy.

Such legal migration is consistent with the goals of service trade liberalization of transferring knowledge, skills and ideas across countries.

⁸⁶ Barbara Stilwell, Diallo Khassoum, Pascal Curn and Mario Dal Poz, “Developing Evidence-Based Ethical Policies on the Migration of Health Workers: Conceptual and Practical Challenges,” *Human Resources for Health*, 8th ser. 1–13 (2003)

Migration is an integral part of economic processes, including those involving international trade and ought to be integrated into negotiations in parallel with the CFTA. By improving the conditions under which migrants move, live and work within the countries of the CFTA, the agreement would be consistent with the African Union's anti-poverty agenda and the Sustainable Development Goals of incorporating migration into trade and development policy making and implementation.

The CFTA should follow the recent trend of seeing labour rights as an important complement to trade liberalization. For example, the 2012 US-Colombia Free Trade Agreement (FTA), incorporated rights of unions and union members as a result of the violence that union members and leaders in Colombia have faced. The US-Colombia FTA also includes a 'Labour Action Plan' that commits the Colombian government to a broad range of obligations including protecting trade unionists, prosecuting violations of labour rights, reforming labour laws, increasing the number of inspectors and judicial officers handling labour matters. In addition, the FTA sets up a bilateral follow-up mechanism.

The 2012 the US-Panama FTA includes commitments to labour protection in Export Processing Zones such as protecting the right to strike, eliminating restrictions on collective bargaining as well as an exemption that allowed companies to use temporary workers for three years. In the Panama's Baru Special Economic Zones, there are similar commitments to eliminate restrictions on collective bargaining for companies less than six years old; eliminate an exemption that allowed companies to use temporary workers for three years, while companies less than two-years old were required to eliminate restrictions on collective bargaining. Quite significantly, these labour obligations will be subject to the same level of accountability and dispute settlement as commercial obligations. Further, available remedies for violations of labour obligations include trade sanctions and fines.⁸⁷

Obligations and Commitments

The freedom of movement is protected in Article 12 the African Charter on Human and Peoples' Rights and in Article 12 of the International Covenant on Civil and Political Rights. Article 12(2) protects the right of every individual to travel to another country. Under the Covenant, this right to leave the territory of one State to another "is not dependent on any specific purpose or on the time the individual chooses to stay outside the country."⁸⁸ As noted above,

⁸⁷ For the experience of the European Union, see Lorand Bartels, Human Rights and Sustainable Development Obligations in EU Free Trade Agreements (September 1, 2012). University of Cambridge Faculty of Law Research Paper No. 24/2012. Available at SSRN:<http://ssrn.com/abstract-2140033> or <http://dx.doi.org/10.2139/ssrn.2140033>

⁸⁸ United Nations Human Rights Committee, General Comment No. 27 (Freedom of Movement), (Page 3) November 1999

some of Africa's regional economic communities have permitted the free movement of persons and labour. For example, Article 7 of the Protocol on the Establishment of the East African Community Common Market guarantees the free movement of persons who are citizens of the other Partner States within their territories.⁸⁹ Article 9 allows for freedom of movement using common standard travel documents while Article 10 allows the free movement of workers with the entitlement of applying for and taking up employment anywhere within East Africa together with the attendant rights of freedom of association and collective bargaining. The ECOWAS Free Movement Protocol guarantees at Article 2(1) citizens of ECOWAS States the "right to enter, reside and establish (businesses) in the territory of" other ECOWAS Member States.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (UN Migrants' Convention), provides all migrant workers the following: Right to leave and return to the State of origin (Article 1); Right to life (Article 9); Prohibition of cruel, inhuman or degrading treatment (Article 10); Prohibition of slavery or servitude and of forced or compulsory labour (Article 11); Freedom of thought, conscience and religion (Article 12); Right to hold and express his opinion (Article 13); Respect of honour, of dignity and of privacy (Article 14); Prohibition of arbitrary depriving of property (Article 15); Necessity to ensure an equitable procedure of recourse to migrant workers and members of their family (Article 16–20); Prohibition of arbitrary expulsion (Article 22) and Equal treatment to nationals of the State of employment (Article 25–28).

The ILO's Domestic Workers Convention of 2011 extends the labour and social protections available to workers in other occupations under a variety of instruments to domestic workers defined as workers working in private homes. These protections include regulations of working time, safeguards against forced labour and restrictions on movement, maternity protection, effective access to courts and minimum wage. Women comprise the overwhelming share of domestic workers. In some economies such as South Africa, domestic workers double as farm labourers.⁹⁰ Since many farm labourers are also migrant workers, it is important to take into account the rights of domestic workers in negotiating the CFTA or in relevant parallel processes

⁸⁹ The East African Court of Justice has invalidated Ugandan immigration rules for their inconsistency with the East African Community's freedom of movement rules, see *Muhochi v Attorney General of Uganda*, Ref. No. 5 of 2011, EACJ First Instance Division, Judgment, May 17, 2013. In West Africa, the ECOWAS Court of Justice has applied analogous provisions of ECOWAS law to reach a similar conclusion, see *Balde v Republic of Senegal*, ECW/CCJ/APP/22/12, Judgment, Feb. 22, 2013. For an excellent analysis, see Laurence R. Helfer, "Sub-regional Courts in Africa: Litigating the Hybrid Right to Freedom of Movement," *iCourts Working Paper Series*, No. 32 Duke Law School Public Law & Legal Theory Series No. 2015-43

⁹⁰ http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf at page 44

such as the AU process on labour movement. The increasing inclusion of labour provisions in regional and bilateral trade agreements provides an opportunity for the CFTA to incorporate labour provisions that reflect African priorities such as those relating to migrant and domestic workers.

Preliminary Recommendations

Making commitments that incorporate business persons in the informal sector would help build more and better opportunities for the large numbers of skilled and semi-skilled workers in the services sector. Such commitments would be consistent with the recognition of the rights enumerated above. The preliminary recommendation here is to expand the scope of movement of business-persons to include the informal labour as well as the services sector as a strategy of employment creation for small traders and migrant workers. As an example, Uganda has made extensive protections for low skilled workers within East Africa in what are known as Mode 4 commitments in its East African Community Common Market Protocol.⁹¹ Uganda used the ILO's International Standard of Classification of Occupations, (ISCO), because unlike the WTO's General Agreement of Trade in Services classification system, it provides the most ideal way to facilitate liberalization of trade in services for low-skilled labour.⁹² Quite significantly, the EAC's Common Market (Free Movement of Workers) Regulations are more generous to families than those of the WTO because they bring within their scope spouses and children of workers.

Commitments on movement of persons ensure transparency and efficiency in application processes for temporary movement of migrant workers and small traders. This goal is both an employment expansion strategy as well as a response to the massive wave of young African people who are leaving the continent for Europe and elsewhere on dangerous voyages for search of better opportunities. The East African Community has already initiated a pro-small trader initiative in goods called the Simplified Trade Regime for goods worth less than the equivalent of USD 30. COMESA has had success with a similar initiative. The CFTA could be designed to incorporate a similar system for trade in services for small traders.

Africa could build on such commitments and help facilitate elimination stringent visa regulations that restrict both temporary employment across national borders and movement of informal workers. This could be achieved through an African agreement on Labour Migration.

⁹¹ Joy Kategekwa, *Opening Markets for Foreign Skills: How Can the WTO Help – Lessons from the EU and Uganda's Regional Service Deals*, 203-204 (2014)

⁹² *Id.* at 204

An agreement could guarantee the rights to enter and reside in another country; the right to equal treatment; the right to form labour unions and the right to collectively bargain wages. This agreement should aim to improve efficiency and transparency in the application for permits for temporary movement. One proposal is the establishment of a Single Window visa system in which applications for visas are submitted, conserved and approved. The system would provide information on all categories of permits required, documentation required, processing times and fees and whether or not extensions were possible.

In the formal sector, an agreement could be negotiated to establish norms and standards to facilitate recognition of academic degrees and national requirements in degrees, diplomas and other qualifications with a view to encourage mobility.

To ensure that the CFTA is not used as a justification to depart from internationally protected labour rights or rights guaranteed under national law and discriminate against non-national workers in particular, a non-derogation clause should be included in the CFTA. Non-derogation clauses that are increasingly used in FTAs, could for example provide that each African Union Member State shall strive to ensure that it does not waive or derogate from adherence to international labour laws pursuant to implementing the provisions of the CFTA.

Countries that want flexibility in their service commitments such as Least Developed Countries, (LDCs), need longer phase in periods to come into full compliance with CFTA obligations. Consistent with their lower level of economic development, LDCs could also be entitled to make lower levels of commitments. This is already the norm in some regional economic communities such as under Article 11 of the COMESA Regulations on Trade in Services.⁹³

⁹³ For more on this see Joy Kategekwa, *Options and considerations for draft modalities for the CFTA services negotiations: Lessons from the Frontline and Back Office*, paper presented at the Workshop on Trade in Services Modalities for CFTA Negotiations, Cape Town, South Africa, 24 November 2015.

Part Three

Institutional and Structural Mechanisms under the CFTA for Monitoring, Remedies and Social Protection

The availability of remedial regimes for violations of human rights has received renewed emphasis. For example, the Principles for Responsible Contracts contemplates that businesses should have in place grievance mechanisms for non-contractual parties.⁹⁴ In addition, as stated above, modern trade agreements now contain enforcement mechanisms for violations of labour rights. Indeed, international human rights treaties provide that victims of violations have a right to seek and to obtain effective remedies.⁹⁵ Promoting popular participation of individuals and communities through consultations in their formulation as well as through opportunities to raise human rights concerns during their implementation can help the progressive realization of human rights as well as the accountability of governments for the obligations they assume under trade and investment treaties.⁹⁶

This part of the scoping study outlines three institutional and structural mechanisms that make it more likely that those adversely affected by the trade commitments in the CFTA can have their rights vindicated. A non-tariff barrier monitoring mechanism, expanding the monitoring mandate of the African Peer Review Mechanism to include CFTA impacts and compensatory and adjustment mechanisms, would do so through monitoring, providing remedies and social protection. These mechanisms would also be consistent with involving civil society in the implementation, monitoring and dispute settlement of the CFTA. Finally, these mechanisms would to a large extent ensure that the CFTA would be guided by considerations founded on human rights guarantees both under the African Charter on Human and Peoples' Rights as well as under international human rights treaties.

⁹⁴ Special Rep. of the Secretary General, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011) (by John Ruggie), available at <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf> (Principle 9 contemplates that business should have in place grievance mechanisms for non-contractual parties affected by a project). This Essay argues that one can go beyond Principle 9, which contemplates only non-judicial (operational level) relief mechanisms.

⁹⁵ For example, the Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art.2 (3), art 9(5) and 14(6)) and the African Charter on Human and Peoples' Rights (art. 21(2)).

⁹⁶ In General Assembly Resolution, "Globalization and Its Impact on the Full Enjoyment of All Human Rights," A/RES/57/205, the General Assembly reaffirmed "the commitment to creating an environment at both the national and global level that is conducive to development and to the elimination of poverty through, inter alia, good government within each country and at the international level, transparency in the financial, monetary and trading systems and commitment to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system."

The Non-Tariff Barrier Mechanism to anchor ambitious Liberalization of Trade in Goods

Proposal: To include a Non-Tariff Barrier Mechanism (NTB) to anchor liberalization of trade in goods and agriculture. This mechanism would supplement, rather than supplant the Monitoring and Evaluation Mechanism anticipated within the CFTA. Achieving the objective of a mutually beneficial trade agreement among Member States of the African Union and increasing trade among African countries by 50% will require removal of the extremely large number of non-tariff barriers. The inclusion of a Non-Tariff Barrier Mechanism will build on the progress made in Africa's Regional Economic Communities and expand the participation of ordinary traders in reporting Non-Tariff Barriers barring their ability to participate in intra-regional trade.

As part of the CFTA's goal of trade expansion, the negotiating mandate anticipates:

- Elimination of tariffs on intra-African Union trade and the enactment of a common tariff schedule and a set of regional rules of origin
- Elimination of Non-tariff barriers and Technical Barriers to Trade
- Harmonization of customs valuation rules and procedures
- Removal of Trade-distorting effects of sanitary and phytosanitary measures

To ensure the success of these goals particularly for the large informal and small scale business sector in Africa, the CFTA should include a Non-Tariff Barrier Mechanism.

NTBs are widely recognized as one of the most important impediments to trade integration in Africa.⁹⁷ These barriers include burdensome and costly customs procedures, import licensing procedures and charges, costly road-user charges, and sanitary and phytosanitary barriers.⁹⁸

The NTB Mechanism is an administrative strategy for monitoring, reporting, and removing NTBs. In the East African Community, the NTB mechanism was designed in a process that

⁹⁷ For example in East Africa, see East African Community, *The Second EAC Development Strategy 2001–2005*, at 12 (Apr. 24, 2001), http://www.eac.int/index.php?option=com_docman&task=doc_view&gid=3&Itemid=163 (identifying nontariff barriers such as administrative and bureaucratic inefficiencies standards and technical requirements as major impediments to trade in East Africa). The report further noted nontariff barriers could be more significant than tariffs as barriers to trade in East Africa. Id.

⁹⁸ Article 1 (Interpretation) of the East Africa Community Establishment Treaty defines nontariff barriers as "administrative and technical requirements imposed by a partner state in the movement of goods." EAC Establishment Treaty, at art. 1. The EAC Customs Union Protocol defines nontariff barriers as "laws, regulations, administrative and technical requirements other than tariffs imposed by a Partner State whose effect is to impede trade." EAC, Protocol on the Establishment of the East African Customs Union, at pt. A, art. 1 (Mar. 2, 2004) [hereinafter Customs Union Protocol].

involved key policymakers and heads of agencies responsible for enforcing trade-related requirements, on the one hand, and business associations and representatives of key businesses in the EAC, on the other.⁹⁹ These negotiations coincided with the coming into force of the Customs Market Protocol in 2005.¹⁰⁰ Soon thereafter, the East African Business Council, (EABC), forwarded the study to the EAC Council of Ministers, which adopted it in 2006.¹⁰¹ That same year, the EABC compiled the first inventory of NTBs in East Africa.¹⁰²

Under the NTB mechanism, each member state has established a National Monitoring Committee (NMC), which meets annually and reports to the Regional Forum on NTBs, which in turn meets quarterly.¹⁰³ In 2013, the twelfth Regional NTB Forum meeting was held.¹⁰⁴ In each EAC member country, there is both a public and private-sector focal point designed to work together toward the elimination of NTBs.¹⁰⁵

In East Africa, the removal of NTBs is a legally non-binding administrative mechanism. It establishes a coordination framework within which national institutions and officials in a variety of government departments responsible for facilitating intra-EAC trade¹⁰⁶ assume responsibilities for overseeing NTB elimination. The East African Business Council, its members, and the

⁹⁹ EAC, EABC & Simon Ngatia Ihigaa, *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC*, at 3 [hereinafter *Monitoring Mechanism*].

¹⁰⁰ See *Customs Union Protocol*, supra note 120, at art. 43 (stating the protocol will become effective “upon ratification and deposit of instruments of ratification with the Secretary General by all the Partner States”).

¹⁰¹ Nick Kimani, *Overcoming Non-Tariff Barriers to Regional Trade Through Stakeholder Forums: Normative and Empirical Dimensions*, 4, *African Economic Conference* (Oct. 28–30, 2013), <http://www.afdb.org/en/aec-2013/papers/paper/overcoming-non-tariff-barriers-to-regional-trade-through-stakeholder-forums-normative-and-empirical-dimensions-902/>.

¹⁰² EABC, *Non-Tariff Barriers*, <http://www.eabc.info/policy/non-tariff-barriers-ntbs> (last visited Feb. 25, 2015).

¹⁰³ See *Monitoring Mechanism*, supra note 121, at 18 (on annual meetings of NMCs). Kenya, Tanzania, and Uganda established National Committees in 2007 and Burundi and Rwanda in 2008. Capacity-building workshops were conducted. For a typical meeting where NMCs report to the Regional Forum, see EAC, *Report of the 16th EAC Regional Forum on Non-Tariff Barriers* (Dec. 9–11, 2014), <http://www.meac.go.tz/sites/default/files/Documents/NTB%20REPORT%20DEC%202014.pdf>.

¹⁰⁴ Outcome of the 12th EAC Regional Forum on NTBs, Rwanda National Monitoring Committee (Oct. 28, 2013), <http://nmcwanda.org/spip.php?article141>.

¹⁰⁵ Kimani, at 5. Since 2012, the EAC Secretary General has held annual forums for the private sector and civil society groups to engage with the work of the EAC. See EAC Secretariat, *Entebbe to Host 3rd EAC Secretary General's Forum for Private Sector and Civil Society in September 2014*, (Mar. 6, 2014) http://www.eac.int/news/index.php?option=com_content&view=article&id=1165:entebbe-to-host-3rd-eac-secretary-generals-forum-for-private-sector-and-civil-society-in-september-2014&catid=48:eac-latest&Itemid=69; see also EAC News Agency, *Uganda to Host Secretary General's Third Forum*, IPPNews Media (Mar. 9, 2014), <http://www.ippmedia.com/frontend/?l-65577> (The “Dialogue Framework Forum for Private Sector, Civil Society and other interest groups in the EAC integration process was endorsed by the EAC Council of Ministers at its 26th meeting in November 2012 in Nairobi, Kenya. The Forum is guided by the principles of cooperation for mutual benefit, trust, goodwill, active and constructive participation, inclusivity and respect for diverse views.”).

¹⁰⁶ These include customs and immigration officials, standard setting agencies such as bureaus of standards, plant and health inspectorates, revenue agencies, and trade and industry officials.

responsible organs of the EAC monitor and report to the EAC Council of Ministers on the progress made in the removal of NTBs. The NTB mechanism is therefore a forum for communication and dialogue to eliminate NTBs. It is a cooperative solution designed to provide a common pool of information and knowledge about NTBs among an otherwise disparate set of national and regional actors needed to remove NTBs.¹⁰⁷ A World Bank study showed that, between 2008 and 2009, the Kenya Private Sector Alliance had successfully negotiated the removal of several NTBs.¹⁰⁸

Three African Regional Economic Communities have developed an NTB Monitoring Mechanism. These are the East African Community, the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC). The mechanism facilitates the identification, reporting and monitoring of the elimination of NTBs in the three RECs. This mechanism includes an on-line Reporting and Monitoring Mechanism and a Short Messaging System (SMS) through which barriers can be reported on a cell phone. The Tripartite Free Trade Area Agreement includes a commitment to merge these mechanisms to cover the Tripartite Free Trade Area as a whole.

As the COMESA Business Council argues, the NTB mechanism “enables stakeholders to report and monitor the resolution of barriers encountered as they conduct their business in the COMESA, EAC and SADC regions.”¹⁰⁹ Since it is cell-phone and web-based, it can be used by a wide variety of stakeholders - economic operators, cross border traders, companies, government functionaries, academic researchers and other interested parties.¹¹⁰

The NTB Mechanism would therefore be consistent with the objectives of the CFTA insofar its adoption would:

- Create an opportunity for involvement of a broad cross section of traders including informal traders, women and other marginalized stakeholders in the CFTA to report

¹⁰⁷ The NTB Mechanism also aims at awareness creation among trade officials at the national level and calls upon EAC member states to allocate resources for eliminating NTBs.

¹⁰⁸ George Omondi, *Trade Experts Tackle Non-Tariff Barriers at Nairobi Forum*, *Business Daily* (Jan. 7, 2009, 9:00 PM GMT), <http://dev.bdafrica.com/rest-africa/policy-and-politics/financial-services/trade-experts-tackle-non-tariff-barriers-nairobi>.

¹⁰⁹ COMESA Business Council, *COMESA Non-Tariff Monitoring Mechanisms*, available at <http://www.comesabusinesscouncil.org/comesabusinesscouncil/?q=NTB%20Monitoring%20Mechanisms>

¹¹⁰ *Id.*

NTBs.¹¹¹ The participation and inclusion of people is recognized as a critical factor for success of the African Union's Agenda 2063;¹¹²

- Build upon already existing NTB mechanisms in regional economic communities;
- Help bring down NTB barriers and therefore reduce business costs and in the process help in trade liberalization across Africa's Regional Economic Communities for a broad cross-section of stakeholders;
- Be consistent with the letter and spirit of the African Charter on Human and Peoples' Rights that recognizes freedom from discrimination¹¹³; equality before the law¹¹⁴ and the protection of vulnerable groups;¹¹⁵
- Complement the participation and involvement of the people in the negotiations of the CFTA. This is already acknowledged with forums such as Civil Society Dialogue and Private Sector Forum/Ministerial Dialogue, (planned for October 2016), in the Indicative Roadmap for Negotiation and Establishment of the CFTA;
- Be consistent with the African Union Common Position on the Post-2015 Development Agenda commitment for participatory processes in development.¹¹⁶

Extending the Mandate of the African Peer Review Mechanism to Include Monitoring of CFTA Implementation and Impacts

Proposal: To add within the mandate of the African Peer Review Mechanism, a system to review, analyze and monitor all aspects of the implementation and impacts of the CFTA. The mechanism will provide members with an opportunity to make recommendations to the relevant African Union bodies – aimed at either improving the implementation of reviewed provisions, or improving the provisions themselves through re-negotiations particularly where they have adverse impacts.

¹¹¹ See CAADP Working Group on Non State Actor Participation, Guidelines for Non State Actor Participation in CAADP Processes, (Addis Ababa, January 2011) (noting the importance of targeting communication and consultation to marginalized stakeholders, id. at page 16). See also CAADP, AUC/NEPAD/RECs/CAADP Key Messages (Addis Ababa 2013) (noting the importance of multi-stakeholder participation, id. at page 2)

¹¹² African Union Commission, Agenda 2063: The Critical Factors for Success (Addis Ababa, October 2015) (listing participation, inclusion and empowerment as the third critical factor for the success of Agenda 2063)

¹¹³ African Charter on Human and Peoples' Rights, Article 2.

¹¹⁴ Id. at Article 3.

¹¹⁵ Id. at Article 18.

¹¹⁶ African Union, Common Position on the Post-2015 Development Agenda (Addis Ababa, January 2014) (id. at Para 99 on participatory processes)

The African Peer Review Mechanism is an "instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism."¹¹⁷

The importance of expanding the ambit of the African Peer Review Mechanism to monitor the implementation of the CFTA is demonstrated by the fact that it has been operational for several years now and it has won the confidence of African Union Member States. The experience and expertise it has developed will be critical in monitoring the commitments African Union Member States make in the first decade of the CFTA. Leaving that task to newly established committees within the African Union is likely to falter given their relative lack of resources, experience and stature among African Union Members. By contrast, the African Peer Review Mechanism has been well financed and it has established a highly visible profile given the involvement of former Heads of States at its apex. Its non-confrontational or non-adversarial approach has given it credibility that could easily be translated into monitoring the implementation of the CFTA. By doing so, the African Union Peer Review Mechanism would greatly complement the work of the CFTA Secretariat which can help the African Peer Review Mechanism with the technical aspects of implementation for deliberation with Member States.

Adding the monitoring of CFTA implementation to the African Peer Review Mechanism has additional advantages. It would increase transparency as a tool for securing compliance with the commitments in the CFTA. The African Peer Review's inbuilt processes of information sharing, performance reporting, policy assessment, persuasion, and data collection may be ideal to facilitate compliance with CFTA commitments in a non-adversarial manner. In addition, the African Peer Review Mechanism facilitates the participation of non-state actors in the process of objectively assessing the performance of States in all the sectors in which are reviewed. This gives the African Peer Review Mechanism the added advantage of being able to obtain information on the extent to which States have implemented their CFTA obligations. This particularly so because the African Peer Review Mechanism has established National Focal Points that can be used as points of contact for monitoring the implementation of the CFTA.

At the moment, the African Union Commission, and in particular, its Department of Trade and Industry of the Commission is not represented in the Regional Economic Communities, except in SADC and even here it is not in Gabarone, where the SADC Secretariat is based. Without regional presence or prior experience in monitoring implementation of agreements, it would be better to commit such monitoring to the African Peer Review Mechanism. The alternative is to add this responsibility to the newly established CFTA Secretariat and this would be too mon-

¹¹⁷ The African Peer Review Base Document AHG/235(XXXVIII) 1.

umental a task for a new institution. The CFTA Secretariat needs to establish presence in the Regional Economic Communities so that these can become the focal points for the monitoring role of the African Peer Review Mechanism.

Compensatory and Adjustment Mechanisms including Adjustment Funding and Social Protection Arrangements as well as Remedial Grievance Mechanisms

Proposal: To include mechanisms and frameworks to help small- and medium-sized as well as informal businesses to understand the CFTA and in particular how to take advantage of its opportunities, (including the NTB Mechanism) so that they are able to have challenges unique to them come to the attention of African governments. The CFTA must be designed to be beneficial to economies at different levels of development, as well as businesses of many sizes and capabilities including those in the large informal sector.

The African Union constitutes an extremely diverse range of countries not only in terms of levels of development, but also in terms of economic and political systems, size and geography. Some countries may require special transitional periods and mechanisms which offer additional time to develop capacity to implement new obligations. This flexibility is already recognized in all of African Regional Economic Communities and is referred to as Variable Geometry.¹¹⁸

The CFTA should also include specific commitments on development and trade capacity building, to ensure that all Parties are able to meet the commitments in the Agreement and take full advantage of its benefits. Every agreement that is part of the CFTA must have its own inbuilt compensatory, adjustment, grievance and remedial mechanisms. The foregoing proposals in this report that will be anchored around the CFTA's Monitoring and Evaluation Mechanism include:

- The Non-Tariff Barrier Mechanism;
- The Special Safeguard Mechanism;
- Trade Adjustment and Protection Mechanisms including Social Protection Floors and Public Stockholding for Food;
- The Negative List for liberalization of trade in Services

In particular the following mechanisms should be included:

- A development fund from which funding to compensate for losses from liberalization commitments of the CFTA would come from;
- Longer transition periods to adjust to import competition for countries that need them;
- Appropriate times to harmonize national tariffs with the new CFTA tariff to level out revenue losses particularly for least developed country members;
- Mechanisms to ensure equitable sharing of gains from liberalization in a fair and proportionate way to African Union members.¹¹⁹

¹¹⁸ See James Gathii, African Regional Trade Agreements as Legal Regimes, 2011.

¹¹⁹ These mechanisms are already a central part of African Regional Economic Communities and therefore the CFTA can adopt them quite easily, see James Gathii, African Regional Trade Agreements as Legal Regimes, 34–64 (2011)

Conclusion and Way Forward

This scoping study identifies three potential risks in the negotiations of the CFTA and three proposals are made with regard to institutional and structural mechanism for monitoring, remedies and social protection under the CFTA.

In short, this scoping study proposes that a HRIA be conducted focusing on the explicit addition of agriculture to the scope of CFTA negotiations; ensuring the CFTA adopts strategies to create decent jobs, create social protection floors, raise productivity and the contribution of the services sector to growth and employment and making commitments that incorporate business persons in the informal sector as well as an African Agreement on Labour Migration to guarantee the rights to enter, reside and work in another country. These suggestions would in turn create employment for small traders and migrant workers.

The HRIA should have as a critical element broad consultation of all stakeholders including the African Union Commission, African Union Members, Civil Society Groups, and International Organizations such as the International Labour Organization. These consultations should include public meetings, workshops, ad hoc consultations and personal interviews. Consultations are particularly important because one of the lessons learnt in the consultations conducted in the scoping stage was clear that the HRIA process and outcome must take into account the sensitivities that African Union member countries associate with human rights.

To be effective, the HRIA will therefore have to squarely address itself ensuring that it is associated with human rights as universal guarantees that are also protected in the African Charter on Human and Peoples' Rights, than as a tool of conditionality. In addition, an assessment of the gendered impacts of potential CFTA commitments should be a key component of HRIA. The feedback obtained in these consultations would help in ensuring the recommendations of the HRIA were derived from the proper context.

With regard to methodology, the HRIA should include a variety of methods including surveys designed to reach respondents who are likely to be directly impacted by the three likely scenarios identified in this scoping study. Such surveys could elicit information about whether or not technical assistance may be required if the CFTA introduced certain changes in particular sectors for certain business enterprises – particularly those likely to be affected by the recommendation to expand the scope of movement of business persons to include services and informal traders. This likely to yield specific recommendations such as what types of obligations would be

negotiated to support, improve or further food and livelihood security and decent jobs as well as the types of obligations not to be made that might prevent the attainment of these goals.

For each of the three main areas where preliminary recommendations have been made, alternative scenarios would be developed. For precision particularly in ensuring that the impacts were specific and closely tied to trade measures under the CFTA, trade in agriculture could be segregated into specific categories such as: grains; forestry; livestock and meat products; vegetable oils and fats; beverages and tobacco; textiles, wood and paper publishing and leather products. A few of these could be selected in terms of their importance for CFTA negotiations. Selecting two or three categories would then allow for a more in-depth assessment of the scenarios. This would allow an assessment of the strengths and weaknesses of the selected sectors which would allow zooming into specific indicators derived from the scope of the CFTA negotiating mandate such as technical barriers or sanitary and phyto-sanitary measures, as well as market access commitments. Quantitative assessments will help to measure the expected effects and impacts of these measures on employment or wage increase or decreases as well as on food and livelihood security.

Most significantly, the full scale HRIA would have to adopt quantitative analysis. Causal chain analysis, for example, can help identify cause and effect relationships between the proposed scenarios and trade measures. One example is how a change in a tariff can impact on prices for consumers and producers. Rule changes, market opportunities or new incentive structures can also alter market conditions for consumers and producers as well. The impact of trade agreement commitments on market actors such as informal traders and small and medium scale enterprises ought to be taken into account.

In terms of timing of the HRIA, it should ideally be completed by the time the preparatory period of the CFTA is concluded.

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