

The Effect of Rules of Origin on Regional Trade: An Analysis of the Africa Continental Free Trade Area

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ABSTRACT

Purpose – The aim of this study is to identify the factors that affect the success of Regional Trade Agreements and the impact Rules of Origin on increasing intra-regional trade.

Research design/methodology – An inter pretivist paradigm is adopted by the researcher to address the posed research questions. This is achieved through a qualitative inquiry, relying on secondary data for the adopted case study approach.

Findings – The author finds that various factors play a role in the success of RTAs and that if the Africa Continental Free Trade Areas is to be successful, due regard must be given to the specificity of the legal texts defining the RoO. Further, that in order for business originating from member-states to truly benefit, measure must be put in place both on the regional and national level.

Recommendations – The study recommends that at national level, there must be policy changes that will facilitate the implementation of the AfCFTA and at regional level, there is need to enhance the legal backing of implementing institutions and to ensure that the concluded rules are easy to understand and result in a simplified certificate of origin to aid business growth and efficiencies.

Originality/value – The findings of this study address the core challenges faced by RTAs in Africa and what must be done to ensure that the AfCFTA succeeds in achieving its core vision and mandate.

Keywords: Africa Continental Free Trade Area, Deep Agreements, Regional Trade Agreements, Rules of Origin, Spaghetti bowl, European Union

INTRODUCTION & BACKGROUND

Regional Trade Agreements (RTAs) can be generally divided into five categories, depending upon their level of integration; Preferential Trade Agreements (PTAs), Free Trade Agreements (FTAs), Customs Unions (CUs), Common Markets, and Economic Unions, (Pal, 2004). Most notable among the five types of RTAs are PTAs and FTAs. PTAs have been defined as “a union in which member countries impose lower trade barriers on goods produced within the union, with some flexibility for each member on the extent of the reduction” (Pal, 2004). Whereas, a Free Trade Area (FTA) has been defined as “a special case of PTA where member countries completely abolish trade barriers (both tariff barriers and non-tariff barriers) for goods originating within the member countries”(Pal, 2004).

The majority of countries around the world entered into Bilateral Trade Agreements (BITs) and RTAs with the aim of, *inter alia*, meeting their trade objectives and advancing their economic regional integration

(Archaya, 2016). It is against this background that African countries, through the African Union (AU), negotiated the establishment of the African Continental Free Trade Area (AfCFTA). It entered into force on 30th May 2019 for the 24 countries that had deposited their instruments of ratification (Tralac, 2022). According to Tralac (2022), the “main objectives of the AfCFTA are to create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Customs Union. It will also expand intra-African trade through better harmonization and coordination of trade liberalization and facilitation, and instruments across the RECs and across Africa in general. The AfCFTA is also expected to enhance competitiveness at the industry and enterprise level through exploitation of opportunities for scale production, continental market access and better reallocation of resources.”

However, for businesses to benefit from Free Trade Areas and gain free market access across borders, they must adhere to the Rules of Origin and prove the economic nationality of the goods (Archaya, 2016). This entails that the goods being traded originated from within the member countries to the said agreement. In order to do so, they must fulfil the origin criteria conditions, as provided in the Rules of Origin (RoO) text of any trade agreements. Therefore, this paper will analyse the approach taken by the AU in the creation of the AfCFTAs key document on Rules of Origin, and the extent to which it may be successfully implemented by drawing lessons from the European Union (EU).

Problem statement

The AU currently recognises eight Regional Economic Communities (RECs) in Africa (Chiumya, 2009; African Union, 2022). Almost all African states are members to one or more RTAs that focus on increasing their economic integration through liberalised trade in goods and services. Thus, facilitating the growth of their economies by enabling local business to participate in cross border trade, at little to no added cost. However, despite the multiple RTAs that exist in Africa and the overlapping memberships (where a country is a member to multiple RTAs), statistics show that there have been little correlative developments in African countries based on the said RTAs and that there is still a low level of intra-Africa and intra-RTA trade. For example, a study by Songwe (2019) highlights that in 2017 intra-Africa exports amounted to a total of 17 percent which is significantly low in comparison to North America, Asia and Europe that recorded a 31 percent, 59 percent and 69 percent share respectively. One of the reasons advanced for this low level of intra-Africa and intra-RTA trade is the challenges that are associated with the application of rules of origin (Draper Krogman and Chikura, 2019). Therefore, this paper will analyse the current approach taken by the AfCFTA in creating the text governing the Rules of Origin (RoO), considering the impact these rules have on business growth and attraction in Africa, by comparing with that taken under the European Union.

Research objectives

To identify the factors that affect the effective operation of RTAs and whether RoO are central to the success of RTAs in general, and the AfCFTA in particular.

The Benefits of membership to the AfCFTA

Regional integration in Africa has been a top priority and talking point for decades. It has been viewed as a tool that may be used to boost economic growth and aid in poverty reduction in African countries. Globally, successful examples of regional integration include the United States–Mexico–Canada Agreement (USMCA), the European Union (EU) and Asian Free Trade Area (AFTA), that show that at the centre of economic growth and development is Intra-RTA trade. In contrast, African countries have not successfully participated in trade amongst themselves despite being members of various RTAs, the most recent of them

being the AfCFTA. This has stifled the ability of businesses to successfully participate in regional trade, and it has resulted in minimal economic growth and development.

Albert (2019) and The AUC/OECD(2018) report that “intra-continental merchandise exports account for less than 19% of total trade within Africa, in contrast to 63% in Europe and 58% in Emerging Asia”. The low percentage of intra-Africa trade has been partly attributed to trade barriers, ranging from regulatory restrictions to capital and human resource challenges (Hailu, 2014). Other contributing factors are insufficient infrastructure development and lack of access to finance, that impedes the efficiency of business activities (Hossein *et. Al*, 2011; Melo and Tsikata, 2014). It stems from this background that the Africa Continental Free Trade Area (AfCFTA) agreement was created with the aim of dealing with the said challenges and strengthening intra-African trade.

The AfCFTA entered in to force in 2018 with a membership of forty-four countries, with the aim of liberalising trade amongst its members through the progressive elimination of tariffs and non-tariff barriers for trade in goods (AfCFTA Agreement, 2019). The Economic Commission for Africa (2019) estimates that the removal of tariffs and non-tariff barriers among countries has the potential to significantly boost intra-African trade by over fifty percent. This stems from the fact that AfCFTA will create the largest free trade area in the world, measured by the number of countries participating in it. It connects 1.2 billion people across fifty five countries with a combined gross domestic product (GDP) valued at US\$3.4 trillion(Tralac, 2022). This will expand trade within Africa, and enhance competitiveness among African businesses.

The AfCFTA offers a unique opportunity for states in Africa to reduce poverty, promote inclusion and competitively integrate into the world economy. Despite Africa’s progress in reducing poverty and raising living standards in the last few decades, an increase in trade will result in policy reforms that will boost productivity and job creation, and result in a further reduction of poverty (Maliszewska and Ruta, 2020). It has been estimated that by 2035, the implementation of the AFCFTA will have the effect of facilitating the elevation of thirty million people from extreme poverty and another sixty-eight million from moderate poverty, and increase real income gains by about US\$450 billion, or seven percent (World Bank, 2020). As the world economies struggle to manage the consequences of COVID-19, the implementation of the AfCFTA could be an anchor for African countries long term reform and integration (Maliszewska and Ruta, 2020).

The role of Rules of Origin in the Success of RTAs

In order for businesses to benefit from the free market access provided by RTAs, they must prove that the goods being traded originate from within the jurisdiction of the member states(Dinh, 2018). In order to do so, they must fulfil the origin criteria conditions, this is what is referred to as the Rules or Origin (RoO)(Cadot, 2006). This condition of satisfying the criteria for RoO was necessitated by two main factors, the first was to protect the markets and businesses in the member states from free-rider problems, were for example a non-member state export product into a member state and uses that member state to gain free market access to the other member states. This defeated the rationale for the creation of the RTAs, as it is to increase trade in the products produced from the member states in order to grow their linkages, thereby, leading to the growth of industries and the internationalisation of businesses, resulting in economic growth and development. The second rationale being linked to the first, is the protection against Dumping. The emergence of the antidumping laws as a key policy tool during the 1980s and 90s was mostly responsible for the rising interest in the use of RoO as a commercial policy instrument that can influence the interaction between the internationalisation of production and its location (Inama, 2008). Therefore, Rules of Origin aim to highlight the Economic Nationality of Products.

Though the role of RoO is to avert trade deflection, they can become the fine print in the agreement that

restricts the potential market integration of the RTA. The goal in the design of RoO is to find a balance that allows only businesses originating from member-states to benefit from the preferential market access, while allowing for flexibility in input sources, to promote efficiency in the cost of production and competitiveness (Hartzenberg, 2011). To find this balance is not an easy task, as RoO may be used as a tool to provide effective protection to the domestic industry. RoO may also pose a supply-side issue that can affect business-level decisions, thereby, affecting a firm's competitiveness.

In the African context, RoO on the trade in goods agenda has proved to be a very contentious issue, and the different standards set across RTAs clearly demonstrates the impact RoO have on intra-regional trade. An example can be drawn from the different RoO under the COMESA and SADC RTAs. The Rules of Origin under SADC follow a product or sector approach: accommodating the specific interests of a state to protect a sector or an industry, but effectively frustrating intra-regional trade opportunities (Naumann 2011). In contrast, The COMESA RoO took a more generic approach with across the board rules, with minimal exceptions (Hartzenberg, 2011).

Therefore, in the context to RTAs, RoO serve to regulate the trade patterns of the members of RTAs (Inama, 2009). However, it must be mentioned that RoO are often designed to respond to industrial policy objectives of domestic industries.

MODELS OF RULES OF ORIGIN

Historically, there are two major players that have formed the blueprint of drafting and developing models of rules of origin; these being the Pan-European rules of origin – that adopted the Change of Tariff Heading (CTH) criterion of RoO that defines the concept of “substantial transformation” coupled with a list of product-specific RoO, requiring CTH with or without exceptions, specific working or processing, or maximum import content percentages (Inama, 2009); and the United States model of rules of origin – mainly uses an across-the-board percentage criterion (Inama, 2009). This study examines the Pan-European model, as it has been the most consistent and ultimately has resulted in the highest level of intra-regional trade. This is ideal as the AfCFTA aims to create a deep agreement that will reach a similar level of regional economic integration and trade success (Maryla Maliszewska et al., 2020).

Another reason as to why the Pan-European model is ideal for this case study analysis is because of the rationale behind its creation. Similar to the current case in Africa, Europe had various RTAs in place that had conflicting RoO, such as the European Community (EC), European Free Trade Area (EFTA), Central and Eastern European countries (CEEC), and the European Economic Area agreement (EEA). These conflicting RoO caused challenges for manufacturers and opened loopholes that led to circumvention and trade deflection. Therefore, in order to address the tangle of regional and sub-regional agreements, the Pan-European RoO were introduced to harmonising and simplifying the Rules (Inama, 2009).

According to the Pan-European rules of origin, the origin criterion is habitually defined as follows: “a product shall be considered as originating in a country if it has been either wholly obtained or undergone sufficient working or processing in that country.” (Inama, 2009). Key points to note under this definition is what would be regarded as ‘wholly obtained’ or what amounts to ‘undergone sufficient working or processing’ in that country.

Wholly Obtained

Wholly obtained should be regarded in its natural meaning, denoting that the entirety of the product and its inputs should be originating from a member state, in the absence of any external importation (Inama, 2009). In this approach, the RTA promotes the need for the preferential market access and economic benefit to be

enjoyed by the citizens and businesses from the member-states. For example, this may be achieved by specifying the definition of a national ship or vessel to include, not only its place of registration but to the detail of the nationality of its crew members.

This very approach is used by the EU in relation to trade amongst its member-states. Specificity of this nature, though restrictive to third-countries, is cardinal in promoting intra-RTA trade and encouraging the development of industries within the member states. Thereby, leading to advancements in technology and infrastructural development.

Sufficient Working or Processing

This requirement refers to the amount (usually in the form of a percentage) of value addition that must be added to a product in order for it to meet the origin requirement. Thus, where a product is not wholly obtained in a member-country, it can be regarded as sufficiently worked or processed if it meets specific conditions pertaining to the said product, as outlined by the agreement (actions contained in what is referred to as a 'single list'). However, certain actions regardless of their sophistication are regarded as insufficient or irrelevant and will not qualify a product to originating status (actions contained in a 'common list'). In other words, the Pan-European model of rules of origin relies on the adoption of a Single List containing identical product-specific rules of origin and common rules applicable to all products (Inama, 2009; Murray, 2010).

Key for this study is to identify the processes that are regarded as irrelevant or insufficient in the Pan-European Model. This will allow businesses in the manufacturing or packaging industries to ensure that the general amount of value addition to the products goes beyond what is contained in such a list, before examining the single list that contains specifics regarding their products.

How does this relate to the AfCFTA?

The data collected shows that being a member of an RTA has a positive impact on a countries trade data and results in an increase in intra-regional trade. Trade necessitated by an RTA places a mandate on member-countries to allocate their resources in areas or industries where they have a competitive or comparative advantage, with spill-over effects as a result of the said trade, leading to interactive exchanges of technical know-how and technologies (Wang'ombe, 2013). This is particularly the case for smaller economies, as is the case for most African countries, that have a higher likelihood to benefit from economies of scale, advancing towards the enhancement of their labour and capital productivity. The exposure caused by trade liberalisation leads to increased competition. An increase in competition has two main effects, the first being an enhancement in production and/or services quality, and the second being a drop in the cost of commodity prices that is determined by market forces, thereby mandating producers to be efficient in the production process.

However, evidence does suggest that there is a need to balance the rules governing RTAs as they may result into either trade creation or trade diversion, and this may pose a threat to businesses originating from non-member states. This threat, however, has been minimised by the deepening of RTAs, where overall results confirm the positive impact of deep agreements on trade flows (Mattoo, Mulabdic and Ruta, 2017).

From these models, the Pan-European model is the appropriate model, considering the fact that it has proved to have the highest level of integration and intra-regional trade. This is ideal as the AfCFTA aims to create a deep agreement that will reach a similar level of regional economic integration and trade success (Maryla Maliszewska et al., 2020). Another reason being the historical similarities between the proliferation of RTAs

in Europe and Africa, and their conflicting RoO. These conflicting RoO cause challenges for manufacturers and open loopholes that result in circumvention and trade deflection (Inama, 2009).

Factors that may affect the successful implementation of RoO in the AfCFTA

In order to adequately prepare for the successful implementation on the Rules of Origin, it is imperative to understand the factors that may affect the contextualisation and implementation of the text.

Political will

The decision to enter into RTAs is the preserve of a state's government. Political will refers to the desire or motivation for a countries government to join or establish an RTA. There have been various reasons advanced as to why governments enter RTA agreements. For the purpose of this study, we will look at two, the first being for political factors as highlighted by Pal (2004) and the second is the domino theory as espoused by Baldwin (2006).

With the deepening of RTAs, governments use RTAs as a tool to strategically increase regional security and consolidate peace among member states. This is possible because trade linkages improve cross-border cooperation and can increase the cost of conflict. RTAs have the ability to build up diplomatic ties and forge geopolitical alliances (Pal, 2004). By their traditional nature, they provide discriminatory access to larger markets and garners increased support on the political front. RTAs created on this premise are often not driven by economics, therefore, where larger developed countries are involved, it is often the case that the interests of the developing or least developed countries would be of secondary concern (Pal, 2004).

On the other hand, the domino theory of regionalism begins with a positive model of membership in a RTA and proceeds in two stages – the beginning being the idiosyncratic deepening of integration in the RTA, and the knock-on impact implied by bloc-enlargement (Baldwin, 2006). The positive model's assertion is that a countries decision to join an RTA is guided by its domestic 'political equilibrium' that balances its anti-membership and pro-membership forces. The pro-membership usually being the nation's exporters that benefit from preferential market access if the country joins and suffer from discrimination if it doesn't. whereas, the anti-membership forces are often the import-competing industries that would be disadvantaged from the liberalisation that is associated with being a member of an RTA, coupled with some other non-economic objections to membership. In this instance, taxpayers and consumers are regarded as interest groups of secondary importance for the usual "Oslen's Asymmetry" reasons (Baldwin, 2006).

In the domino theory, the pressure to join the RTA rises as the membership in the block expands, due to the threat of market loss posed to businesses originating from outside the RTA. Therefore, as more nations join the RTA, those that may have been politically motivated to stay out will be triggered to request membership based on the shift in the political equilibrium (Baldwin, 2006).

In the African context, for decades there has been overwhelming political will to regional economic integration. This is evidenced through the various RTAs that are on the continent, more so since 2012 when there was an agreement to speed track the establishment of the AfCFTA, as it would be key in the realisation of the agreed continental vision as enshrined in Agenda 2063 (Hartzenberg, 2011; UNCTAD, 2021). Therefore, the question may not be whether there is political will for regional integration, but rather does their experience shows a solid commitment to rules-based governance; specifically, whether RTAs are viewed as rules-based dispensations by member-states (Hartzenberg, 2011).

It is common to note delays in the ratification or domestication of regional legal instruments by member-

states across RTAs and their failure in the implementation of specific provisions, such as negotiated tariff reductions. Further, in a number of RTAs there are no provisions that focus on dispute resolution or ramifications of breaches. Where they exist, there is no actual application or enforcements of sanctions for lack of implementation(Hartzenberg, 2011).

It is evident that RTAs and the established regional institutions mandated to contribute to their implementation, do not play a robust role as an agency or external anchor to ensure national compliance (Hartzenberg, 2011). An example would be the case of Zimbabwe that was handled by the SADC Tribunal. A decision was passed that Zimbabwe, in its actions, had breached Article 6 of the SADC Treaty. Zimbabwe then expressed its dissatisfaction with the decision and this led to the suspension of the SADC Tribunal at the August 2010 summit(Bösl, 2010; Saurombe, 2012).

CULTURAL DIFFERENCES

In order for regionalisation to be successful in this modern era of global political economy, it must be a product of member-states adaptation to globalisation, with particular dynamics determined by the interaction of norms, culture, national interest and geopolitical context(Murray, 2010). Therefore, one of the main governance challenges that may affect regional integration is the management of interdependence and shared sovereignty where countries do not have the same degree of cultural homogeneity(Murray, 2010; Lombaerde, 2017).

From a business perspective, cultural difference may affect the cost of doing business, and where the cost of business is high, the lesser the volume of trade. Factors such as language barriers often escalate the cost of doing business and are captured in what is called the ‘cultural distance argument’. This argument suggest “that the greater the physical distance, the greater the chances that there will be many cultural difference”, that result in the escalation of trade transactional costs, as factors such as the buying and selling cultures could differ, or language barriers, causing misunderstandings and delays(Wang’ombe, 2013). For example, in most countries bargaining is part of everyday business culture, while in others, this is highly frowned upon.

In the African context, a regional integration study was carried out by Geda (2009) that used statistical data to analyse the challenges that lead to low intra-Africa trade. Geda found that although given Africa’s proximity, geographic, economic and cultural affinity, There is a large potential for intra-Africa trade. However, it is contrained by the lack of product diversification and competitiveness of potential African export suppliers(Geda, 2009). This posing a challenge to intra-Africa trade in the short term.

Access to finance

This variable is more specific to businesses originating from RTAs signed by developing or LDCs. As was earlier stated, a studies by the AUC/OECD(2018) report that “intra-continental merchandise exports account for less than 19% of total trade within Africa, in contrast to 63% in Europe and 58% in Emerging Asia”. The low percentage of intra-Africa trade has been partly credited to high trade barriers, ranging from regulatory restrictions to capital and human resource challenges. Other contributing factures being insufficient infrastructure development and lack of access to finance, that impedes the efficiency of business activities.

In addition, the luck of sufficient infrastructural development hinders business progression and market access. Unfortunately, Africa is facing a challenge in securing finance to meet its infrastructure needs. It has been estimated that currently the continent need infrastructure investment amount to USD 68-152 billion per

year, which is roughly 3-7% of GDP, over the coming decades (EIB, 2018; OECD, 2019).

Therefore, factors such as high cost of borrowing, inconvertibility of currencies, insufficient capital investments, and poor road networks and other infrastructural challenges pose a real threat on firms' abilities to truly benefit from their nation's membership of various RTAs in Africa (Geda, 2009).

Spaghetti bowl problem

The proliferation of RTAs has resulted in a spaghetti bowl of overlapping arrangements, each of which have differing rules of origin, tariff schedules, and periods of implementation. Those differences delay the passage through customs of goods covered by preferential arrangements, and longer processing times drive up the cost of trade (Newfarmer, 2006). Jagdish Bhagwati, who coined the spaghetti bowl term in 1995, states that PTA proliferation makes trade procedures more complicated by increasing the number of tariffs and rules of origin. Hence the concept is relevant for both Customs Unions and FTAs (Fergin, 2011).

This brings out the two distinct features of the spaghetti bowl: (1) different rules of origin and/or the exclusions of different lists of sensitive goods can result in trade not being fully free or liberalised; and (2) bilateral cumulation as opposed to diagonal or full cumulation can distort the purchase pattern of intermediate inputs in a way that does not occur under the Most Favoured Nation (MFN) rule of free trade. For short, these two symptoms of the spaghetti bowl syndrome are referred to as non-harmonised RoOs and bilateral cumulation (Baldwin, 2006).

RECOMMENDATIONS

The following are the recommendations based on the findings of this paper:

National level

1. National level policy reforms – There is a need for African states to reform their non-tariff and trade facilitation measures. As challenging as it may be, the perceived opportunities presented by the AfCFTA will aid the member-states in making these difficult decisions. Only through the implementation of substantive reform on national level, can the AfCFTA be as competitive as the EU.
2. Quality assurance – beyond the rules of origin, at national level, member-states must heighten their product standards requirements. This will ensure that products entering their markets through trade diversion or deflection do not negatively affect the competitive environment within the state, by flooding the market with cheap low standard good dumped from more developed third countries.

Regional Level

1. Dispute Resolution and Institutional strengthening – The regional institutions established to implement the Agreement must be empowered through the legal texts of the agreement to allow them to play a more robust role in ensuring compliance on a national level and the provision of sanction for non-conforming members must be provided. Further a comprehensive dispute resolution mechanism must be created that will balance the interest of the member-states and local industry players
2. Well defined Rules of Origin – the rules must be design to find a balance that allows only businesses originating from member-states to benefit from the preferential market access, while allowing for flexibility in input sources, to promote efficiency in the cost of production and competitiveness. This can be done by ensuring that there is clear and simple to understand common list as is the case in the

Pan-European model, and a simplified certificate of origin. Making the RoO more business friendly rather than penalising SMEs in their complexity. It can further be achieved by clearly defining what amounts to ‘sufficient working or processing’ for products under the single list, considering the competitive or comparative advantage of producers originating from the member-states.

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