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## EXECUTIVE SUMMARY

This issues paper explores the potential of conducting a human rights impact assessment (HRIA) of the Continental Free Trade Area (CFTA) in Africa. The CFTA is part of the African Union's broader push to achieve greater regional integration and development and its main aim is to boost intra-African trade.

HRIAs can be viewed of as a pioneering tool in bringing a human rights perspective into the policy development stage. Given this, the Economic Commission for Africa (ECA) proposed collaboration with the Office of the High Commissioner for Human Rights (OHCHR) and the Friedrich-Ebert-Stiftung (FES) with regard to a HRIA of the CFTA.

The purposes for conducting HRIAs include prioritising human rights in policy-making, strengthening accountability, and empowering rights holders. A well-conducted HRIA can change a project or agreement and mitigate adverse impacts. HRIAs can unveil human rights issues to policy makers who may not have considered them, and thus be of utility in the context of negotiating trade agreements such as the CFTA.

This issues paper explores conducting a HRIA of the CFTA by first outlining the regional context of the CFTA in Africa. This includes an analysis of the regional trade landscape and the effects of implementing a CFTA, as well as a discussion of the challenges and opportunities that regional integration offers. The paper also discusses the interplay between trade, human rights and the CFTA by examining the relationship between human rights and trade regimes, as well as scrutinising key human rights issues in relation to trade agreement provisions. The paper later includes background information on HRIAs, as well as methodological options and next steps for conducting a HRIA of the CFTA. The paper explicitly outlines two areas at the heart of economic development in Africa – agriculture and employment – noting the human rights concerns that could arise during the negotiation and implementation of the CFTA. The paper finishes by addressing the need to adhere to the key human rights principles of transparency, consultation and participation throughout the CFTA negotiations.

Human rights are likely not at the forefront of the presently technical negotiations over the CFTA. In spite of this, Africa's development-orientated regional integration and vibrant regional human rights system provides entry points from which human rights can be considered during the CFTA negotiations. This is not human rights as ideology, but instead as methodology. This is acknowledging that trade interventions can, and do, impact on human rights, and that trade provisions in free trade agreements (FTAs) can have short and long term impacts on people, the environment and development more broadly.

The issues paper advocates that, given nascent CFTA negotiations, we have the ideal frame in which to explore a HRIA of the agreement. And based on a potential scoping assessment, interested actors and stakeholders can make a considered decision on how to proceed further. Multiple options could come into play including sub-regional HRIAs, national HRIAs, specific case studies, regional surveys. The issues paper could also be used as a basis for discussion for stakeholders, especially civil society, for further advocacy and work in this area.

## INTRODUCTION

African Union (AU) Heads of State and Government have adopted and are pursuing regional integration as an overarching continental development strategy. The vision at the continental level is to achieve an African Economic Community (AEC) as the last of six successive stages that involve the strengthening of sectoral cooperation and establishment of regional free trade areas (FTAs), a continental customs union, a common market, and a monetary and economic union.<sup>1</sup> One focus of regional integration on the African continent and the larger vision of the AEC is a mega agreement, the Continental Free Trade Area (CFTA). In January 2012, the African Union decided to fast-track the establishment of the CFTA by 2017, with the main aim of boosting intra-African trade.

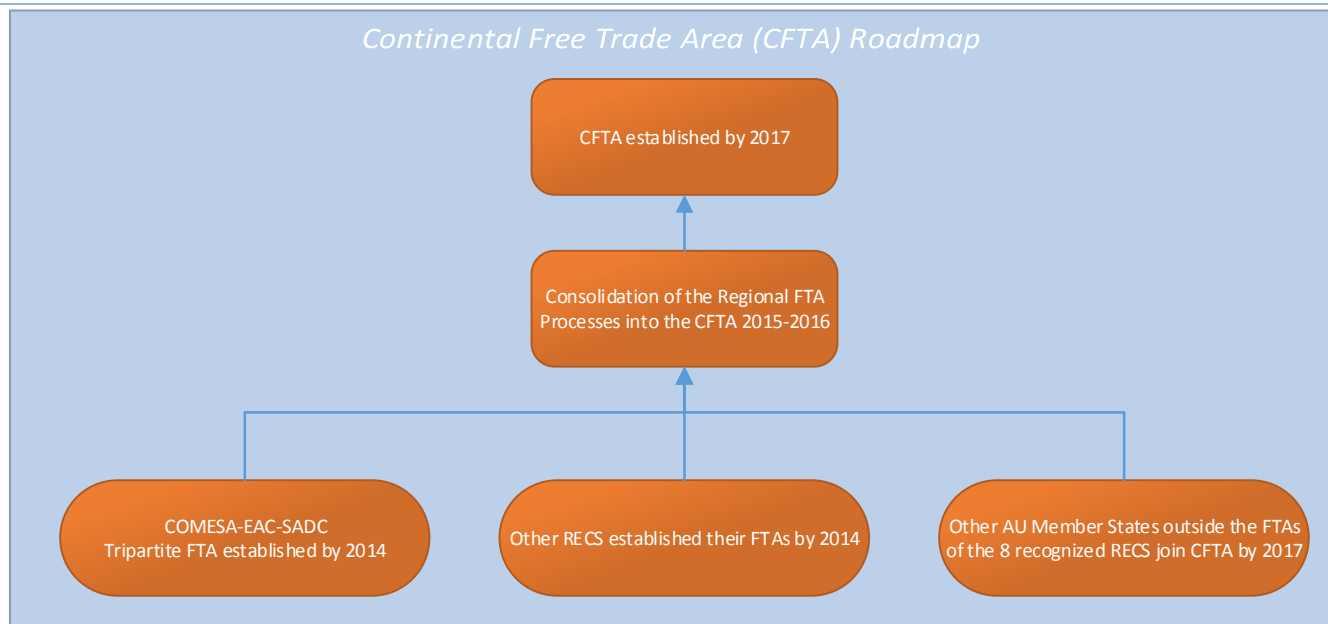
The first priority in the CFTA is to broaden Africa's economic and market space. Other priorities are to deal with supply-side constraints, weak productive capacities and infrastructural bottlenecks. The negotiations for the CFTA will be conducted within assigned institutional arrangements with political and technical oversight over a CFTA Negotiating Forum. The African Union Commission (AUC) will serve as the Secretariat to the CFTA negotiations and the process will be supported by the Continental Task Force (CTF).

It is expected that the CFTA negotiations will be conducted in two or three phases covering concurrent negotiations on trade in goods, trade in services and movement of business persons. A further phase or phases will cover negotiations on investment, trade, development, intellectual property rights and competition policy. See figure below for a tentative CFTA roadmap.<sup>2</sup>

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<sup>1</sup> See: Foreword, Economic Commission for Africa (ECA), *Assessing Regional integration in Africa V: Towards an African Continental Free Trade Area*, 2012 (ECA, 2012). This was envisioned in the Abuja Treaty signed in June 1991.

<sup>2</sup> Figure adapted from: Soininen, I., *The Continental Free Trade Area: Current State of Play*, Policy Brief 01, Saana Institute, September 2014 (Saana Institute Policy Brief, 2014).



Given these developments in the continent, the Economic Commission for Africa (ECA) proposed collaboration with the Office of the High Commissioner for Human Rights (OHCHR) and the Friedrich-Ebert-Stiftung (FES). This collaboration is with regard to a potential human rights impact assessment (HRIA) of the CFTA given the scale and importance of the agreement. This is in follow up to a workshop hosted by OHCHR and the FES in Bogis-Bossey, Switzerland in September 2014. The workshop examined the topic of HRIAs in trade and investment regimes. HRIAs can be viewed of as a pioneering tool in bringing a human rights perspective into the policy development stage.<sup>3</sup> HRIA can be defined as "an instrument for examining policies, legislation, programs and projects and measuring their impact on human rights." The purposes for conducting HRIAs include prioritising human rights in policy-making, strengthening accountability, and empowering rights holders. Unlike other forms of impact assessment, HRIAs engage the international human rights framework. The organising principle of HRIAs is the human rights themselves. With time and resources, an ex-ante assessment brings significant value and has the potential to change a project or agreement and mitigate adverse impacts. HRIAs can unveil human rights issues to policy makers who may not have considered them and thus be of utility in the context of negotiating trade agreements such as the CFTA.

This issues paper outlines the regional trade landscape in Africa, with the benefits that a CFTA may bring to the region, and what a potential HRIA of the CFTA could look like in terms of utility, substance, methodology, timing and process.

<sup>3</sup> See *Workshop report - Making the Right Impact? OHCHR/FES Expert Workshop on Evaluating Human Rights Impact Assessments (HRIAs) in Trade and Investment Regimes*, September 2014.

## PART I – REGIONAL CONTEXT OF THE CONTINENTAL FREE TRADE AREA IN AFRICA

### 1. TRADE LANDSCAPE IN AFRICA AND THE TURN TO REGIONAL INTEGRATION

#### a) Africa and intra-regional trade

To understand the CFTA in context, Africa's trade-related challenges need to be understood. The share of Africa's exports in total world exports is only about 4 per cent.<sup>4</sup> Of these exports, Africa performs better in exporting primary, agricultural, and food products than it does for categories of industrial products. African exports are directed outside the continent, mainly to the EU and the US. Though, recent developments in trade relationships between Africa and other developing countries, especially emerging economies, translate into significant exports. This is largely due to preferential agreements: the Generalized System of Preferences (GSP), the Everything but Arms (EBA) initiative, and the African Growth Opportunity Act (AGOA).

Some 30 per cent of African exports to the rest of the world go to developing countries, with the BRIC countries taking more than half.<sup>5</sup> This is at divergence with other major regions that trade more among themselves than with the outside world. In addition, "the existing structure of commodity specialization in Africa has placed the continent at a long-term disadvantage not only on the grounds of cumulative terms of trade losses but also in terms of loss of continental self-esteem and growth."<sup>6</sup> The structure of Africa's exports to the rest of the world reflects a lack of export diversification and concentration in primary products. However, in terms of intra-African trade, there is more trade of agriculture and food products and manufactured products represent more than two-thirds of intra-African trade.<sup>7</sup>

On the import side, Africa imports low technology, labour-intensive manufactured goods from around the world. This is despite the existence of a large semi-skilled or unskilled labour pool in many African countries that could produce such goods. "In terms of import shares, those of agriculture and food exceed those of primary products both from the external world and within Africa."<sup>8</sup>

In terms of trade, tariff barriers still constitute significant obstacles to trade within Africa and high rates of protection on Africa's exports to African countries partly explain the low levels of intra-African trade. The

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<sup>4</sup> Cheong, D., Jansen, M. & Peters, R. (eds.), *Towards a Continental Free Trade Area in Africa: A CGE Modelling Assessment with a Focus on Agriculture* in *Shared Harvests: Agriculture, Trade and Employment*. International Labour Office and United Nations Conference on Trade and Development, 2013 (Cheong et al, 2013), 28.

<sup>5</sup> *Ibid*, 283-284.

<sup>6</sup> ECA, 2012.

<sup>7</sup> Cheong et al, 2013. 283-284

<sup>8</sup> Cheong et al, 2013, 285.

protection structures are extremely complex and heterogeneous. While tariffs impede trade, they also provide revenues for governments. “In many African countries the receipts generated by enforcing tariff duties represent an important share of the government’s income - nearly 40 per cent of the continent’s total tax revenues in 2010 - and therefore these countries are particularly reluctant to remove them.”<sup>9</sup> But since most tariff revenues are imposed on imports from non-African countries, liberalization reforms within the continent will not, in general, entail considerable loss of tariff revenue. Tariff barriers are not the only obstacle to intra-regional trade. Many non-tariff barriers (NTBs) limit African trade. “They take multiple forms, such as lengthy customs procedures, sanitary and phytosanitary measures, product standards, anti-dumping measures, counteravailing duties, and licensing, as well as lack of infrastructure (even though this is not an NTB per se).”<sup>10</sup> This particularly affects agriculture and food products which are perishable and subject to strong sanitary and phytosanitary constraints. Delays in the export/import process are generally more costly than for other categories of products, as it can result in the loss of the merchandise. High transport costs and complicated customs procedures are the two key trade-facilitation issues identified to affect all Regional Economic Commissions (RECs) most.<sup>11</sup>

Infrastructure development is an integral part of trade facilitation and a priority for most RECs.<sup>12</sup> Most RECs have comprehensive policy and frameworks on the development of regional inter-REC cross-border transport, ICT connections, water and transport development, and power supply coordination. The flagship strategy for infrastructure is the Programme for Infrastructure Development in Africa (PIDA) from July 2010 which covers Africa’s essential infrastructure needs in the areas of energy, ICT, transport and transboundary water. This strategy is an example of the way in which investment in infrastructure, integration and trade goals are being pursued simultaneously.

In terms of intraregional investment, it is mostly concentrated in four major sectors. These are: mining; quarrying and petroleum; finance, business services and transport; and storage and communication. Intra-African investment opportunities abound in mineral extraction, heavy industrial products and raw material processing.<sup>13</sup> Analysis of intra-African investment and capital movements is made challenging by lack of data and work needs to be done to upgrade data on intra-regional investment.

## b) Regional background: challenges and opportunities

Regionalism in Africa is often regarded as necessary to aggregate bargaining power to negotiate with powerful trading partners like the European Union (EU). “Since independence, integration has been a core element of African countries’ development strategies.”<sup>14</sup> The long term view in terms of regional integration and trade in Africa is to establish an African Economic Community, with the creation of a Pan-African Economic and Monetary Union by 2028.<sup>15</sup> The road towards the ultimate step of regional integration is not straightforward, however, and

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<sup>9</sup> Ibid, 286-287.

<sup>10</sup> Ibid, 287.

<sup>11</sup> These elements also feature in the WTO Trade Facilitation Agreement more generally.

<sup>12</sup> ECA, 2012.

<sup>13</sup> According to IMF, 2008, net private capital flows to Sub-Saharan Africa increased more than six-fold from an average of USD 3.4 billion in 2000-2002 to 21.7 billion in 2010, with inflows growing much faster than outflows. In the last decade nearly half of the FDI inflows went to Nigeria (29.4 per cent) and South Africa (18.2 per cent) as they have substantial locational advantages and where capital markets as is the case with South Africa is highly developed.

<sup>14</sup> Saana Institute Policy Brief, 2014.

<sup>15</sup> See: *Abuja Treaty* signed on 3 June 1991 and entered into force on 12 May 1994.



to date, progress within the eight RECs<sup>16</sup> recognized by the African Union Commission has been made at different paces.<sup>17</sup> The tripartite agreement among the COMESA, EAC and SADC which aspires to create a free trade area (FTA) among these three RECs aims to be a catalyst for launching the CFTA. This tripartite arrangement combines 26 African countries, with a combined population of 530 million people, with a total GDP of USD 630 billion, representing over 50 per cent of Africa's economic output.<sup>18</sup>

African regional trade agreements (RTAs) are generally trade plus regimes that reflect a broad set of goals and are not simply trade treaties.<sup>19</sup> The role of treaty commitments became that of providing a framework for initiatives such as joint ventures or initiatives in areas including trade, investment and capital, while also extending further into transport, security, water, electricity supply and labour movement, as well as agreements for the management of common resources such as river basins.<sup>20</sup> African RTAs also serve as institutions of basin management demonstrating the entwined relationships among trade, environment, and security aspects of international river basins.<sup>21</sup>

Under the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) framework, the formation of complete agreements is allowed because they have been recognized to promote trade liberalization through the removal of barriers to substantially all of the trade between members to such agreements. RTAs created under Article XXIV of the GATT must comply with the WTO rules for their formation. As the formation of a regional integration scheme is an exception to the Most Favoured Nation (MFN) principle, the formation of an RTA must be notified to the WTO. The test is whether these RTAs are trade creating or trade distorting. Negotiations in the Uruguay Round and in the Committee on Regional Trade Agreements (CRTA)<sup>22</sup> have proved inconclusive in resolving which benchmarks should be used in the determination of how much intra-regional trade should be included in the members' trade liberalization schemes.

## 2. THE CASE FOR THE CFTA: WHAT WILL IT BRING TO THE REGIONAL LANDSCAPE?

The genesis of the accelerated intra-Africa trade agenda goes back to December 2010, when African trade ministers meeting in Kigali, Rwanda, agreed on a fast track agenda for a Continental Free Trade Area (CFTA) to address Africa's low internal and external trade performances (at 13 percent and 2 percent, respectively).<sup>23</sup> The general objective of establishing the CFTA is the creation of a single market with free movement of goods and

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<sup>16</sup> The eight RECs recognized by the African Union are: the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), the Southern African Development Community (SADC), and the Arab Maghreb Union (UMA).

<sup>17</sup> Cheong et al, 2013.

<sup>18</sup> ECA, 2012.

<sup>19</sup> See:Gathii, J.T., *African Regional Trade Agreements as Legal Regimes*, Cambridge University Press, 2011.

<sup>20</sup> Ibid, 5.

<sup>21</sup> Ibid, 69.

<sup>22</sup> CRTA is the standing review committee for RTAs and was designed to streamline the examination process. Also see WTO, *World Trade Report*, 2011, 187, which covered the relationship between WTO and RTAs.

<sup>23</sup> Ajumbo, G. & Briggs, I., *What does 2015 hold for progress towards establishing the Continental Free Trade Area ?*, Bridges Africa, Volume 4, No. 1, 3 February 2015.

services as a way of promoting social and economic development in Africa.<sup>24</sup> “This in effect means that tariffs and quotas on the trade of most goods and services among African countries will be eliminated, bringing together 54 African countries with a combined population of more than one billion people and a combined gross domestic product of more than USD 1.2 trillion.”<sup>25</sup>

**The key objectives of a CFTA are to:**

- Create a single continental market for goods and services, with free movement of business persons and investments;
- Expand intra-African trade through better harmonisation and coordination of trade liberalisation and facilitation regimes and instruments across Regional Economic Communities and across Africa in general;
- Resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes; and
- Enhance competitiveness at the industry and enterprise level through exploiting opportunities for scale production, continental market access and better reallocation of resources.

In terms of the benefits of the CFTA, a computable general equilibrium (CGE) analysis by Cheong, Jansen and Peters puts forward some impressive projections.<sup>26</sup> For comparative purposes, two sets of scenarios were designed: regional FTAs and a CFTA, both fully implemented by 2017. Each case also considered FTA reforms alone as well as FTA reforms complemented by the improvement of trade facilitation measures. Overall, the reforms would considerably stimulate intra-African trade, increasing it by 52.3 per cent (or \$34.6 billion) under a CFTA in 2022. This would result from exchanges within Africa increasing in all the main sectors. African exports within the continent would rise most in the industrial sector, by 53.3 per cent (or \$27.9 billion) compared with the baseline, in 2022, if a CFTA is established. This would enhance the “sophistication” of intra-African trade, dominated by industrial products. In the same vein, trade of agricultural and food products within the continent also would increase strongly, by 53.1 per cent (or \$5.7 billion) in 2022. Intra-African trade in services would also rise significantly, by 31.9 per cent (or \$1.0 billion), albeit from a lower base, as intra-African trade in services is relatively limited from the onset. “In other words, following the creation of a CFTA assumed to be effective by 2017, the share of intra-African trade would be enhanced by 52.0 per cent over a 12-year period, rising from 10.2 per cent in 2010 to 15.5 per cent in 2022.”<sup>27</sup> In this study, the authors also considered the effect of trade facilitation measures and concluded that intra-African trade increases by 128.4 per cent (or \$85.0 billion) through a CFTA. The results indicate that, for Africa as a whole, the establishment of regional FTAs and the formation of a larger FTA at the continental level would increase continental exports, real income, and real wages for all categories of workers.

While the projected gains from the CFTA are impressive, inequitable distribution of the gains may require mechanisms to redress any imbalances. “The AU includes many smaller [Least Developed Countries] LDC states, as well as economic powerhouses such as Nigeria and South Africa. It will be important that the negotiating

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<sup>24</sup> ECA, 2012, 5.

<sup>25</sup> Ajumbo et al, 2015.

<sup>26</sup> Cheong et al, 2013. The CGE model is especially well designed for assessing economic impacts of trade policies.

<sup>27</sup> Ibid, 297.

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framework allows for all member states to effectively participate and the negotiations reflect the interests of the poorest countries on the continent.”<sup>28</sup>

The questions that now loom for the CFTA include mapping the relationship between the CFTA and the existing regional FTAs and the binding trade agreements with third parties and an assortment of bilateral investment treaties (BITs). It is important to establish a common understanding of how the systemic issues and multilateral system implications arising from these would be treated.<sup>29</sup> Much also needs to be done to incentivize private sector involvement - both small and medium enterprises (SMEs) and large firms - to buy into the regional FTA and CFTA agenda. “In November 2013, the Pan-African Chamber of Commerce and Industry (PACCI), representing 35 national chambers, signed an [memorandum of understanding] MOU with the African Union outlining its support to the CFTA process and highlighting the need to engage with the business community.”<sup>30</sup> “Constructive engagement with the private sector and civil society will be vital to generate the momentum to drive the process forward.”<sup>31</sup>

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<sup>28</sup> Saana Institute Policy brief, 2014.

<sup>29</sup> Ajumbo et al, 2015.

<sup>30</sup> Saana Institute Policy Brief, 2014.

<sup>31</sup> Ibid.

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## PART II – TRADE AND HUMAN RIGHTS

### 1. CHARTING THE RELATIONSHIP BETWEEN TRADE AGREEMENTS AND HUMAN RIGHTS

The global, bilateral and regional trade regimes have a profound impact on human rights, given that the promotion of economic growth in itself may not lead to inclusive, sustainable and equitable development outcomes. There has been sometimes widespread criticism of, and mobilization against, trade agreements and investment treaties, particularly given governments' orientation to focus exclusively on commercial interests in negotiations without taking into account their obligations to address human rights, the environment and development. International trade and investment law have largely grown in isolation from the norms and standards of human rights. It is only over the last decade or so that there has been increasing recognition of the potential for international trade and investment law to impact on human rights.<sup>32</sup> As a result, there is a growing interest and commitment by civil society and by some governments to assess the social and human rights implications of trade and investment policies and agreements - both multilateral and bilateral - including through the use of HRIAs.

Specifically, trade agreements could potentially have positive and adverse effects on the right to food, the right to water and sanitation, the right to education, the right to health, the right to an adequate standard of living, the right to work and the right to development. These human rights are recognized in international and regional treaties; and consequently, human rights obligations can be enforced through a variety of means, including domestic courts, national human rights institutions, and international mechanisms such as African courts and commissions and United Nations treaty bodies.

A human rights focus on trade and investment rules helps create coherence and balance in international law and policy-making, and strengthens the democratic processes around key economic issues. A human rights-based approach entails considering how States' obligations under trade agreements might impact on their ability to fulfil their human rights obligations; what measures States and other actors should be taking to ensure positive impacts

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<sup>32</sup> See Commission on Human Rights, Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights (E/CN.4/2002/54), Geneva; Commission on Human Rights, Economic, Social and Cultural Rights: Liberalization of trade in services and human rights (E/CN.4/Sub.2/2002/9), Geneva; Commission on Human Rights, Economic, Social and Cultural Rights: Human rights, trade and investment (E/CN.4/Sub.2/2003/9), Geneva; Commission on Human Rights, Economic, Social and Cultural Rights: Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization (E/CN.4/2004/40), Geneva; Commission on Human Rights, Economic, Social and Cultural Rights: Mainstreaming the right to development into international trade law and policy at the World Trade Organization (E/CN.4/Sub.2/2004/17), Geneva; Commission on Human Rights, Economic, Social and Cultural Rights: Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalization (E/CN.4/2005/41), Geneva; OHCHR, 5th WTO Ministerial Conference Cancún, Mexico 10-14 September 2003: Human Rights and Trade, 2003, Geneva; OHCHR, Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights, 2005, Geneva; Pacific Trade and Human Rights, UNDP, WHO & OHCHR, 2014, Suva (Pacific trade and human rights, 2014).

and avoid negative impacts; and consideration of action that is required to mitigate against any negative impacts that do occur.

In sum, what does a human rights-based approach bring?<sup>33</sup>

- **Respects the principle of non-discrimination;**
- **Promotes participation of all, including marginalized groups;**
- **Monitors trade processes and outcomes through human rights impact assessments;**
- **Ensures that progressive trade liberalization promotes the progressive realization of human rights;**
- **Promotes the accountability of State actors;**
- **Promotes ethical and fair business; and**
- **Encourages international cooperation and assistance to ensure that poorer countries also benefit from trade.**

Greater attention to human rights in the negotiation and implementation of trade and investment agreements can improve the substantive outcomes- particularly for the people who are most likely to be affected by them in a negative manner.<sup>34</sup> This approach “shifts the perspective from aggregate values - from the benefits of trade for the country as a whole - to the impacts of trade on the most vulnerable and...insecure”<sup>35</sup>, given that economic benefits may not be evenly distributed across and within countries. This approach focuses on protecting vulnerable individuals and groups - in particular, low-income and resource-poor farmers, as well as farm labourers and rural communities.<sup>36</sup>

Applying the three levels of human rights obligations - respect, protect and fulfil - to trade agreements, De Schutter suggests the following categorisation.<sup>37</sup> Given their duty of respect, States must not ratify any trade agreements obliging them to implement measures that would impact negatively on human rights. Examples of possible violations mentioned by De Schutter include excessive tariff reductions where this would lead to the destruction of the livelihoods of small producers, and overly strict intellectual property rights if this were to make it more difficult to gain access to seeds. Given their duty of protection, States must not ratify any agreements making it more difficult for them to ensure that private actors comply with human rights, for instance by introducing protection for foreign investors that could negatively impact upon the human rights of domestic constituencies. Finally, given their duty of fulfilment, States must refrain from ratifying any agreements that make it more difficult for them to fully uphold human rights, for instance through customs and taxation losses that might lead to an

<sup>33</sup> See: Pacific trade and human rights, 2014.

<sup>34</sup> Ibid.

<sup>35</sup> *Commission on Human Rights, Economic, Social and Cultural Rights: Liberalization of trade in services and human rights* (E/CN.4/Sub.2/2002/9), Geneva.

<sup>36</sup> *Commission on Human Rights, Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights* (E/CN.4/2002/54), Geneva.

<sup>37</sup> A/HRC/19/59/Add.5, 2011.

underfunding of social security systems. Consequently, States must not ratify any agreement that impedes another State's ability to uphold its human rights obligations.<sup>38</sup>

## 2. KEY HUMAN RIGHTS ISSUES IN RELATION TO TRADE AGREEMENT PROVISIONS

There are eight trade sectors identified that are more often referred to in discussions on the impact of trade agreements on human rights. These trade sectors often appear as specific chapters in trade agreements or stand-alone agreements. The trade sectors are: goods; agricultural trade; technical standards; health; safety measures; intellectual property protection; government procurement; and investment liberalization.<sup>39</sup> The gendered aspects of trade liberalization need to be considered in this regard. "Trade liberalisation agreements are part of an intricate web of macroeconomic reform involving the re-tuning of export promotion and social, fiscal and labour market policies. These policies impact on gender relations, human development and poverty dynamics by re-arranging relations of power and access to resources between men and women."<sup>40</sup>

"The full range of international human rights can be linked to trade. However, early experiences of conducting human rights impact assessment of trade agreements demonstrates the non-exhaustive list of connections outlined..."<sup>41</sup> Broadly, for civil and political rights, the ability of persons to participate in informed public debate and decision-making about trade policy depends on the right to participate in public affairs, freedom of expression and freedom of association. The right of access to remedies implies that individuals and communities have the ability to effectively raise concerns about the impacts of trade agreements through judicial and non-judicial mechanisms at the domestic and international levels. Increases in revenues from trade provide governments with the resources to progressively realise the full spectrum of economic, social and cultural rights. Trade can facilitate or create barriers for access to medicines. Privatisation of public services, often linked with trade liberalisation, can have impacts on the enjoyment of the human rights to health, education, water and sanitation. Changes to tariffs on agricultural products can have impacts on the right to food. Reduction of import tariffs as part of regional trade negotiations can impact countries ability to collect revenue and support basic social service such as health care.<sup>42</sup> In relation to import revenue, countries in Sub-Saharan Africa spend less than 5% of their GDP on public social protection.<sup>43</sup> Given that budgetary spending in social protection or even other social sectors may not be optimal to start with, loss of import revenue should not lead to retrogression in human rights protection.

"Although States have the primary obligation to address the human rights impacts of trade liberalisation, trade agreements form an important backdrop and context for business enterprises to understand their human rights responsibilities given that provisions in these agreements have impacts on the development or decline of specific economic sectors."<sup>44</sup> The provisions of free trade agreements ultimately will have impacts on local economies that

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<sup>38</sup> A/HRC/19/59/Add.5, 2011, para 8.

<sup>39</sup> Walker, S., *The Future of Human Rights Impact Assessments of Trade Agreements*, Intersentia, 2009, 60-61.

<sup>40</sup> Williams, M., *Gender Mainstreaming in the Multilateral Trading System: A handbook for policy-makers and other stakeholders*, Commonwealth Secretariat, 2003.

<sup>41</sup> See: Pacific trade and human rights, 2014, 14.

<sup>42</sup> Ibid.

<sup>43</sup> ILO World Social Protection Report, 2014, Table, 297.

<sup>44</sup> Pacific trade and human rights, 2014, 13.

are measurable in terms of increases or decreases in the activities of various business enterprises. In other words, where trade agreements stimulate or facilitate activity in a particular economic sector, the State should be aware of the typical impacts that business enterprises in that sector may have on human rights. The State should take appropriate steps to ensure that such changes in business activities do not result in infringements on the human rights of workers, communities and consumers. Businesses have responsibilities under the United Nations (UN) Guiding Principles on Business and Human Rights adopted by the UN Human Rights Council in 2011.

Gender, as mentioned, is a key factor in the complex relationship between trade, growth and development - and yet there is a widespread assumption that trade policies and agreements are class, race and gender neutral. There is a need to ensure that trade liberalization does not undermine women's rights and poor people's livelihoods, and supports the gender equality agenda.<sup>45</sup> First and foremost, this requires the explicit recognition of women's contribution to the economy through both their productive and their unpaid reproductive work. Trade agreements raise particular concerns for women, who are affected differently by trade policies. Many women confront sexual violence, lack of security, credit and education as factors impeding their access to markets. Women's work in the global market - particularly migrant women's labour - tends to be concentrated in informal sectors, which exposes them to a heightened risk of abuse, including low wages, long hours and uncertainty of tenure.<sup>46</sup>

The applicability of the concept of indigenous peoples is also a subject of ongoing debate in Africa, and has implications for policy decisions and the human rights of the concerned populations. From a human rights perspective, the question of which groups are indigenous is not a matter of *who came first*, but the shared experiences of dispossession and marginalization and particular human rights concerns. It is in this sense that the term has been applied in the African context by the African Commission on Human and Peoples' Rights<sup>47</sup> and UN Specialized Agencies in their efforts to address long-standing patterns of discrimination and marginalization of distinct communities by dominating groups and States. Within this perspective, pastoralists and hunter-gatherers are normally regarded as indigenous peoples in the international context, and they have increasingly come to identify themselves as such in many African countries. Groups that identify as indigenous peoples in Africa often live in areas with very poor infrastructure and claim land that governments have regarded as vacant or not productively used. "Increased investment and trade can encourage development on the traditional lands and territories of indigenous peoples. This raises issues related to whether there are adequate domestic processes to ensure the right of indigenous peoples to free, prior and informed consent, on-going consultation and participation in the benefits of these developments."<sup>48</sup>

Special attention must also be paid to the potential impacts of trade on children, national, ethnic, linguistic and religious minorities, migrant workers, persons with disabilities, lesbian, gay, bisexual and transgendered persons (LGBT), older persons and other groups. Some of these groups are protected by additional international human rights provisions.<sup>49</sup>

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<sup>45</sup> Ziegler, J. et al (eds.), *The fight for the right to food: Lessons Learned*, Graduate Institute, 2011 (The fight for the right to food, 2011).

<sup>46</sup> Ibid.

<sup>47</sup> See: Reports of the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights.

<sup>48</sup> Pacific trade and human rights, 2014, 15.

<sup>49</sup> Ibid.

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## PART III: EXPLORING A POTENTIAL HUMAN RIGHTS IMPACT ASSESSMENT (HRIA) OF THE CFTA

### 1. WHAT ARE HUMAN RIGHTS IMPACT ASSESSMENTS (HRIAS)?

HRIAs are “instrument[s] for examining policies, legislation, programs and projects to identify and measure their impact on human rights.”<sup>50</sup> HRIAs enable an objective analysis of the ways and the extent to which an intervention impacts upon the human rights of the affected population. Depending upon the actor conducting the HRIA and the time at which they are undertaken, the objectives of HRIAs are to prioritise human rights in policy development and decision making processes, to identify negative human rights impacts and enable the amendment of the proposal to reduce negative impacts,<sup>51</sup> and to identify and enable the redress of negative impacts upon human rights that have already occurred.

There have been over four decades of growth in the field of impact assessments.<sup>52</sup> In the last twenty years, this has included demand for development actors, governments and corporations to undertake HRIAs. HRIAs developed in the late 1990s,<sup>53</sup> bear most resemblance to social impact assessments (SIAs). Walker<sup>54</sup> cites four reasons for the development of HRIAs: (1) increasing demand from donor agencies for an assessment of the actual impact that technical cooperation programs have had on the enjoyment of human rights; (2) the push to operationalize human rights in the field, especially in development; (3) the growing recognition of the profound impact of businesses upon human rights and demands upon businesses to avoid impacting upon human rights; and (4) the greater focus on social and cultural rights, requiring an instrument capable of assessing social and cultural as well as economic impacts of interventions.

While HRIAs emerged out of existing impact assessments, they can be distinguished from other impact assessments in important ways:

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<sup>50</sup> The Nordic Trust Fund and World Bank, *Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development*, 2013, ix (Nordic Trust Fund and World Bank study, 2013).

<sup>51</sup> Hunt and MacNaughton 2006, cited in The Nordic Trust Fund and World Bank study, 2013.

<sup>52</sup> In the 1950s, the economic impact assessment model was first adopted to incorporate environmental impact assessments, which in turn led to the development of social impact assessments in the 1980s. Today, types of specialized impact assessments include poverty impact assessments, health impact assessments, gender impact assessments, equality impact assessments, child impact assessments and integrated impact assessments.

<sup>53</sup> Fabiane Baxewanos and Werner Raza, *Human Rights Impact Assessment as a New Tool for Development Policy*, Working Paper 37, OFSE, 2013, 7.

<sup>54</sup> Walker, 2009.



- **HRIAs are based on the normative framework of international human rights law;**
- **HRIAs can be informed by established human rights jurisprudence and human rights mechanisms may assist in implementation of the recommendations of HRIAs;**
- **Although other impact assessments regularly address human rights principles (such as participation, accountability and equality), HRIAs do so in a more systematic and comprehensive way;**
- **HRIAs are more universal and comprehensive than other impact assessments, considering economic, social, cultural, civil and political rights;<sup>55</sup>**
- **HRIAs focus on non-discrimination as a key guiding principle and the impacts on the marginalized and disadvantaged given that they are often at risk from human rights violations.**

A range of HRIAs have been conducted so far in the area of trade agreements in relation to trade. The European Union (EU) also systematically conducts economic, social and environmental impact assessments of all major multilateral and bilateral trade negotiations. These are known as Sustainability Impact Assessments. The United Nations Environment Programme conducts Environmental Impact Assessments and has also developed an impact assessment methodology that incorporates integrated environmental, social and economic assessment.

The Guiding Principles on human rights impact assessments of trade and investment agreements, developed by the former Special Rapporteur on the right to food, Olivier de Schutter (2011),<sup>56</sup> provide guidance to States on how to ensure that trade and investment agreements they conclude are consistent with their international human rights obligations. It recognizes that HRIAs are an important tool for States in trade and investment negotiations to ensure that the terms of the agreement do not hinder the ability of the State to meet its obligations under international human rights law.

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<sup>55</sup> The Nordic Trust Fund and World Bank study, x.

<sup>56</sup> A/HRC/19/59/Add.5, 2011. The guiding principles were developed in response to a request by the Human Rights Council to explore ways and means of countries to ensure the realization of the right to adequate food for populations.

There are seven guiding principles; these relate to:

- (1) Preparation of HRIAs prior to the conclusion of trade and investment agreements;**
- (2) Requirement that the conclusion of agreements does not impose obligations inconsistent with pre-existing international treaty obligations;**
- (3) Range of responses to a human rights incompatibility;**
- (4) Requirement for a human rights-based approach to guide the assessment procedure, comprising independence, transparency, inclusive participation, relevant expertise and sufficient funding, and status of the report;**
- (5) A methodology which makes explicit reference to the normative content of human rights obligations, uses human rights indicators and ensures decisions on trade-offs are subject to consultation, meets the requirements of equality and non-discrimination and does not result in retrogression;**
- (6) Purpose of aiding the overall protection of human rights; and**
- (7) Requirement that the process of preparing a HRIA follows a number of key steps: screening, scoping, evidence-gathering, analysis, conclusion and recommendations, and evaluation.**

## 2. WHY CONDUCT A HRIA OF THE CFTA?

The CFTA, given its continental scope and scale, has the potential to radically alter the nature of intra-African trade and provide major impetus to the African regional integration project. If going by the projections, there will be substantial increases in both industrial and agricultural intra-African trade and real improvements in wages and employment. However, going by the experiences of other bilateral and regional free trade agreements, it is clear that with the potential positive impacts on human rights, there are also potential adverse impacts as a result of trade provisions and how they are designed and implemented and also the process of the negotiations themselves. While there have been HRIAs conducted in the area of trade, most of these have been civil society assessments and some have been ex post assessments. There are not many examples of the results being used by governments to design or modify trade rules or provide policy measures designed to mitigate potential and actual negative human rights impacts.<sup>57</sup> This offers a unique opportunity in the context of the CFTA for a HRIA to be completed well before negotiations are complete and for the findings of an HRIA to be fed into the actual design of the final agreement.<sup>58</sup>

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<sup>57</sup> James Harrison, *Conducting a Human Rights Impact Assessment of the Canada-Colombia Free Trade Agreement : Key Issues, Background Paper Prepared for the CCIC Americas Group, February 2009* (Harrison, 2009)

<sup>58</sup> *Ibid.*

### Why conduct a HRIA of the CFTA?

*It is increasingly recognized that obligations contained in trade agreements can have implications for the ability of governments to respect, protect and fulfil a range of human rights*

-An ex ante assessment of the CFTA will help bring human rights concerns to light in a way by which it will be of utility to negotiators, decision-makers, parliaments, civil society and the private sector;

-A HRIA of CFTA can be utilized as a tool to gather evidence of human rights impacts to be fully aware of human rights implications of trade commitments, advocate for policy change and influence negotiations;

-By undertaking an HRIA at the outset of the negotiation process this will provide negotiating countries with an evidence base and policy recommendations from which to develop effective and cohesive trade policy - a trade policy that is aligned with national human rights as well as development commitments and priorities;

-Better decision-making, better design of the CFTA, ensuring that it is a trade agreement which puts people's concerns at the core are all value additions brought by a HRIA;

-A HRIA provides a unique opportunity to present any findings and analysis early on in the CFTA negotiations through various channels while emphasizing the need for participatory processes and stakeholder consultation to be integrated into the negotiations at the outset; and

-Improve compliance with the obligations of Member States under international and regional human rights law.

Conducting a HRIA, of course, brings with it challenges in terms of resources, time, identifying causal chains and ensuring that a proper objective, methodological process is employed underpinned by human rights principles. However, as emphasized earlier, one of the key strengths of a HRIA is its reliance on the normative framework of human rights law. In addition, we have previous HRIA experiences to learn from and the Guiding principles on human rights impact assessments of trade and investment agreements (2011), which can provide starting points to move forward.

For examining a potential HRIA of the CFTA, in this paper, we will outline methodology and key steps that could be followed and the substantive issues that may come up in the particular case of the CFTA in the areas of agriculture and employment. It must be pointed that since the CFTA negotiations are yet to begin, the substantive issues outlined are broad, illustrative and general, to begin the conversation on the CFTA and human rights, not to

prejudge the issues that may arise in the context of a screening and scoping assessment, two of the essential steps in a HRIA.

### a) Methodology and key steps

A HRIA of the CFTA would aim to assess how the legal provisions of the proposed agreement are likely to impact on the realization of clearly defined human rights. It would focus explicitly on the obligations of the member States of the AU, and would seek to measure the potential impacts of specific provisions on affected rights-holders in Africa. This would entail an empirical study of the actual or potential human rights impacts of the trade agreement itself - using quantitative and qualitative research, and a participatory approach to collect that information. It must be stressed here that covering impacts of all FTA provisions would be a monumental task and not practicable. This is why the steps of screening and scoping outlined below are crucial to work out a HRIA that is feasible and of real utility. Ultimately, a HRIA is a technical process, not an ideological one. A well-designed HRIA should indicate potential positive and negative human rights impacts, and provide recommendations to enable parties to the agreement to avoid or mitigate any negative impacts and build on positive ones.<sup>59</sup> While the focus is on positive and negative impacts, the HRIA should aim to have a preventative approach, and ensure that trade policies do no harm, and do not lead towards human rights violations.

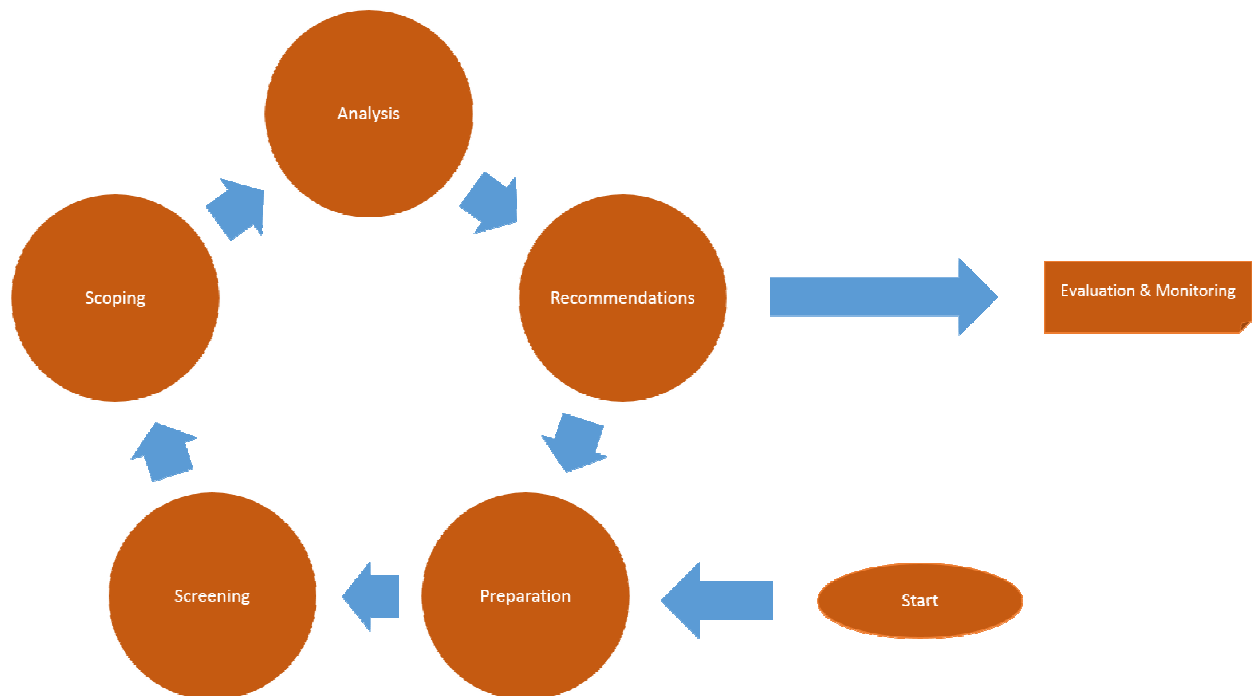
Steps outlined in Walker's full length treatment on HRIAs can be of guidance for a potential HRIA of a CFTA as there is no single one-size-fits-all methodology for undertaking impact assessments.<sup>60</sup>

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<sup>59</sup> Walker, 2009.

<sup>60</sup> Walker, 2009, 86.

The steps are the following:<sup>61</sup>



1. Preparation -this includes outlining the context of the assessment, setting out the objectives, scale and focus.
2. Screening - this involves narrowing the range of trade measures subject to the assessment.
3. Scoping - this stage identifies the terms of reference of the assessment exercise.
4. Analysis - this stage involves collecting and analysing data to verify the impacts of the policy or project identified during the scoping stage, as well as their likelihood and significance.
5. Recommendations - this stage considers what measures might optimize the likely positive impacts identified during the assessment stage, as well as measures to reduce or exclude negative impacts.
6. Evaluation and monitoring - the assessment should also undergo its own assessment to consider the extent to which it has met its objectives and is acceptable to stakeholders and to identify lessons learned.
7. Preparation of the report - upon completion of the six substantive steps, a report must be compiled.

Methodologies for ex ante impact assessments of trade agreements are generally iterative, beginning with a general or preliminary assessment which is deepened and narrowed at later stages to clarify specific impacts.<sup>62</sup>

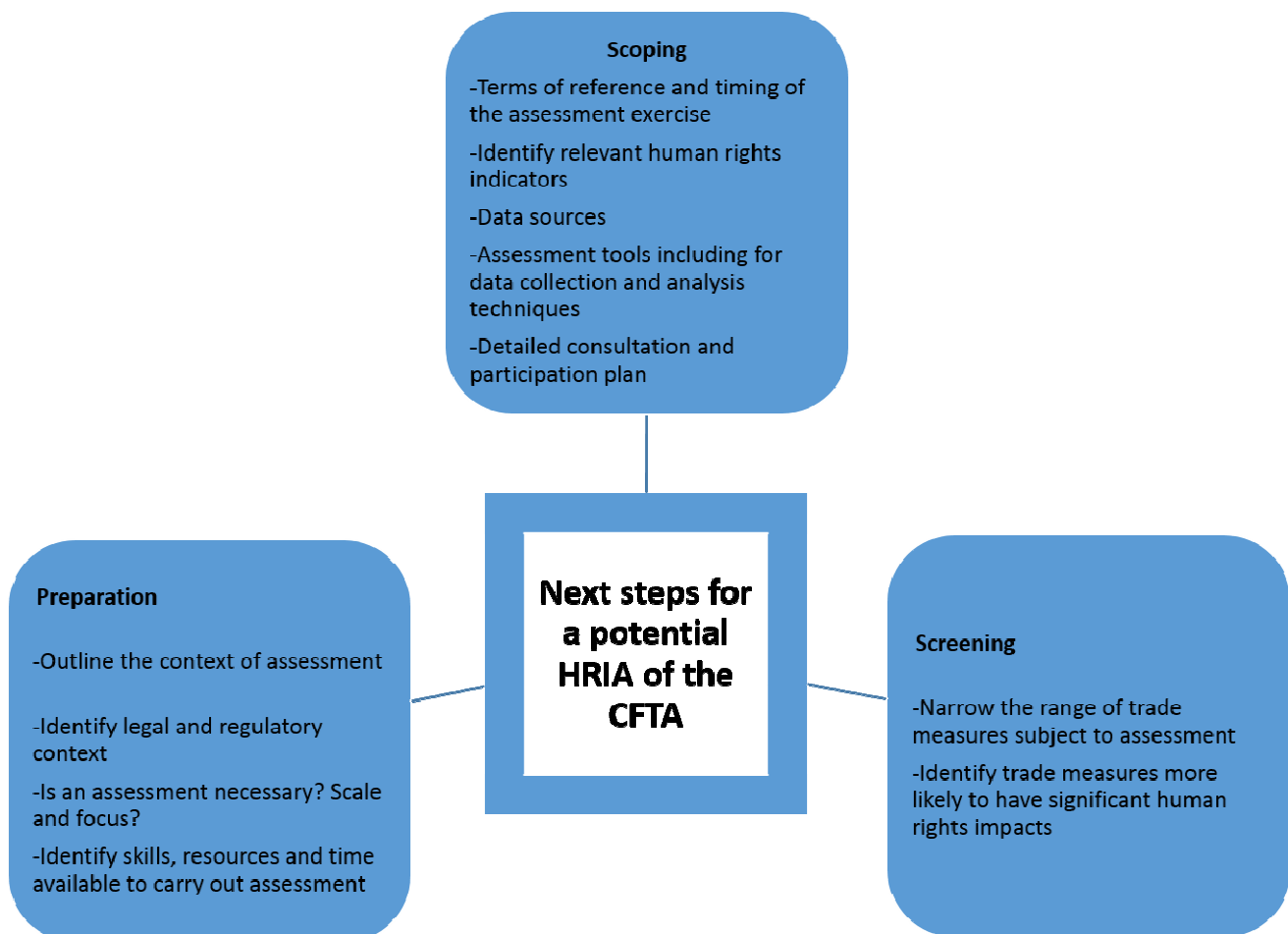
<sup>61</sup> Ibid, 87-88.

<sup>62</sup> Walker, 2009, 88.

The iterative process of assessment is an important means of dealing with the complexities inherent in the analysis of trade agreements given their wide sectoral, regulatory and geographical scope.<sup>63</sup>

## b) Next steps for a potential HRIA of the CFTA

If a HRIA of the CFTA is pursued or if it is decided to explore this a bit further, the next *essential* steps in a potential HRIA are **preparation, screening and scoping**. These stages will help clarify the utility of a HRIA, who will conduct it, oversight mechanisms, the team and resources required, and how best to fit this into the CFTA negotiations timeline and agenda.



As mentioned before, a trade agreement contains a vast array of provisions that are potentially subject to a HRIA. While the **screening stage** is a narrowing exercise, the **scoping stage** is an elaboration of what has to be done for the rest of the assessment and addresses key questions.<sup>64</sup>

<sup>63</sup> Ibid.

<sup>64</sup> Ibid, 93.

Since there is not a wide variety of experience with ex ante HRIAs of trade agreements, a fair amount of innovative thinking and creativity is required. From recent HRIA and trade experiences, we can deduct some main lessons: (1) being selective and focusing early on in the process on a narrow set of human rights and policy elements is key to the success of the exercise; (2) HRIAs are iterative processes, which require some degree of procedural flexibility; (3) particularly in the case of an ex ante assessment, the HRIA will have to extensively rely on expert judgments; (4) involving field researchers at an early stage of the process and closely assisting them during data gathering is critical to aligning information needs with information collection.<sup>65</sup>

In terms of timing, the scoping study should be able to assess when the best time is for a HRIA. There are pros and cons of when the HRIA is conducted. In the negotiation cycle, there may be preferences for undertaking a study later as it may be the view that it may be too early for an in-depth assessment of the CFTA.<sup>66</sup> This concern stems from the fact that the terms of the agreement and structure of the negotiation process are yet to be determined. However, an alternative viewpoint is that undertaking an HRIA at the outset of the negotiation process would provide negotiating countries with an evidence base and policy recommendations from which to develop effective and cohesive trade policy that is aligned with national human rights and development commitments and priorities.<sup>67</sup> This should not in any case rule out a potential scoping study to identify this in advance and help the planning along substantially.

Building constructive engagement with *all* governments involved in the negotiations would be very important for the success of an HRIA, regardless of the implementation timeframe.<sup>68</sup>

A **consultation and participation plan** should be elaborated on during the scoping stage. “The centrality of the consultative process is one of the key ways in which HRIAs can be differentiated from standard economic impact assessments which tend to focus on aggregate impacts and often pay insufficient attention to the impact on vulnerable groups.”<sup>69</sup> Participation and consultation can occur through several modalities including the use of electronic media, use of existing stakeholder networks, holding public meetings and workshops and attending meetings organized by stakeholders, use of publications by civil society, establishment of advisory committees consisting of stakeholder representatives, and publishing feedback. The HRIA process can also provide useful capacity-building support by assisting community members in mobilizing and demanding respect for their rights.<sup>70</sup>

A HRIA methodology should ensure that participation is sufficiently inclusive to the maximum extent possible given time and budget constraints, and that the participation and consultation plan is publicly available and developed in a transparent manner. This should include hearing and considering women’s views, through house to house

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<sup>65</sup> *Owning Seeds, Accessing Food, A Human Rights Impact Assessment of UPOV 91 based on case studies in Kenya, Peru and the Philippines*, The Berne Declaration, October 2014, 44. The pioneering nature of the research, applying a HRIA to PVP laws necessitated a fair amount of thinking and creativity as there was no pool of experience to draw from. In this situation, the HRIA methodology suggested in the literature provided valuable guidance to structure the process and to ensure a sound approach. (Owning Seeds, 2014).

<sup>66</sup> See: Morgan, W. et al, *Human rights and trade in the Pacific: A scoping study on designing a Human Rights Impact Assessment for PACER-Plus*, Universities-Linkage Project, 2010 (PACER-plus scoping study, 2010).

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Nordic Trust Fund and World Bank study, 2013.

<sup>70</sup> Also see: Columbia Center on Sustainable Investment et al, *Human Rights Impact Assessments of Large-Scale Foreign Investments: A Collaborative Reflection - Roundtable Outcome Document*, 2014.

consultations or holding women-only meetings. Overall for HRIAs, surveys and assessments should determine the exact nature and causes of negative impacts on men and women.

### c) Potential screening and scoping assessments: CFTA provisions

If a scoping assessment is to be considered as a next step, screening relevant provisions of the CFTA and linking them with human rights issues of concern is crucial. In screening issues of human rights concern, a human rights mapping of the region would be useful. Please see Annex 1 for an illustrative and preliminary look at what a human rights mapping could cover.

In exploring a potential HRIA of the CFTA in a scoping assessment, the starting point is that negotiating a new regional trade agreement of this scale and magnitude involves negotiating new, legally binding rules. Potential human rights impacts of CFTA will depend to a large degree on the scope and coverage of new trade rules that may be included in the new agreement. The negotiation phases will cover liberalization of trade in goods, trade in services, free movement of persons and accompanying measures on intellectual property rights, competition policy and investment.

Different approaches are required for assessing different types of provisions. Provisions of FTAs can have an indirect human rights impact. Two areas that will be further covered in this paper are agriculture and employment which will be expanded on to illustrate how a human rights based approach can help illuminate key concerns in these areas. It must be noted that in examining any of these areas closely, gendered impacts must be taken into account and the need for gendered analysis, along with a focus on non-discrimination and the impacts on marginalized and disadvantaged groups.

## 3. AGRICULTURE, CFTA AND HUMAN RIGHTS

### a) Background<sup>71</sup>

Agriculture constitutes 37% of Africa's GDP, contributes 40% of Africa's total export value, and 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. Smallholder, mainly family communities account for over 90% of Africa's agricultural production. Agriculture is therefore not only essential for Africa's growth but also for reducing poverty and inequality given the size of the workforce engaged in agriculture. Over a quarter of the world's multidimensional poor people live in Africa, largely earning their livelihoods from agriculture. Africa's food production has risen significantly but this has been accompanied by growing food imports. Despite the fact that 60% of the world's arable land is in Africa, nearly all members of the African Union are net importers of food. Food security is further placed at risk by increased environmental degradation, which includes climate change impacts,<sup>72</sup> and poor land management that results in an estimated cost of USD 9 billion per annum.<sup>73</sup>

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<sup>71</sup> Based on ECA note, 2014 – on file with author.

<sup>72</sup> Calestous Juma, *The New Harvest: Agricultural Innovation in Africa*, Oxford University Press, 2011, xiv (The New Harvest, 2011).

<sup>73</sup> Open Society Initiative et al, *Better Land Use, Better Future for All: Partnering with civil society to enhance sustainable land management in Sub-Saharan Africa*, 2013.



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## b) CFTA and agriculture – thematic areas of concern

“Agriculture is the cornerstone of economic development in many African countries. Eighty per cent of the population in Africa still relies heavily on the agricultural industry to support their economies.”<sup>74</sup> Trade liberalization among AU member States within the context of the CFTA is expected to provide further incentives to boost agricultural production and productivity.<sup>75</sup> Agricultural and food products are the products most likely to be traded within the continent, amounting for about one-fifth of the sector’s total exports. In terms of intra-African trade, trade of agriculture and food products surpasses that of primary products, at 18.4 per cent and 8.8 per cent respectively. In terms of import shares, those of agriculture and food exceed those of primary products both from the external world and within Africa. Given this, the below themes should be particularly scrutinised:

### *Effects of the elimination of tariff barriers*

“Considering the high trade protection levels, elimination of tariff barriers following the establishment of FTAs among African economies could lead to substantial increases in trade flows within the continent. This will, however, entail adjustment costs such as tariff revenue losses.”<sup>76</sup> This means that countries could lose considerably from the phasing out of import duties. This would come at a time when these countries need to invest in their production capacity, infrastructure and human resources to tackle enhanced competition. This loss in fiscal resources could have severe effects on the developing countries’ income for public spending, thereby undermining the role of the State in the provision of basic services such as education or healthcare. Yet, if the elimination of tariff barriers is “accompanied by other policies – for example, the reduction of non-tariff barriers – benefits could be considerably enhanced and related adjustment costs offset.”<sup>77</sup>

### *Demand, supply and employment*

The trade-creating effect could lead to higher demand for imports from African countries and, thus, to higher production. “In addition, as the majority of the African population relies on agriculture and food production for its livelihood, it is very likely that any economic gains would not be limited to the strictly trade sphere. Also, purchasing power, at least that of those engaged in activities related to agriculture and food, could increase, and implicitly poverty could be reduced, as long as employment is also favoured.”<sup>78</sup>

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<sup>74</sup> Gathii, 2011, 366-367.

<sup>75</sup> So far regional cooperation in agriculture is in its infancy and major challenges lie ahead. The initiation of the African-led Comprehensive Africa Agriculture Development Programme (CAADP) by the AU’s NEPAD is a significant step in this regard- It brings agriculture to the forefront of the development dynamics of African nations, by linking key players in national, regional and continental levels.

<sup>76</sup> Cheong et al, 2013.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid, 288.

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### *Wages of agricultural workers*

As observed at the global level, whenever the real wages of unskilled labour employed in non-agricultural sectors increases more than for unskilled workers engaged in agriculture, employment slightly decreases in agriculture and increases elsewhere;<sup>79</sup> this impacts real wages.

### **c) Human rights framework**

The critical areas of concern in the debate on agriculture are food security, food sovereignty and sustainable livelihoods. Food security and sovereignty are intertwined with the loss of domestic agricultural production, with impacts for nutrition and caloric intake of rural families. Loss of sustainable livelihoods is linked to import penetration and the loss of preference in international agricultural markets.

“Agriculture provides a necessary foundation for the enjoyment of various inter-related human rights amongst them: Right to an adequate standard of living, right to work, right to adequate housing, right to water, right to adequate food, right to education, right to self-determination and right to culture.”<sup>80</sup> A variety of human rights violations and other abuses also occur in the context of agriculture such as right to life and conflicts over land, right to social security, right to health and women’s and indigenous people’s rights.<sup>81</sup>

Many HRIAs that have been conducted of trade agreements have focused on the right to food specifically. The right to food includes ensuring that food be accessible in ways that are sustainable (sustainability incorporates the notion of long-term availability and accessibility) and that do not interfere with the enjoyment of other human rights. Human rights principles and approaches ensure that no discriminatory practices are used to achieve food security. Transparency, participation and social inclusion are at the heart of these approaches.

In relation to the right to food, “women are disproportionately affected by hunger, food insecurity and poverty, largely as a result of gender inequality and their lack of social, economic and political power.”<sup>82</sup> A principal human rights issue for indigenous peoples on the continent also relates to the loss and environmental degradation of their land, forests and resources that they depend on to maintain their distinct identities and cultures and to develop economically.

### **d) Potential CFTA impacts on agriculture-related human rights**

Increased market access in the CFTA can promote the availability and accessibility of food (right to food); special and differential treatment can promote rural development, but high barriers to trade in some wealthy countries can exacerbate poverty and threaten rural livelihoods (right to an adequate standard of living); food aid can provide

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<sup>79</sup> Ibid.

<sup>80</sup> ESCR-Net and Center of Concern, *Kuala Lumpur Guidelines for a Human Rights Approach to Economic Policy in Agriculture*, 2010. The three-part Kuala Lumpur Guidelines are designed as a tool to provide basic information and a methodology for use by anyone concerned with ensuring the primacy and centrality of the human rights of those affected by trade, investment and finance rules as well as fiscal, monetary and other economic policies related to agriculture. They aim to contribute to the further development, application and interpretation of international human rights law in relation to economic law and policy as pertaining to agriculture. (Kuala Lumpur guidelines).

<sup>81</sup> Ibid, para 22.

<sup>82</sup> The fight for the right to food, 2011, 23.

food, but it can also damage sustainability of food production in the longer term (right to food). The elimination of tariffs, which would leave domestic agriculture unsheltered from the arrival of cheaper products, could drive small-scale farmers out of business. This could have potentially severe consequences for the right to food for poor people. This would also lead to rising unemployment levels; and if small farmers are obliged to abandon their land and migrate to cities because of their need to find gainful employment, it could further impoverish rural areas, while increasing pressure on cities. On the other hand, the reduction in agricultural production would increase these countries' dependence on food imports; given the highly volatile commodity prices on world markets, this also entails major risks for their food security.<sup>83</sup>

The CFTA will contain chapters on intellectual property rights (IPRs), investment, services and public procurement. These non-commodity issues are able to impact food and agricultural production and distribution within countries.

For example, the expansion of intellectual property rights on seeds might well restrict small-scale farmers' practices of seed saving and exchange in the informal seed system, thus limiting access to protected seeds and putting farmers' right to food at risk.<sup>84</sup> There must be efforts to actively inform farmers in the design and implementation of seed policies. States should promote innovation in both the commercial seed system and in farmers' seed systems, ensuring that innovation in both systems works for the benefit of the poorest and most marginalized farmers.<sup>85</sup>

In terms of the investment chapter, this will raise issues of the level of investor protection provided and the impacts that this may have on land reforms and land evictions and other investment related issues in the context of large investment sectors especially extractive industries. One of the examples in the latter scenario which is currently under debate is investments in land that lead to displacement of rural or urban communities who depend on this land as their source of alimentation, housing or cultural activities. Land reform can contribute to the progressive realization of the human right to food in certain contexts.<sup>86</sup>

Finally, in terms of services and public procurement, there can be impacts on the retail sectors and small vendors in countries and access to public procurement market of partners. "Small-scale food producers must be provided with greater opportunities to sell on the local markets, which they can more easily supply without having to be dependent on large buyers. Furthermore, the poorest consumers, who now often rely on large retailers or fast food outlets to feed themselves, must have the possibility to purchase food that is fresh and nutritious, and therefore healthier."<sup>87</sup>

## 4. EMPLOYMENT, CFTA AND HUMAN RIGHTS

### a) Background

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<sup>83</sup> For specific studies done on right to food and trade, see: FIAN, *Trade Policies & Hunger: the impact of trade liberalisation on the Right to Food of rice farming communities in Ghana, Honduras and Indonesia*, Ecumenical Advocacy Alliance, 2007; also see: Misereor et al, *Right to Food Impact Assessment of the EU-India Trade Agreement*, December 2011.

<sup>84</sup> *Owning Seeds*, 2014.

<sup>85</sup> *Report of the Special Rapporteur on the right to food: seed policies and the right to food*, A/64/170, 2009, New York.

<sup>86</sup> *Report of the Special Rapporteur on the right to food: access to land and the right to food*, A/65/281, 2010, New York.

<sup>87</sup> *Report of the Special Rapporteur on the right to food: the transformative potential of the right to food*, A/HRC/25/57, 2014, Geneva.

Employment is a huge challenge in Africa.<sup>88</sup> The continent is experiencing a youth bulge, with “over 65% of its population aged below 35 years.”<sup>89</sup> Moreover, “60% of the continent’s unemployed are aged 15 to 24,” and this means that “an overwhelming 72% of Africa’s youth population lives on less than US\$2 a day.”<sup>90</sup> And while Africa has experienced dramatic population growth – almost quintupling in size – since 1950, the continent is set to grow further, garnering almost 1/5 of the global population by 2034, as compared with 9% and 15% in 1940 and 2014 respectively.<sup>91</sup>

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 increasingly recognized in various analyses of emerging and frontier markets and also indeed in the ‘Africa rising’ narrative. On the other hand, the rights relating to employment require attention as internal markets in Africa are liberalized to boost production and trade.<sup>92</sup>

## b) CFTA and employment – thematic areas of concern

Current modelling on employment levels in Africa is not very conclusive,<sup>93</sup> and consequently, for the purposes of the CFTA, further modelling and analysis on employment and labour should be undertaken to fill the gaps in the current data. In spite of this, it has been suggested that “trade reforms have a positive, although small, impact on real wages for all categories of African workers.”<sup>94</sup>

Previous experience of research of trade reforms in other regions suggest that some themes should be particularly scrutinised, and as such, when analysing the CFTA’s impacts on employment, the following themes deserve specific attention:

### *Short - term vs. long- term impacts*

While it has been suggested that “the direct effects of trade reform on aggregate employment are muted,”<sup>95</sup> others suggest that employment is impacted and that “in general, in the longer run, the impact of imports on employment is more positive than in the short run.”<sup>96</sup> Moreover, others suggest that, on average, poverty is reduced by trade liberalisation in the long run,<sup>97</sup> and this “improves aggregate welfare but the gains are small and unequally distributed.”<sup>98</sup> Yet UNCTAD suggests that ‘increased inequality does not imply that the least favoured

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<sup>88</sup> ECA note on agriculture and employment, 2014 - on file with author.

<sup>89</sup> Odame, A. ‘5 loaves can feed 5000: a case for agriculture and employment in Africa’, *African Dev Jobs*, 2014.

<sup>90</sup> Ibid.

<sup>91</sup> ECA note on agriculture and employment, 2014 - on file with author.

<sup>92</sup> ECA note, 2014.

<sup>93</sup> Cheong et al, 2013.

<sup>94</sup> Cheong et al, 2013, 298.

<sup>95</sup> Hoekman, B. & Winters, A., *Policy Research Working Paper 3676: Trade and employment: Stylized facts and research findings*, World Bank, Washington, 2005.

<sup>96</sup> UNCTAD, *The Impact of Trade on Employment and Poverty Reduction (TD/B/C.I./29)*, Geneva, 2013, para. 24.

<sup>97</sup> Winters, L., McCulloch, N. & McKay, A., ‘Trade liberalization and poverty: The evidence so far’, *Journal of Economic Literature*, Vol. 42, 2004, pp. 72–115.

<sup>98</sup> Santos-Paulino, A., ‘Trade, income distribution and poverty in developing countries: A survey’, *UNCTAD Discussion Papers*, no. 207, 2012.

segments of the population are worse of in absolute terms.”<sup>99</sup> These competing conclusions suggest that further analysis needs to be undertaken to determine the short term and long term impacts of trade liberalisation on job creation and inequality.

#### *Goods vs. services industries*

UNCTAD suggests that “employment creation is relatively small in services compared to the agricultural and industrial [goods] sectors.”<sup>100</sup> And while offshoring of services is “an opportunity for developing countries,”<sup>101</sup> it creates comparatively small job opportunities, and has raised concerns over the “small linkages to the rest of the economy”.<sup>102</sup> Thus, UNCTAD acknowledges that “the link between gross trade and employment is weaker than between value added exports and employment,”<sup>103</sup> and advances that “increasing value addition [to products] is important for job creation.”<sup>104</sup>

#### *Impacts on low skilled workers vs. high skilled workers*

The ILO has suggested that “deeper integration increases the demand for unskilled, rather than skilled labour,” given this, it advances that education and training be used ‘to alleviate potential deficits in skills.’<sup>105</sup> Moreover, the ILO suggest that education policies “prepare the ground for new export products,”<sup>106</sup> and thus, in order to enable trade liberalisation to facilitate growth in jobs, education services need to prepare citizens for jobs. It is particularly important that up-skilling accompanies trade liberalisation, as UNCTAD has noted that “trade contributed to increasing inequality in the remuneration of skilled and unskilled labour in many countries.”<sup>107</sup>

#### *Migrant workers: pros and cons*

According to UNECA, “migrant labour has become an essential feature in meeting economic and labour market challenges,”<sup>108</sup> moreover, “for sending countries, immigration reduces the incidence of poverty, improves health and education outcomes, and increases business investment,”<sup>109</sup> and thus, migration of workers is useful for realising human rights and growing economies. Yet, while the Treaty Establishing the African Economic Community (Abuja Treaty) calls for the free movement of people, “lack of recognition of their professional and academic qualifications remains a major obstacle” to enabling the free movement of labour.<sup>110</sup>

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<sup>99</sup> UNCTAD, *The Impact of Trade on Employment and Poverty Reduction* (TD/B/C.I/29), Geneva, 2013, para. 31.

<sup>100</sup> *Ibid.*, para. 64.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*, para. 66.

<sup>103</sup> *Ibid.*, para. 76.

<sup>104</sup> *Ibid.*, para. 77.

<sup>105</sup> ILO, *Efficient Growth, Employment and Decent Work in Africa: Time for a New Vision*, Geneva, 2011, 21.

<sup>106</sup> *Ibid.*

<sup>107</sup> UNCTAD, *The Impact of Trade on Employment and Poverty Reduction* (TD/B/C.I/29), Geneva, 2013, para. 30.

<sup>108</sup> ECA, 2012, 61.

<sup>109</sup> *Ibid.*, 63.

<sup>110</sup> UNCTAD, *The Impact of Trade on Employment and Poverty Reduction* (TD/B/C.I/29), Geneva, 2013, para. 85.

### *Workers' rights in the informal sectors*

“The informal sector dominates the manufacturing, commerce, finance and mining sectors in Africa.”<sup>111</sup> Further, it employs more people than the formal sector, with “as many as nine in ten rural and urban workers [having] informal jobs.”<sup>112</sup> Given that the informal sector is not adequately overseen, and that the informal economy begets “lower wages, lower productivity, longer working hours, hazardous conditions and the abuse of workers, in particular the most vulnerable such as women, children, migrant workers and indigenous peoples,”<sup>113</sup> it is integral that labour inspections of the informal economy are undertaken to ensure human rights protection. Additionally, informal workers often lack social security coverage and this further impacts their labour and human rights.

### *Implementing labour standards*

While most African States have ratified the eight fundamental conventions of the ILO, “the major challenge for Africa remains translating commitments into effective protection and guarantees, with real enforcement of the relevant provisions.”<sup>114</sup>

## c) Human rights framework

At the international level, the legal framework on trade, human rights and employment comprises the following: the International Covenant on Economic, Social, Cultural Rights (ICESCR) and the various International Labour Organization (ILO) standards. At the regional level, regional human rights instruments, the Abuja Treaty, and the various agreements made by the sub-regional economic groupings contribute to the legal framework on trade, human rights and employment. Article 6 of the ICESCR recognises everyone’s “right to work”, while article 7 ensures fair and equal remuneration, safe working conditions and equal opportunity for everyone. Importantly, article 8 recognises the legitimacy of the ILO. The ILO’s labour laws and regulations cover a range of areas, including “the elimination of all forms of forced or compulsory labour’ and ‘the effective abolition of child labour’.”<sup>115</sup>

## d) Potential CFTA impacts on employment-related human rights

In some cases, the human rights impacts can be positive, for example, where new jobs and economic opportunities assist in the realisation of the right to work and the right to an adequate standard of living. On the other hand, there can be corresponding negative impacts on human rights as structural reforms result in job losses or business closures in less competitive sectors.<sup>116</sup> Competitive pressures can put labour rights at risk, and affect the right to organise and to bargain collectively. In terms of the investment chapter in the CFTA, “(f)oreign investment has an impact on employment patterns and on the nature, size and growth potential of small and medium-sized firms in host countries.”<sup>117</sup>

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<sup>111</sup> Gathii, J.T., ‘The variation in the use of sub-regional integration courts between business and human rights actors: the case of the East African Court of Justice’, *Law and Contemporary Problems*, forthcoming, 2015, 15-16.

<sup>112</sup> ILO, *Efficient Growth, Employment and Decent Work in Africa: Time for a New Vision*, Geneva, 2011, 18.

<sup>113</sup> *Ibid*, 250.

<sup>114</sup> *Ibid*, p. 23.

<sup>115</sup> ILO, *The text of the Declaration and its follow up*, Geneva, 1998.

<sup>116</sup> *Pacific trade and Human Rights*, 2014, 33.

<sup>117</sup> Williams, 2003, xxi

When conducting a HRIA of the CFTA in regards to labour rights, assessors will likely be concentrating primarily on the degree of positive and intentional impacts such additional labour regulation might produce, as opposed to the potential negative and unintentional impact of investment provisions. It will be important to make sure that, to the extent that such provisions are found to have a positive impact, this does not lead to an endorsement, from the human rights perspective, of the FTA as a whole.<sup>118</sup>

One area in the CFTA that particular attention must be paid to is the free movement of people and the right of residence and establishment. The Abuja Treaty, the UDHR and the ICCPR all recognise these rights.<sup>119</sup> Significant progress has been made by various RECs, including the adoption of protocols on the free movement of people, labour, services, right of establishment and right of residence (see Annex 2).<sup>120</sup> “Yet the process of full transition of mobility of workers among African countries remains one of the most contentious issues among African countries for various reasons, including security and unemployment, and is slow.”<sup>121</sup> This needs to be analysed through a human rights lens, ensuring human rights protection as a core principle underpinning the movement of people and the right of residence and establishment.

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<sup>118</sup> Harrison, 2009.

<sup>119</sup> ECA, 2012, 61.

<sup>120</sup> Ibid, 68.

<sup>121</sup> Ibid, 62.

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## PART IV: TRANSPARENCY, CONSULTATION AND PARTICIPATION IN THE CFTA NEGOTIATIONS

### 1. BACKGROUND

There is generally very limited transparency in the context of bilateral and regional negotiations when compared, for instance to the WTO context. In recent years, there have also been rising protests and concerns registered about participation and transparency in the context of plurilateral agreements and mega regional agreements, such as the Trade in Services Agreement (TISA), the Transatlantic Trade and Investment Partnership (TTIP) agreement between the United States and the EU, and the Trans-Pacific Partnership (TPP). Apart from substantive concerns in these agreements relating to investor-state disputes and the weakening of regulatory space in relation to public services, many of the concerns have been about disclosure of negotiation texts, inclusion of stakeholders and participation in general.

In the process of negotiating a trade agreement, we need to assess the extent to which it has promoted transparency and participation in accordance with key human rights principles. Active, free and meaningful participation is a human rights principle, and it is at the heart of a human rights-based approach to trade. People are entitled to participate in decisions that directly affect them. States should ensure public consultation and debate prior to the conclusion of free trade agreements. The right to take part in the conduct of public affairs (Article 25, International Covenant on Civil and Political Rights) implies that no trade or investment agreement should be concluded in the absence of a public debate. In principle, trade and investment agreements should be elaborated within a democratic process that provides opportunities for parliamentary approval, participation by stakeholders and access to information.<sup>122</sup> HRIAs can serve to inform such public debate.

The right to take part in the conduct of public affairs, freedom of expression, the right to seek, receive and impart information, freedom of association and assembly, freedom of movement and the right to a remedy are all relevant to ensuring popular participation in political and public processes. “Of these rights, the right to take part in the conduct of public affairs and the right to seek, receive and impart information are particularly relevant in the context of trade.”<sup>123</sup> At the national level, the tendency of some governments to maintain secrecy and exclude representative civil society organizations from trade policy formulations raises questions of participation and freedom of information. The extent to which individuals and their representative organizations have any right to participate in international fora is more ambiguous. However, the United Nations Human Rights Committee considers that the right to take part in the conduct of public affairs covers “all aspects of public administration, and the formulation and implementation of policy at the international, national, regional and local levels.”<sup>124</sup>

Consideration of these broader impacts of trade on human rights entails consultation with a broader range of stakeholders - including individuals, communities, civil society organizations, and other government departments -

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<sup>122</sup> Guiding Principles, 2011.

<sup>123</sup> Walker, 2009.

<sup>124</sup> *General Comment No. 25*, Human Rights Committee, “The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service”(article 25), para.5.



when developing trade policy and negotiating agreements. “Other issues in the area of general governance include the lack of gender analysis and consultation with women’s groups and community-based organisations in: (a) determining national priorities for trade negotiations; and (b) formulating the substantive advocacy positions of governments and NGOs.”<sup>125</sup> “This should involve significant participation of national and regional gender machineries in the decision-making process of trade negotiation frameworks.”<sup>126</sup>

## 2. SHAPING THE CFTA NEGOTIATIONS

As the CFTA process moves forward and the negotiations begin, it will be useful to envision in advance a plan for transparent negotiations that is inclusive and participatory. “Average Africans need to be involved in the integration process more. This requires more information on how it works, which will also help to offer greater transparency of the process and secure greater buy-in from the populace.”<sup>127</sup> Given Africa’s regional integration approach ‘transcends narrow economic considerations’, is ‘developmental’ and has ‘cogent, development-related justifications’, it lends itself naturally to an open, inclusive process for a continental agreement such as the CFTA. “From the onset, it will be instructive to have principles and guidelines for the negotiations, and they should outline the proposed permanent CFTA institutional framework, principles, scope and the mechanisms for monitoring the CFTA negotiations.”<sup>128</sup> The modalities for the negotiations are being presently discussed which allows an early opportunity for integrating participatory processes.

“In order to enhance, build and create greater participation in the formulation and implementation of trade policy, focus should be on a more active role for all stakeholders in determining negotiation mandates and in the regular monitoring of progress; wider and deeper inter-agency collaboration, wider civil society involvement in debates via national consultations.”<sup>129</sup> The effective inclusion of groups affected by a free trade agreement presupposes that they possess both the necessary information to judge the agreement in question and the capacity to participate in a discussion process. These are not automatically given but must be ensured in the process of preparing, negotiating and implementing free trade agreements if aspects of sustainability and human rights are to be adequately taken into account. Adequate time and resources need to be allowed. Development policy can play a supporting role here.<sup>130</sup>

Draft texts should be made available of the CFTA, and there should be public consultation. This means that, as well as the substantive provisions of the CFTA, if a HRIA is conducted it should also consider assessing key procedural mechanisms of the negotiation process and the extent to which they have promoted transparency and participation in accordance with key human rights principles.

These processes could include provision for receiving inputs and comments, a disclosure policy for documents relating to the trade negotiations, also taking into account confidentiality and related factors, hearings and meetings with a wide variety of stakeholders. Timing is key in ensuring that comments and participation are

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<sup>125</sup> Williams, 2003, xxv.

<sup>126</sup> Ibid.

<sup>127</sup> ECA, 2012, 23.

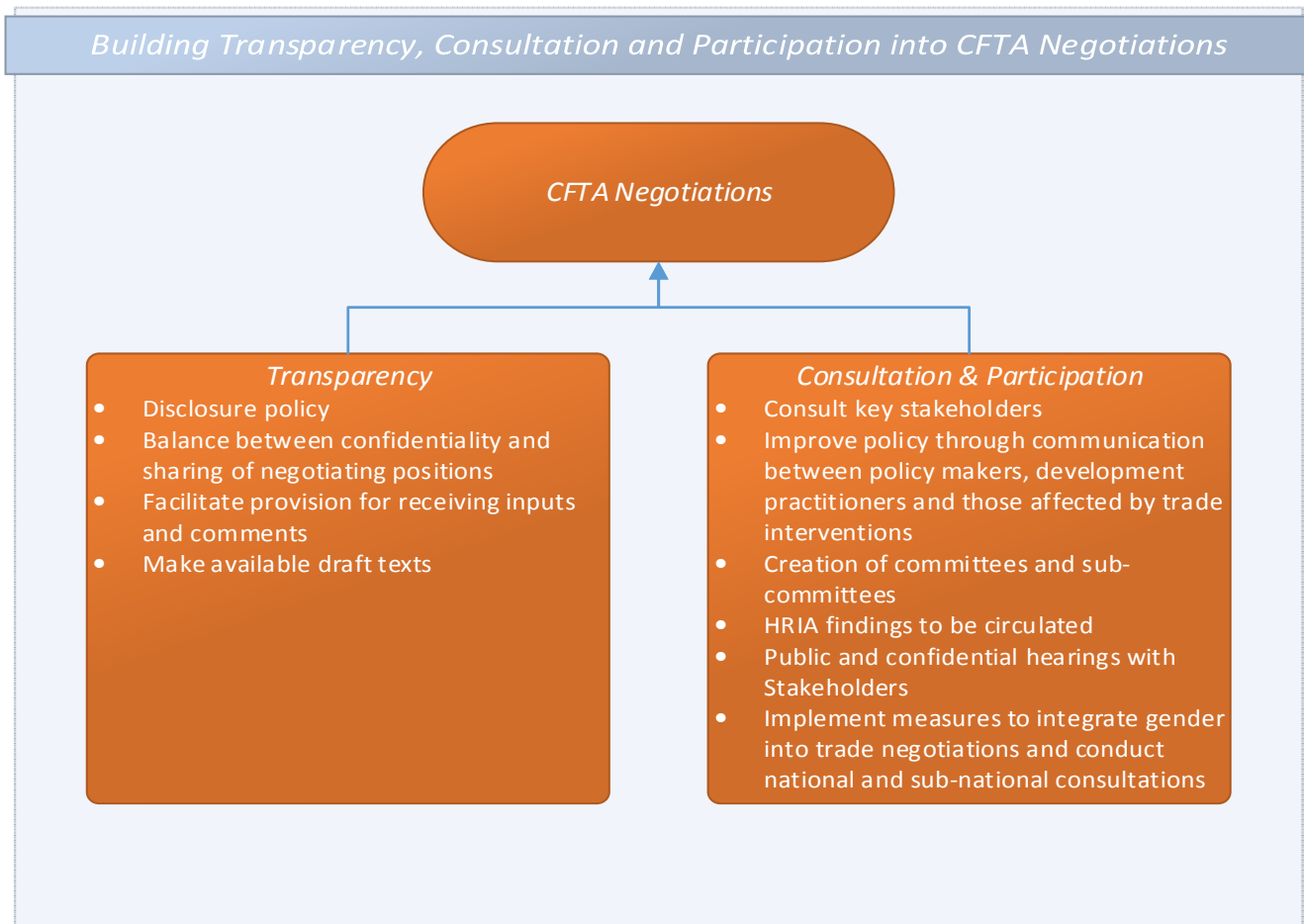
<sup>128</sup> Ibid.

<sup>129</sup> Williams, 2003, xxviii.

<sup>130</sup> Schmeig, E., *Human Rights and Sustainability in Free Trade Agreements: Can the Cariforum. EU Economic Partnership Agreement Serve as a Model?*, German Institute for International and Security Affairs, May 2014.

integrated throughout the process (see figure below). Trade negotiations have traditionally been confidential, and the publication of definitive negotiation positions would decrease the room for negotiations.<sup>131</sup> One way to address this problem both in the context of the negotiations generally and for a HRIA is through the creation and involvement of committees that are allowed to see the confidential negotiation position. Broader participation would necessarily require an increased degree of disclosure of the trade negotiation positions.

In terms of gender, “regional agreements should be used as a conduit for members to share experiences with integrating gender and improving access to decision-making processes.”<sup>132</sup> “Measures to integrate gender into trade negotiations at the international level include establishing independent focal points, undertaking gender impact assessments, resources and training for the collection and analysis of sex-disaggregated trade and trade-related data and integrating gender equality and gender mainstreaming goals and commitments into trade and other macroeconomic policies.”<sup>133</sup>



<sup>131</sup> Blobel et al, Report on Trade, Environment and Sustainability Impact Assessment, CAT & E, 2005.

<sup>132</sup> Williams, 2003, xxix.

<sup>133</sup> Williams, 2003, xxix.

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## CONCLUSION

The CFTA negotiations are scheduled to commence in 2015 and to be completed in 2017. This is an ambitious fast tracking towards an overarching continental development strategy and broad continental vision. The negotiation modalities, timelines and how the negotiation phases will be conducted are all still at a nascent, blueprint stage. As the CFTA process moves forward and the negotiations begin, it will be useful to envision in advance a plan for transparent negotiations that is inclusive and participatory.

Human rights concerns may not be at the forefront of what are considered presently to be technical negotiations. However, it is Africa's development oriented regional integration and vibrant regional human rights system that provide, in many ways, the best entry points for human rights to be considered. This is not human rights as ideology, but instead, as methodology. This is acknowledging that trade interventions can and do impact on human rights and provisions in FTAs can have short and long term impacts on people, the environment and development more broadly.

In a HRIA, legal obligations and key principles of human rights must be central to the assessment, and findings should be limited to impacts of specific provisions within the trade agreement. Measuring the overall human rights impacts of an agreement is a monumentally complex task.<sup>134</sup> In this issues paper, we have looked at the steps and methodology a HRIA should employ to result in objective findings and analysis that can be of utility to a range of actors and stakeholders, including, prominently, those at the negotiating table. HRIAs can be ex ante or ex post and while for an ex ante assessment, anticipating likely impacts is a challenge, its great advantage is that findings can be taken into account in the decisions made to ratify or amend the FTA.

Given that the CFTA negotiations are yet to begin, this provides an ideal frame in which to explore a potential HRIA. Given the resources, time and complexity of measuring impacts, this paper suggests a scoping assessment and study precisely to look at the pros and cons of undertaking an assessment and narrowing the provisions and areas of human rights concern. In terms of the substance, this paper has already sketched in an illustrative manner, what kinds of human rights concerns may be raised in the context of the CFTA. However, it will require far more data collection and analysis to really draw a clearer picture around these issues. The issues of agriculture and employment are flagged and attempts have been made in this paper to explore what human rights issues could be raised in this regard. This should not prejudice the further scoping of human rights issues and a narrowing of the CFTA provisions to be further studied. However in the African regional context, there is no doubt that these are issues at the heart of economic development in the region with accompanying human rights concerns.

Based on a potential scoping assessment, interested actors and stakeholders can make a considered decision on how to proceed further. Multiple options could come into play including sub-regional HRIAs, national HRIAs, specific case studies and regional surveys. Suggestions for a Terms of Reference (TORs) for a potential scoping study could be part of follow up to this issues paper. The issues paper could also be used as a basis for discussion for stakeholders, especially civil society for further advocacy and work in this area. The main aim of any discussions going forward should be to see how best to ensure that regional integration is people-centred, inclusive and participatory.

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<sup>134</sup> PACER-plus scoping study, 2010.

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## ANNEXES

### ANNEX 1: ILLUSTRATION: POTENTIAL HUMAN RIGHTS MAPPING OF THE REGION

#### a) Main thematic issues in the region

The region continues to witness a wide range of challenges with a negative impact on the human rights landscape. Such challenges include: political violence and armed conflicts, increasing youth unemployment and their increased involvement in armed groups and political violence, tensions among communities along ethnic or religious lines, conflicts over natural resources, terrorism with transnational and regional impacts and increased migration from the continent as a result of conflicts or for economic reasons.

#### b) Ratification Status

##### General trends

Although none of the UN human rights treaties enjoy universal ratification, the African region has a good record regarding ratification of some of the core human rights treaties – between 75 and 98 percent ratification for each treaty. These include: International Convention on the Elimination of All Forms of Racial Discrimination (ICERD - 96%), International Covenant on Civil and Political Rights (ICCPR - 94%), International Covenant on Economic, Social and Cultural Rights (ICESCR - 91%), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW - 96%), Convention on the Rights of the Child (CRC - 98%), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT - 83 %) and the Convention on the Rights of Persons with Disabilities (CRPD - 75%). The CRC, for example, is ratified by all countries, except Somalia and South Sudan.

However the ratification rate of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) and the International Convention for the Protection of all Persons from Enforced Disappearances (CCPED) are very low at 34% and 21% respectively.

Regarding the ratification of substantive optional protocols, the general trends show that such ratification remains generally low. For example, the second optional protocol of the ICCPR aiming at the abolition of the death penalty is only ratified by 23% of countries in the region. Interestingly, the Optional Protocols to the CRC on the sale of children and on children in armed conflict are ratified by 87% and 81% respectively.

The acceptance of individual complaints procedures is particularly low for the ICERD (9%), the CAT (21%) and the CCPED (2%). The Optional Protocol to the ICESCR which establishes an individual complaint mechanism for persons alleging violation of their rights under the ICESCR is yet to be ratified by any of the countries in the region.

Similarly, most African countries have a good record with respect to ratification of African Union treaties that relate to human rights issues. The African Charter on Human and Peoples' Rights (African Charter) is ratified by all countries except South Sudan. The African Charter on the Rights and Welfare of the Child and the Convention

Governing the Specific Aspects of Refugee Problems in Africa also have a good ratification rate at 87% and 83% respectively.

In terms of countries with a good ratification record, Rwanda and Lesotho have a 100% ratification rate, followed by Benin, Niger, Nigeria and Togo who each have not ratified only one instrument. As a new Member State, South Sudan has only ratified the Constitutive Act but has recently signed others which might lead to a future increase of its ratification rate. With only two ratifications, Sao Tome & Principe and Somalia also have a very low record of ratification.

### c) Challenges and opportunities

For instance, concluding observations from the Committees under ICESCR and CEDAW as well as from the African Commission highlighted human rights concerns related to:

- (i) Land ownership, land grabs including impacts on women, indigenous peoples, ethnic minorities
- (ii) Exploitation of natural resources, transparency, pollution
- (iii) Expropriation and development based forced evictions
- (iv) Child labor including in plantations
- (v) Minimum wages including for persons in informal sector particularly women and migrants
- (vi) Discrimination against women, lesbians, gays, bisexuals and transgender persons, indigenous peoples, ethnic minorities in employment
- (vii) Free Trade Zones and enforcement of international labor standards
- (viii) Extractive Industries
- (ix) Expropriation and forced evictions for development
- (x) Discrimination of women in general including in employment

Considering that countries in the region seem to respond more to reporting under international treaties, trade and business nuanced rights could be mainstreamed through early engagement with the reporting State on the list of issues and in creating platforms on trade issues. In this regard, upcoming reviews under ICESCR of Angola, Burundi, Kenya, Sudan, Uganda and of Gambia, Malawi, Namibia, Senegal under CEDAW would provide a good opportunity to begin such an engagement.

## ANNEX 2: REGIONAL ECONOMIC COMMUNITIES' PROTOCOLS AND REGULATIONS ON THE FREE MOVEMENT OF PEOPLE, LABOUR, SERVICES, RIGHT OF ESTABLISHMENT AND RIGHT OF RESIDENCE

REC/Sub-region	Protocol	Regulation	Countries that have implemented the protocol
<b>CEMAC*</b>	Arête 29 June 2005 Protocol no 01/08-UEAC-042-CM-17	Free mobility of people within the sub-region Establishment of CEMAC passport	Cameroon; Chad; Central African Republic; Congo, Rep. of
<b>CEN-SAD</b>	Paragraph 2 of treaty 1991; Article 3 of treaty	Free movement of people Right of residence	ECOWAS, IGAD and UMA countries; some ECCAS countries
<b>COMESA</b>	Article 164	Right for establishment, free movement and right to work	
<b>EAC</b>	Article 10 Article 7 Article 13	The regulations of the EAC on free movement of workers The regulations of the EAC on free movement of persons The regulations of the EAC on right to establish  EAC passport	Kenya, Tanzania  Kenya, Rwanda  All member states
<b>ECCAS</b>	Articles 4 and 40 of treaty and protocol in appendix VII Decisions: 03/CCEG/VI/90 01/CEEAC/CCEG/X/02 03/CEEAC/CCEG/X/02	Free movement of persons and rights of establishment ECCAS free movement cards ECCAS free movement books  Separate passage for ECCAS nationals at airports, ports and other entry points	Cameroon; Central African Republic; Chad; Congo, Rep. of. Central Africa Republic, Chad
<b>ECOWAS</b>	Protocol no A/P/.1/5/79 Decision c/dec/3/12/92 Decision A/Dec.2/7/85 Article 2 supplementary protocol A/sp/.1/7/86	Free movement of persons and rights of establishment  The introduction of a harmonized immigration and emigration form in ECOWAS member states ECOWAS travel certificate introduced  ECOWAS passport introduced in 2000 Right of residence and establishment	All member states
<b>SADC</b>	Article 14 Article 17 Article 18	Free movement of persons Right of establishment Free movement of workers	Lesotho, Mozambique, Namibia, South Africa, Swaziland, Zambia, Zimbabwe**
<b>UMA</b>	Article 2 of 1989 treaty	Free movement of people	Tunisia mainly. Libya, Morocco, Tunisia
<b>WAEMU*</b>	Article 4	Free movement, right to establish and free movement of workers	All member states

\*CEMAC and WAEMU are not formally recognised by the AU-

\*\* Angola, Botswana, Malawi, Mauritius, Tanzania are yet to sign; Madagascar and Seychelles are yet to accede.