

Chapter 8

CFTA Governance

In governance, what is needed is function rather than form—a point made in Chapter 3, which emphasized the importance of institutional structures for regional integration that are practical rather than idealistic.

This chapter frames the Continental Free Trade Area (CFTA) governance in the context of the African Union (AU) reform and the fluidity of the negotiations on the CFTA institutional form. It proposes five “guiding principles” for forming the CFTA institutions, with a CFTA institutional structure that aspires to meet these guiding principles, but also emphasizes practicality by relying on existing institutions where possible.

The changing role of the regional economic communities (RECs) in the CFTA is discussed, drawing on the CFTA’s own “negotiating guiding principles” and the Abuja Treaty. Recommendations for institutional structures, including those related to dispute settlement and the role of national courts, are based on what works in Africa’s RECs.

CFTA architecture with the restructuring of the African Union

In discussing the institutional framework for the CFTA, one needs to keep in mind that the AU, as an inter-governmental institution, is going through reform itself. The purpose of this reform is to improve efficiency of the organization; elaborate on a sustainable funding approach that reduces dependence on foreign donor

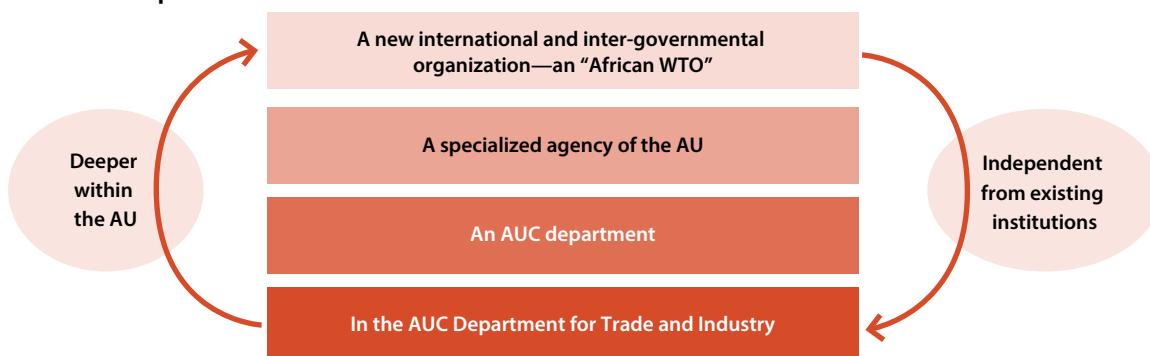
funds; and determine a framework for a coordinated response to Africa’s most pressing challenges.

On the one hand, this AU reform provides an opportunity for member states to discuss and determine how the AU can be reformed such that flagship projects like the CFTA can be better institutionalized and implemented. On the other, designing an institutional framework for the CFTA will be extremely complicated if the main aspects of AU reform have not been finalized. Member states might then try to define an institutional framework for the CFTA without a clear idea of the future institutional arrangements of the AU itself. Some member states might even wish to set up a totally independent institution for the CFTA, such as a specialized agency of the AU, which would have an entirely separate legal personality but could be governed through the AU’s policy organs. A more extreme form could be an “African WTO,” which under international law would be a new international and inter-governmental organization for implementing the CFTA Agreement.

It is possible to design the CFTA institutions with consideration of the principles driving the reform of the AU. Primarily, these reforms are to streamline the most important initiatives through the AU while transforming it into an efficient and effective organization. It would be reasonable to envisage CFTA structures operating within a reformed AU. Possibilities include hosting the CFTA institutions in the African Union Commission (AUC), either as a standalone department of the AUC or in the existing AUC Department for Trade and Industry.

Figure 8.1

Situational options for the CFTA institutions



Alternatively, CFTA institutions could be located outside the AUC, but remain within the remit of the AU as a specialized agency.

This decision will depend on several elements: the extent to which member states want the CFTA institutions to operate independently from existing AU structures or to link closely to existing AU structures; costs; AU inter-linkages and economies of scope; and authority (Figure 8.1).

Institutional architecture envisaged in the Abuja Treaty

To reflect on what the governance architecture of the CFTA should be, it is important to outline the institutional architecture that the Abuja Treaty contemplated for the African Economic Community (AEC). Doing so reveals the “institutional pegs” onto which the CFTA structures will be hooked. The Abuja Treaty envisaged the primary organs of the AEC to be the Assembly of Heads of State and Government, Council of Ministers, Pan-African Parliament, Economic and Social Commission, Court of Justice, General Secretariat, and Specialized Technical Committees.¹

The Assembly—renamed the Summit after the founding of the AU—was to be the supreme AEC organ.² It comprises the Heads of State and Government of the signatory States. The Assembly would be assisted by the Council of Ministers in its functions and the Assembly would, on recommendation of the Council, make decisions and give directives on regional economic activities, approve the AEC’s programme of activity including its budget, and determine the contributions of each member state.³

The Council of Ministers of the AEC is effectively the Council of Ministers of the AU⁴ and is responsible for guiding all the activities of all subordinate AEC organs.⁵ Like the Assembly, it is empowered to request advisory opinions on any legal question from the African Court of Justice (currently, the African Court of Justice and Human Rights).⁶

The Pan-African Parliament is intended to ensure that “the peoples of Africa are fully involved in the economic development and integration of the continent.”⁷

The Economic and Social Commission, which comprises ministers responsible for economic development planning and integration, is empowered to participate in the meetings of the Council of Ministers. The Commission’s primary responsibilities include those to prepare policies, programmes and strategies for cooperation in economic and social development in Africa, as well as between Africa and the international community, and to make recommendations to the Council.⁸

The Court of Justice and Human Rights is to ensure “the adherence to law in the interpretation and application” of the Treaty and to determine disputes submitted to it under the Treaty, although the Assembly could decide to expand its jurisdiction.⁹ Decisions of the Court are “binding on member states and organs of the Community;”¹⁰ and the treaty provides that the functions of the Court should be carried out “independently of the member states and the other organs of the Community.”¹¹

The Specialized Technical Committees span the whole spectrum of economic, trade, industrial, educational, health, labour and human resources cooperation. Each committee would have a representative of each member state.¹²

Under the AU Constitutive Act, all these organs established under the Abuja Treaty are now considered those of the AU.

New thinking for the Abuja Treaty

The treaty underpinning the CFTA must be well designed. For the CFTA, the framework is currently provided by the Abuja Treaty. But it is an old document, adopted in 1991 and ratified in 1994. It addresses an Africa very different from today’s, and it predates lessons in integration from around the continent and elsewhere. For instance, new guidance is needed to rationalize the complex relationship between continental and regional integration, and within this the relationship between the CFTA and the REC free trade areas. Lessons can be learned from experiences with monetary and political unions elsewhere in the world. These challenges merit a reconsideration of how the Abuja Treaty sets out the pathway to continental integration.

African continental integration should not hide behind the Abuja Treaty but reopen debate on how best to

integrate the continent. It may be that the pathway to continental integration envisaged in the Abuja Treaty can be amended to take stock of Africa's achievements in the last 26 years and the challenges overcome along this path.

Five guiding principles for a CFTA institutional structure

Owing to the AU reform, the AU institutional structure is an unsettled foundation on which to build the CFTA institutional structure. Under negotiation, the CFTA institutional structure is also flexible. This merits an approach that emphasizes the principles which should guide the eventual form of the CFTA institutions. Five guiding principles are considered important in constructing the CFTA institutions:

- **Use the Abuja Treaty as the backbone for the CFTA institutional form.** The Abuja Treaty provides endorsement of Africa's integration agenda at the highest level and the vision and guidance for continental integration. The Treaty informs the goals and expectations of the CFTA, which in turn frames what is needed by its institutional structure. As outlined above, the Abuja Treaty may need to be revisited to improve how well it achieves this function.
- **Use and empower existing structures of African integration where available.** These structures exist across Africa and at the national, regional and continental levels. Examples include the REC institutions and the national bodies that report to the RECs. They already possess considerable experience in the integration process that may be leveraged in implementing the CFTA, which would help to avoid institutional duplication, generate economies of scope and reduce costs.
- **Ensure that the institutions of the CFTA are accessible to the African people.** The institutional architecture of the CFTA should not exist at a level beyond reach of the people of Africa. This is important both to ensure that the CFTA is win-win—leaving nobody behind—but also because the long-term sustainability of the project requires ground-level buy-in and support.

- **Support the joint implementation of the BIAT Action Plan alongside the CFTA.** The Boosting Intra-African Trade (BIAT) Action Plan is necessary for ensuring that the benefits of the CFTA are fully realized and shared both across and within African countries. Joint implementation and synergies between the BIAT Action Plan and the CFTA can be realized if there are strong linkages between the institutions charged with their implementation. Better linkages between the BIAT Action Plan and the CFTA can also keep down institutional duplication and costs.
- **Develop practical, rather than idealistic, institutional forms.** Although ideal institutional structures offer aspirations, it is important to consider how to get there. This can mean prioritizing low-cost and easily implementable first steps.

Proposed CFTA institutional structure

Fully recognizing the challenges of fluidity with the envisaged CFTA institutional structure under negotiation and the AU undergoing reform, we now outline a proposed institutional structure for the CFTA to help frame the five guiding principles.

- The structure adopted by the Abuja Treaty should be the platform on which to build a governance framework for implementing the CFTA, so that the proposed institutional structure is consistent with the Treaty.
- The proposed CFTA structures can lean on and incorporate those already established under the RECs and at the national level to meet the second guiding principle.
- In meeting the third guiding principle, the proposed structures must extend down to the country level and give individuals the right to enforce compliance of CFTA obligations in national courts. However, appeals could be addressed at regional courts and subsequently the African Court of Justice and Human Rights so that citizens see the bigger picture on regional and continental jurisprudence developed through the additional layers of integration. In addition to national institutions, this will also require dispute settlement arrangements

that are accessible to individuals (see the next subsection).

- The implementing structure for the BIAT Action Plan should be considered. In particular, folding the implementing structure for the BIAT Action Plan into that for the CFTA can help realize the fourth guiding principle.
- The proposed institutional structure recommends putting pragmatism over idealism by leveraging and reinforcing existing regional and national institutions to implement the CFTA, rather than creating new, idealistic alternatives.

Figure 8.2 illustrates the proposed institutional structure, which builds on that of the AU, the Abuja Treaty and the Draft Strategic Framework for the Implementation of the BIAT Action Plan and for establishing the CFTA (AU, n.d.). The components are discussed subsequently.

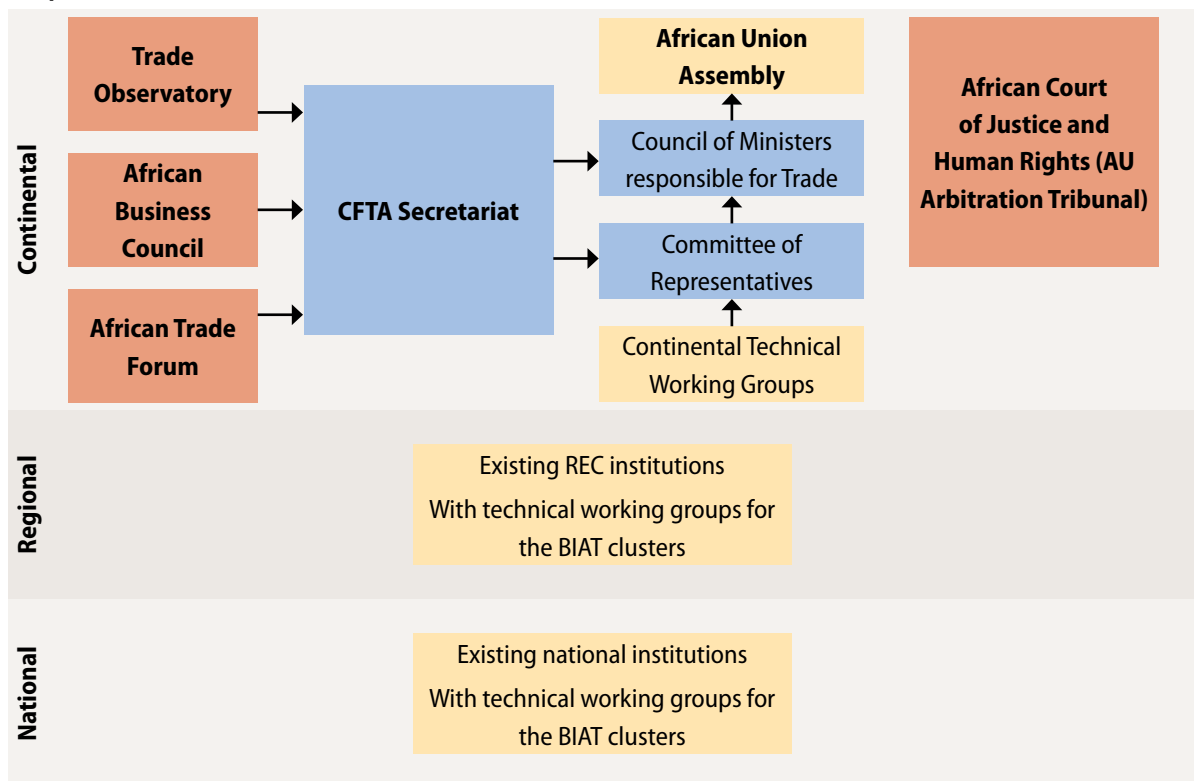
The AU Assembly is the highest decision-making organ of the CFTA and provides overall oversight of the administrative and organizational arrangements.

The Council of Ministers responsible for Trade provide leadership for implementing the CFTA and includes ministers responsible for trade in each member state. It provides strategic oversight for the CFTA and may take all measures it deems necessary for implementing the CFTA, including promoting policies, strategies and measures. It may establish and delegate responsibilities to ad hoc or standing committees, working groups or expert groups, and consider and take action on the reports and activities of the CFTA Secretariat.

The Committee of Representatives supports the implementation of the CFTA and comprises representatives designated by the governments of the member states. It may establish and delegate responsibilities to ad hoc or standing sub-committees and technical working groups, and submit periodic reports, proposals, resolutions, recommendations or

Figure 8.2

Proposed CFTA institutional structures



Note: The blue boxes represent the institutional structures outlined in the CFTA draft text. The green box is the link to existing AU architecture. The yellow boxes incorporate the proposal to combine the BIAT structures envisaged within the BIAT Strategic Framework with those of the CFTA. The orange boxes consider additional components anticipated as operating with the CFTA architecture.

opinions to the Council of Ministers responsible for Trade. Among the Technical Working Groups that report to the Committee of Representatives will be Continental Technical Working Groups, covering each of the seven BIAT clusters.

The CFTA Secretariat provides administrative support for implementing and enforcing CFTA provisions, facilitates the establishment of a monitoring and evaluation mechanism, serves as a depository of notifications from member states as required under the CFTA, convenes and services meetings of the member states as necessary for implementing the CFTA, provides and facilitates technical cooperation and capacity development programmes, serves as a secretariat to CFTA arbitration tribunals, and carries out any other responsibilities that may be assigned to it by the Assembly, Council of Ministers responsible for Trade, or Committee of Representatives.

The Trade Observatory will be responsible for monitoring and evaluation of the implementation of the BIAT Action Plan and the CFTA. Its responsibility will be to gather trade information, with a crucial role as the trade information bank for monitoring and evaluation and will serve as an essential part of the monitoring and evaluation mechanism.

The African Business Council is a necessary continental platform for aggregating and articulating the views of the private sector in the continental policy formulation processes. It can play an advisory role in continental policy formulation and will communicate its views and positions through the CFTA Secretariat. It should be composed of the chairs/representatives of umbrella (regional) associations/business councils that represent private sector interests, such as chambers of commerce and industry, small and medium-sized enterprises, women entrepreneurs and women in trade, sectoral associations such as banking and finance, and farmers, etc. It may be invited to meetings of the Ministers responsible for Trade in an observer capacity.

The African Trade Forum can serve as a Pan-African platform for reflection and discussion on the progress and challenges of continental market integration. It will be organized every year by the AUC and the UNEconomic Commission for Africa (UNECA) jointly. Participants can include all stakeholders in the development of intra-African trade: member states; RECs; representatives of

continental and regional private sector, of civil society, and of women's organizations; research institutes; heads of major African cross-border enterprises; and development partners.

Continental Technical Working Groups: It is proposed that among the Technical Working Groups responsible to the Committee of Representatives would be seven dedicated to each of the BIAT clusters. These will support oversight of CFTA and BIAT technical and policy issues. Experts from the REC Secretariats and Regional Technical Working Groups can be included in these Continental Technical Working Groups.

Regional institutions: Engagement at the regional level can be through the existing REC institutional arrangements to avoid institutional duplication and to leverage existing resources. The RECs can develop region-specific programmes to enhance implementation of the BIAT and the CFTA, including Technical Working Groups for each of the BIAT clusters. Although the BIAT Strategic Framework envisages Regional Technical Working Groups, Regional Steering Committees and Regional Ministerial Oversight Committees, it is not realistic to expect these "best practice" institutions to be set up in the immediate term. Nor is a one-size-fits-all approach appropriate to cover the wide range of REC capabilities or to reflect existing REC achievements. Instead, the regional CFTA institutions should leverage and reinforce what exists in the RECs.

National institutions: The most important first step in approaching the institutional structure will be the requirement of each CFTA partner state to designate or create a ministerial agency that will be responsible for implementing and communicating on CFTA issues. This follows the successful approach used in the East African Community (EAC), in which lead agencies for each country were charged with coordinating implementation and application of EAC commitments at the national level (Box 8.1). The national institutions can be responsible for implementing the CFTA and BIAT at the country level, and should be resourced to engage with regional and continental arrangements, including National Technical Working Groups for each of the BIAT clusters. Again, while the BIAT Strategic Framework foresees national Technical Working Groups, National Steering Committees, and National Ministerial Oversight Committees, these are more feasible as an ideal to which to aspire in the medium to long run. In the short

Box 8.1

Setting up institutional structures: Experience of the East African Community

In the Treaty for the Establishment of the East African Community (EAC), the approach was to designate ministerial agencies responsible for implementing the EAC's commitments at the national level. Each Partner State was required to notify the Secretary General of the designated Ministry for East African affair.*

Each of the EAC Partner States have designated such a ministry, and the success of the implementation of EAC trade rules can be attributed to having a ministry be the lead agency responsible for coordinating the implementation and application of EAC commitments at the national level.

The national ministries for EAC matters have day-to-day interaction with the EAC Secretariat. These ongoing interactions give integration objectives an institutional platform that is a necessary prerequisite to implementation. The TFTA Council of Ministers adopts a similar approach: "ministers as designated by Tripartite Member/Partner States for purposes of the Tripartite Free Trade Area."**

* See Article 8(3)(a) of the Treaty for the Establishment of the East African Community.

** See Article 29(1)(b) of the TFTA.

term, member states should give CFTA responsibilities to existing ministries or agencies charged with regional integration and coordination with the RECs.

Role of the RECs in the CFTA

This subsection outlines the evolving role of the RECs in the CFTA across the following four dimensions.

RECs as experienced institutions in guiding the CFTA

In the Declaration on the launch of the negotiations for the establishment of the CFTA, the AU Assembly "URGE[D] all Regional Economic Communities [...] to participate effectively in the CFTA negotiations." The RECs are unrivalled in their experience and expertise in African trade integration. The lessons learned by the RECs are vital inputs into the conceptualization, negotiation and implementation of the CFTA. In recognition of this, they comprise a substantial portion of the experts in the CFTA Continental Task Force, which in 2012 was constituted by the Assembly of Heads of State and Government of the AU to spearhead the CFTA negotiations and ensure completion by the end of 2017. The RECs perform a vital role in the development of the CFTA.

RECs as building blocks of the CFTA instructional structure

The RECs are explicitly recognized as building blocks of the CFTA within the CFTA negotiating guiding principles. It is envisaged that the RECs coordinate and administer Regional Technical Working Groups, Regional Steering Committees and Regional Ministerial Oversight Committees for the implementation of the CFTA and associated BIAT Action Plan. The RECs will also administer the regional Monitoring and Evaluation Committee for the CFTA. The REC institutional structures for the CFTA will then feed into those at the continental level.

RECs as operators of substantive components of the CFTA

Consistent with their role in the CFTA institutional architecture, the RECs will remain vital for implementing many of the substantive components of the CFTA. Both within and between them, the RECs will be required to operate mechanisms such as those intending to address non-tariff barriers (NTBs) or to mediate trade remedies and disputes (see previous sections).

RECs on graduation of trade policy to the continental level

To the extent that a key objective of the CFTA is the rationalization of multiple trade regimes on the continent and the creation of a continent-wide

economic space, the free trade areas of the RECs cannot coexist with the CFTA. It should also be recalled that the CFTA will be more than a traditional trade agreement and will embody elements of a single market (for example, by reducing non-tariff restrictions and promoting trade in services) and an economic union (for example, by moving towards the harmonization of regulatory policies). This means that the RECs that are not already customs unions or are not on a trajectory towards a customs union will cease to have a role in trade policy.

The preeminent authority for trade policy will graduate to the continental level as the CFTA contributes to a consolidation of Africa's overlapping "spaghetti bowl"

of free trade areas. It is expected that the RECs will contribute to continental-level trade policy through their roles in the CFTA institutional architecture or as customs unions where this applies. This will enable Africa to operate as a stronger, consolidated trading body in its negotiations with its trading partners, such as the European Union (EU), the United States, and the emerging market economies (Chapter 9). Moreover, consolidating this role to the continental level will enable Africa to economize on the resources currently required to undertake these activities in each of the RECs. REC FTAs as building blocks of the CFTA and preservation of the *acquis* draws on the CFTA negotiating guiding principles to outline practically how African trade policy will transition to the continental level.

Box 8.2

REC FTAs as building blocks of the CFTA and preservation of the *acquis*

The envisaged role of the RECs draws on the CFTA Negotiating Guiding Principles, adopted by the African Union Ministers of Trade in May 2016. The Negotiating Guiding Principles help outline the desired vision of the CFTA. Most relevant to the RECs are the following two principles.

1. REC free trade areas as building blocks of the CFTA

"The CFTA shall build on and improve upon the process that has been made in the trade liberalization and integration programmes of Regional Economic Communities: AMU, CEN-SAD, ECCAS, ECOWAS, IGAD, COMESA, SADC and EAC."

The importance of the RECs as building blocks for the CFTA is also reaffirmed by the fact that the Assembly considered that the REC initiatives in the area of trade should be consolidated in order to achieve the CFTA by the indicative date of 2017. This is illustrated by the Decision on Boosting Intra-African Trade and Fast Tracking the CFTA (Assembly/AU/Dec.394(XVIII)) whereby the Assembly decided that "the CFTA should be operationalized by the indicative date of 2017, based on the framework, Roadmap and Architecture, with the following appropriate milestones:

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

This decision appears to provide the way the CFTA should be built: through the establishment of free trade areas at the regional economic community level, the AU member states would prepare for the establishment of a CFTA.

2. Preservation of the *acquis*

"The CFTA shall build on and improve upon the *acquis* of the existing REC FTAs and shall not reverse or be inconsistent with the *Acquis* of the Union including but not limited to the Constitutive Act, the Abuja Treaty and other relevant legal instruments of the Union."

Box 8.2

REC FTAs as building blocks of the CFTA and preservation of the *acquis* (continued)

By stating that the CFTA must build on and improve upon the level of trade liberalization and integration achieved in the RECs, it is implied that the CFTA must not merely add another layer and another free trade area to the existing “spaghetti bowl” of overlapping regional free trade areas, but instead go beyond the level of liberalization and integration achieved by the RECs. If this ambitious principle is satisfied, it is implied that the regional free trade areas will be superseded by an improved level of liberalization within the CFTA. However, consistent with the preservation of the *acquis*, the CFTA additionally must not unravel the REC FTAs.

In practice, the particular modalities for tariff reductions or liberalization in the CFTA will likely require REC FTAs to persist as “islands” until the tide of liberalization envisaged by the CFTA rises above them in the medium to long term. Otherwise, the CFTA will fail in its objective of rationalizing and consolidating the overlapping RECs into a single pan-Africa area and merely add another layer of liberalization. On the other hand, immediately replacing the REC FTAs would not satisfy preservation of the *acquis*, as the CFTA will not immediately begin at the 100 per cent liberalization achieved by the most successful REC FTAs. What is required is a transition. The Abuja Treaty, in relation to Africa’s trade, envisages the adoption of “common policies” by 2020, indicating a timeline for such a transition.

The other remaining role for RECs in trade will be the formation of REC customs unions. These can remain as “islands” of further integration within the CFTA framework.

Dispute settlement arrangements

To give the obligations in the CFTA legal certainty and predictability, it will be important to establish a dispute settlement mechanism that would be compulsory and binding as well as fast and efficient. Where diplomatic and alternative mechanisms have failed, this dispute settlement system would allow CFTA member states to bring cases against each other on the application or interpretation of the rights and obligations created by the CFTA Treaty.

For this system to be effective, it has to build on the experiences of the RECs, in particular by initially encouraging those member states considering litigation to first engage in direct negotiations (COMESA approach to non-litigious dispute settlement). Failure of negotiations would be followed by mediation, conciliation and other negotiated means of settling disputes through the CFTA institutional framework before resorting to litigation.

In the CFTA, where negotiations, mediation or conciliation fail to produce an outcome within six months, there ought to be a CFTA Dispute Settlement Committee as a next step that would be charged with the responsibility of resolving such a dispute between states, represented by government authorities. The decision of the CFTA Dispute Settlement Committee

would be legally binding on the parties to the dispute. However, it is important that this process be expedited so that it can provide for timely resolution of disputes (Proposed dispute settlement arrangements).

Pending the establishment of the African Court of Justice and Human Rights, which will replace the African Court of Human and Peoples’ Rights, and on the entry into force of the Treaty for the Establishment of the CFTA, the AU Assembly could either convene a commercial chamber in the existing African Court of Human and Peoples’ Rights or establish a specialist ad hoc committee to hear appeals from the decisions of the CFTA Dispute Settlement Committee. To be an effective dispute settler, this Chamber ought to

Table 8.1

Proposed dispute settlement arrangements

Non-litigious methods	
Step 1	Direct diplomatic negotiations
Step 2	Mediation and conciliation through CFTA institutions
CFTA dispute settlement	
Step 3	CFTA Dispute Settlement Committee
Step 4	Convene a commercial chamber in the African Court of Human and Peoples’ Rights;* or Establish a specialist ad hoc committee

* Companies and individuals, as well as member states not signatories to the Protocol on the Statute of the African Court of Human and Peoples’ Rights, can have petitions referred by the AUC.

Box 8.3

COMESA approach to non-litigious dispute settlement

Non-litigious methods of resolving trade problems are an important feature of Africa's RECs (Gathii, 2016). For example, in its February 2014 COMESA Council of Ministers meeting, the COMESA Secretariat was empowered to investigate the removal of the contentious NTBs, which the state that had imposed them argued were justified; the Secretariat was tasked with confirming that the NTBs were supported by legitimate policy goals.

In three instances, the COMESA Secretariat facilitated the hiring of consulting firm KPMG to undertake a cost assessment of the three contentious NTBs relating to COMESA's rules of origin. The involvement of a third-party facilitator is incorporated in COMESA's NTB Regulations. These NTBs concerned soap from Mauritius to Madagascar; palm oil from Kenya to Zambia; and regriderators and freezers from Swaziland to Zimbabwe (COMESA Secretariat, 2016).

COMESA has another innovation that could be replicated in the CFTA. COMESA member states that have a complaint against another member states are required to write to that member states requesting clarification. This communication has to be copied to the COMESA Secretariat. If the member states from which additional information is sought do not respond, the Secretariat then writes to the member states seeking a response. Where there is no resolution, the matter is taken up by the COMESA Committee on Trade and Customs. This committee has authority to receive complaints on COMESA treaty violations. The committee may then submit a report to the Council of Ministers or to the COMESA Secretary General requesting that investigations be undertaken. The COMESA Treaty empowers the Council of Ministers to make binding decisions on member states in order "to promote the attainment of the aims of the common market."^{***}

** This committee is established under Article 13(k) of the COMESA Treaty.*

*** Article 9(2)(g) of the COMESA Treaty. See also Article 9(2)(d) empowering the Council to "... issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this treaty." Another institutional feature in COMESA is the Inter-Governmental Committee that comprises Permanent/Principal Secretaries from COMESA Coordinating Ministries in all member states.*

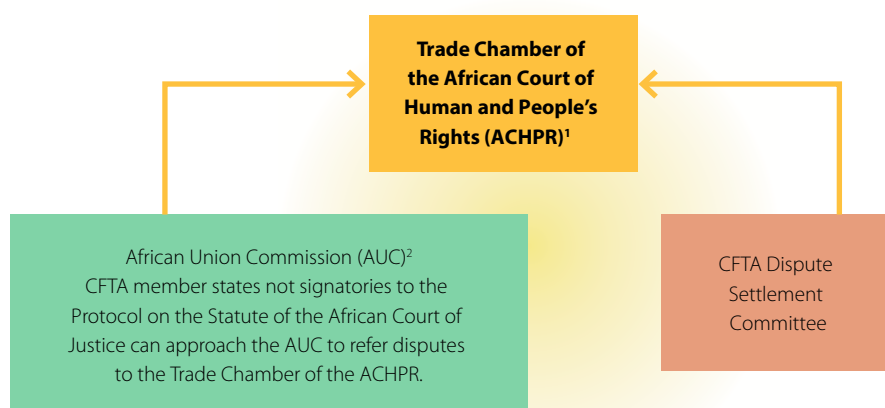
comprise eminent jurists in international trade law, commerce and allied areas.

In addition, for CFTA parties that are not signatories to the Protocol on Amendments to the Protocol on

the Statute of the African Court of Justice and Human Rights, the AUC could be empowered to refer disputes relating to the CFTA to the African Court of Justice and Human Rights for a binding determination of a dispute

Figure 8.3

Proposed CFTA dispute settlement structure



1 To be replaced by the African Court of Justice and Human Rights.

2 The AUC can receive petitions brought by companies and individuals from CFTA member states that have not signed a declaration under Article 34 (6) of the African Charter on Human and People's Rights and refer such disputes to the Trade Chamber of the ACHPR.

that involves them. Figure 8.3 shows the proposed dispute settlement structure.

For AU member states that have not signed a declaration, under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights, in allowing individual access to the Court (including suits by private actors), consideration could be made to allow the AUC to receive such individual petitions from companies and individuals in those AU member states and for the Commission to consider whether or not to file a reference on behalf of such individual claimants in the African Court of Human and Peoples' Rights in cases involving alleged infringement of CFTA rights and obligations.

The Role of National Courts

The CFTA dispute settlement arrangements will be inter-governmental. To ensure that the individuals' rights under the CFTA are fully implemented, national courts of the CFTA member states will be important, as these courts can give individuals the right to enforce compliance of CFTA obligations nationally. National courts can be used to decentralize compliance. National courts work best where the provisions of the CFTA Treaty are made part of domestic law.

There are good precedents for using national courts to enforce regional economic community commitments. For example, Kenyan courts have a series of decisions, stretching more than a decade, that enforced Kenya's COMESA obligations on sugar imports.¹³

References

AU (African Union). n.d. *Draft Strategic Framework for the Implementation of the Action Plan for Boosting Intra-African Trade and for Establishing the Continental Free Trade Area*. Addis Ababa.

COMESA (Common Market for Eastern and Southern Africa) Secretariat. 2016. "All but Four Non-Tariff Barriers resolved." <http://www.comesa.int/all-but-four-non-tariff-barriers-resolved/>.

Gathii, J. 2016. "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* 78 (4): 37–62.

Endnotes

1 Article 7 of the Treaty for the Establishment of the African Economic Community (1994) (also referred to as the Abuja Treaty).

2 Article 8.1 id.

3 Article 8.3 (h) and (i) as well as Article 8(4) id.

4 The treaty refers to the OAU but since the OAU is now defunct and its activities taken over by the African Union, I have used the reference African Union. See Article 11.1 id.

5 Article 11.3(b). Article 11.2 confers on the council the responsibility for the functioning and development of the community.

6 Article 11.3 (f). Similar power to Assembly Article 83 (k) id.

7 Article 14.1 id.

8 Article 16(a)

9 Article 18.2 and Article 18.4 respectively.

10 Article 19.

11 Article 18.5.

12 Article 25.1 and 25.2.

13 See for example, in *Transouth Conveyors Limited and Others Versus Kenya Revenue Authority and Others*, Misc. Court of Appeal No. 120 of 2007 consolidated with Misc. Civil Appeal No. 136 of 2007 (Judgment of 30 May 2008, <http://kenyalaw.org/caselaw/cases/view/44874/>), which found in part that companies that had brought sugar into Kenya were entitled to do so duty free because they complied with the preconditions for importation contained in an agreement between Kenya and COMESA.

