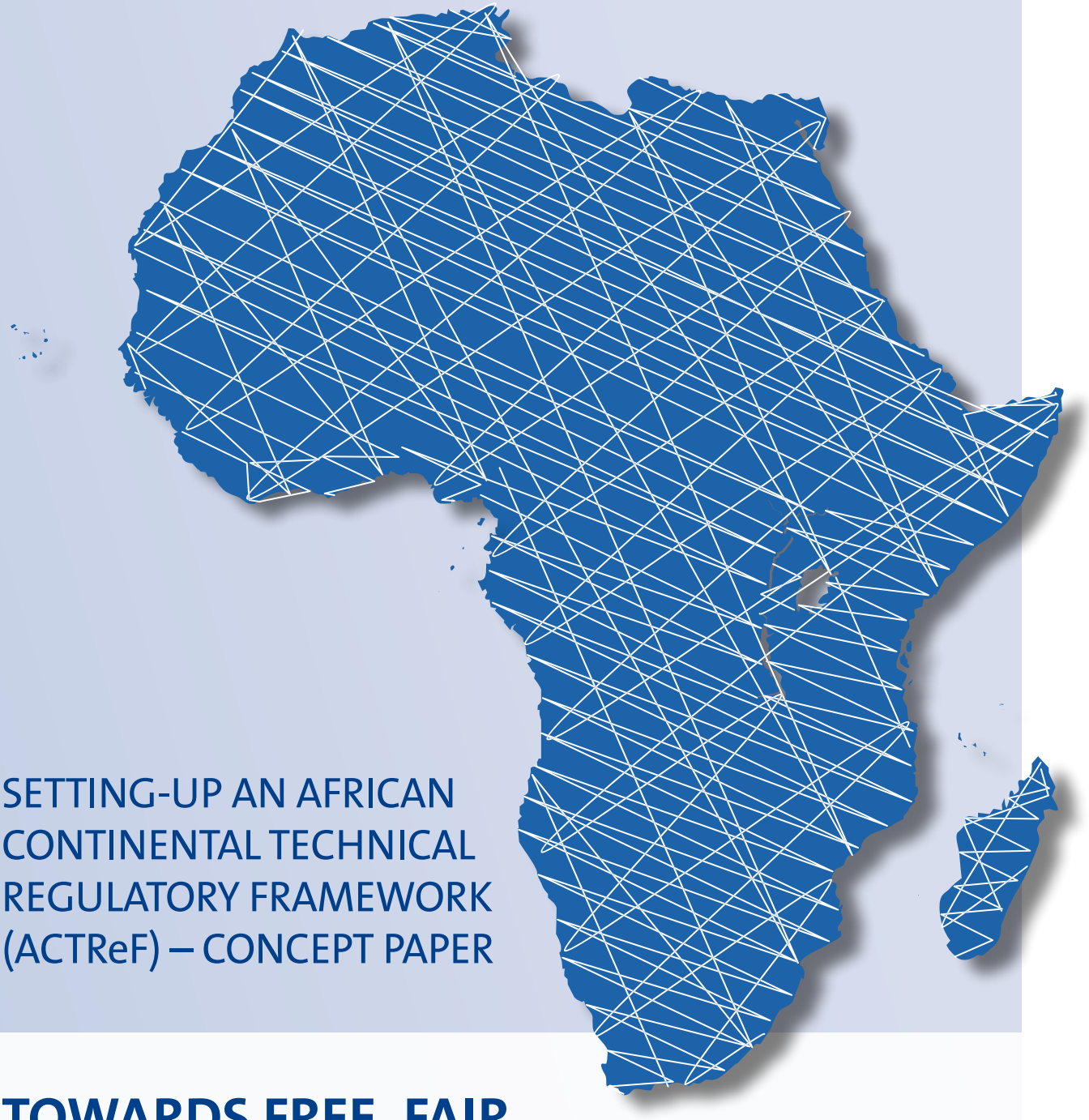
QUALITY FOR AFRICA

PAQI
PAN-AFRICAN QUALITY INFRASTRUCTURE



# SETTING-UP AN AFRICAN CONTINENTAL TECHNICAL REGULATORY FRAMEWORK (ACTReF) – CONCEPT PAPER

# TOWARDS FREE, FAIR AND SAFE TRADE IN AFRICA

Paper prepared by Beer Budoo

The PAQI initiative is supported by

This document is available at www.paqi.org



# TABLE OF CONTENTS

# ACRONYMS

| | |
|---|---|
| ABC | African Business Council |
| ACTReF | African continental technical regulatory framework |
| AfCFTA | African Continental Free Trade Area |
| AFRAC | African Accreditation Cooperation |
| AMA | African Manufacturers Association |
| APEC | Asia-Pacific Economic Cooperation |
| AQP | Africa Quality Policy |
| ARSO | African Organisation for Standardisation |
| ASEAN | Association of Southeast Asian Nations |
| AU | African Union |
| AUC | African Union Commission |
| AUC DTI | African Union Commission – Department of Trade and Industry |
| CAMI | Conference of AU Ministers of Industry |
| Codex | Codex Alimentarius |
| COMESA | Common Market for Eastern and Southern Africa |
| CTG | Committee on trade in goods |
| EABC | East African Business Council |
| EAC | East African Community |
| ECCAS | Economic Community of Central African States |
| ECOQUAL | ECOWAS Quality Policy |
| ECOSHAM | Model and Principles of Harmonization of Standards |
| ECOWAS | Economic Community for West African States |
| EU | European Union |
| GIZ | Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH |
| GRP | Good regulatory practice |
| IAF | International Accreditation Forum |
| ICNTM | International Classification of NTMs |
| IEC | International Electrotechnical Commission |
| ILAC | International Laboratory Accreditation Cooperation |
| INetQI | International Network on Quality Infrastructure |
| IPPC | International Plant Protection Convention |
| ISB | International standardizing body |
| ISO | International Organization for Standardization |
| ITU | International Telecommunication Union |
| MERCOSUR | Southern Common Market |
| MRA | Mutual Recognition Arrangement |
| MS | AU Member State |
| MTS | Multilateral Trading System |
| NaTReF | National Technical Regulatory Framework |
| NMNTB | National Monitoring Committee on NTBs |
| NTB | Non-Tariff Barrier |
| NTM | Non-tariff measure |
| OECD | Organisation for Economic Co-operation and Development |
| OIE | World Organisation for Animal Health |
| PAQI | Pan-African Quality Infrastructure |
| PTB | Physikalisch Technische Bundesanstalt |
| QI | Quality Infrastructure |
| QP | Quality Policy |
| REC | Regional Economic Community |
| RIA | Regulatory impact assessment |
| RTA | Regional trade agreement |
| SADC | Southern African Development Community |
| SADCAS | SADC Accreditation Services |
| SAIIA | South African Institute of International Affairs |
| SCTBT | Sub-Committee on Technical Barriers to Trade |
| SOAC | West African Accreditation System |
| SP | State Party (to the AfCFTA) |
| SPS | Sanitary and Phytosanitary |
| TBT | Technical Barriers to Trade |
| TFTA | Tripartite Free Trade Area |
| TR | Technical regulation |
| TRAINS | UNCTAD Trade Analysis and Information System |
| TRF | Technical regulatory framework |
| UMA | Arab Maghreb Union |
| UNCTAD | United Nations Conference on Trade and Development |
| UNECA | United Nations Economic Commission for Africa |
| UNESCAP | United Nations Economic and Social Commission for Asia and the Pacific |
| WAEMU | West African Economic and Monetary Union |
| WAQP | West African Quality Program |
| WTO | World Trade Organization |

# DEFINITIONS

I. **(Mutual) Recognition Arrangement (MRA)** is an arrangement whereby participating bodies acknowledge to others that the conformity assessment results of the other participating bodies have been produced by competently performed, equivalent procedures (Source: ISO/IEC Guide 68:2002);

II. **Harmonized standards** are standards on the same subject approved by different standardizing bodies that establish interchangeability of products, processes and services, or mutual understanding of test results or information provided according to these standards;

III. **Non-tariff measure (NTM)** are generally defined as policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both. NTM classification comprises technical measures, such as SPS measures and TBT, as well as others traditionally used as instruments of commercial policy, e.g. quotas, price control, exports restrictions, or contingent trade protective measures, and also other behind-the-border measures, such as competition, trade-related investment measures, government procurement or distribution restrictions (source: UNCTAD);

IV. **Quality Infrastructure (QI)** is a system comprising the organizations (public and private) together with the policies, relevant legal and regulatory framework, and practices needed to support and enhance the quality, safety and environmental soundness of goods, services and processes. The Quality infrastructure is required for the effective operation of domestic markets, and its international recognition is important to enable access to foreign markets. It is a critical element in promoting and sustaining economic development, as well as environmental and social wellbeing. It relies on metrology, standardization, accreditation, conformity assessment, and market surveillance (Source: Definition adopted in June 2017 by INetQI);

V. **Quality policy** means a policy adopted at a national, regional or continental level to develop and sustain an efficient and effective QI system (Note 1: This definition relates to policy making at national, regional or continental levels and differs from the definition of Quality Policy as stated in ISO 9000:2015, which applies more to organizations);

VI. **Regulation** is the diverse set of instruments by which governments set requirements on businesses, citizens and the public sector. Regulations include laws; formal and informal orders and subordinate rules issued by all levels of government; and rules issued by non-governmental or self-regulatory bodies to whom governments have delegated regulatory powers (Source: Regulatory Governance in Developing Countries, Investment Climate Advisory Services/World Bank Group, 2010);

VII. **Regulators** are entities authorised by statute to use legal tools to achieve policy objectives, imposing obligations or burdens through functions such as licensing, permitting, accrediting, approvals, inspection and enforcement (Source: OECD (2014), The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy);

VIII. **Standard** is a document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context (ISO/IEC Guide 2:2004);

IX. **Technical regulation** means a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method (Source: WTO TBT Agreement).

# ACKNOWLEDGEMENT

Widely differing technical regulations can be the source of unnecessary trade barriers between countries as producers and traders struggle to comply with the divergent requirements. Cooperation between countries in bringing technical regulation requirements closer facilitates increased free trade.

This paper has been prepared to provide an overview of the different approaches to technical regulation across Africa and it also reviews the options and possible routes that can be followed in establishing a continental framework for technical regulation on the continent. This is important for the successful implementation of the African Continental Free Trade Area (AfCFTA).

I wish to express my gratitude to everyone who was involved in this exercise particularly Mr. Beer Budoo, the author of the report. Review inputs from experts in the Pan-African Quality Infrastructure (PAQI) and its four institutions including the African Accreditation Cooperation (AFRAC), the Intra-Africa Metrology System (AFRIMETS), the African Electrotechnical Standardization Commission (AFSEC) and the African Organisation for Standardisation (ARSO) are duly acknowledged. I also acknowledge with gratitude the technical insights provided by representatives of the African Union Commission, AUC.

This work would not have been possible without the technical and financial support from the Physikalisch Technische Bundesanstalt (PTB) that went towards the refining, translation and printing of the document. I thank PTB for their support.

**Celestine O. Okanya**
Chairperson, Pan-African Quality
Infrastructure (PAQI) and DG/CEO,
Nigeria National Accreditation Service (NiNAS)

# FOREWORD

A key challenge for Africa as a region is to move off an economic growth path built on consumption and commodity exports onto a more sustainable developmental path based on production and trade of high quality products and the promotion of environmental and social well-being. African countries should embrace manufacturing and trade as the main engines of growth. Market competitiveness of manufactured goods depends critically on their compliance to standards and other technical or regulatory requirements. Linked to this is the need to build a quality infrastructure (QI) that supports the provision of quality assurance based on internationally recognised standardization, metrology, technical regulation, conformity assessment and accreditation practices.

In 2020, the Pan-African Quality Infrastructure (PAQI) published the third edition of the "Technical Barriers to Trade Stocktaking report". The report presents a quality infrastructure index for African countries and shows that only 18 African countries have "reasonably or well developed" quality infrastructure institutions at national level. The rest have "partially developed or not developed at all" quality infrastructure systems. This means that the majority of AU Member States are not in a position to fully implement the AfCFTA annexes on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) measures. In fact, of the countries that had ratified the AfCFTA Agreement as at 1 September 2020, only 52 % demonstrate full readiness to fulfil the requirements of the AfCFTA Agreement Annex on TBT.

In order to address the QI support requirements of Africa's industrialization and trade, and for safeguarding of the health and safety of consumers as well as protecting the environment, the African Union Commission (AUC), in collaboration with PAQI and with the technical support of the Physikalisch Technische Bundesanstalt (PTB) Germany, developed an Africa Quality Policy (AQP). The development of this AQP has been subject of wide consultation among Member States, Regional Economic Communities (RECs), stakeholders, specialized technical agencies of the UN, and regional PAQI institutions.

The AQP aims at building a strong and sustainable QI that will adequately support continental development programmes including a diversified, innovative and globally competitive industrial base, as well as facilitate trade under the AfCFTA and globally. The continental level QI needs to be vertically integrated to sub-regional and national level QI so as to operate as an effective system as a whole. The AQP provides the vision, objectives and guidance to achieve this.

One of the 7 main focus areas of the AQP is about 'setting and implementing a technical regulatory framework (TRF)', i.e. a system that establishes how technical regulations (TRs) are developed and enforced. TRs are documents that lay down product characteristics and the parameters for ensuring compliance to those requirements. TRs are mostly developed, applied and enforced at the national level but they can become technical barriers to international trade since compliance with TRs is mandatory. One of the essential conditions for increased intra-African trade is therefore achieving regulatory convergence among all the parties managing technical regulations. A certain level of regulatory convergence is de-facto achieved at the level of the Regional Economic Communities (RECs) but more needs to be done at the continental level to bring all African countries and RECs at the same level of regulatory management.

Among the tools used to achieve regulatory convergence, one of the most prominent is the use of good regulatory practices (GRPs) which describe best practices and procedures to improve the quality of regulation, including technical regulations. The formulation of an African Continental Technical Regulatory Framework (ACTReF) will thus, in addition to covering how TRs are managed in Africa, also lay down principles of GRP that are equally relevant for managing regulations other than TRs, for example in the areas of the environmental management, industrial safety, energy or physical infrastructure.

The most efficient manner of implementing the ACTReF would be through the AfCFTA since one of the objectives of its Annex 6 is to 'establish mechanisms and structures to enhance transparency in the development and implementation of standards, technical regulations, metrology, accreditation and conformity assessment procedures'. However, as pointed out in the previous paragraphs, achieving better regulation and implementing GRPs is not limited to the field of trade and AfCFTA but is highly relevant in support of overall African policies in other sectors. Consequently, although the ACTReF would apply first and foremost to the AU Member States (MSs) who are State Parties (SPs) to the AfCFTA, the principles and practices of the ACTReF are for wider and general application within all other relevant AU policies targeting all MSs.

The foregoing thus implies that both the AfCFTA and the AUC have a role in the implementation of the ACTReF. The AfCFTA will be responsible for ensuring that the ACTReF enhances intra-African trade while the AUC will use the ACTReF to work towards better regulation on the continent.

# EXECUTIVE SUMMARY

Consolidating this continent into one single market through the AfCFTA provides great opportunities for trading enterprises, businesses and consumers across Africa. UNECA estimates that AfCFTA has the potential both to boost intra-African trade by 52 per cent by eliminating import duties, and to double this trade if non-tariff barriers (NTBs), which also include technical barriers to trade (TBT), are also reduced. The ACTReF is conceived as a system that establishes how technical regulations are developed and enforced in order not to create unnecessary obstacles to trade so as to comply with the requirements of the WTO TBT Agreement.

The need for the ACTReF arises from the observation that there are notable differences in the way the AU Member States and RECs develop and enforce TRs. The challenge facing the AU is to bring the different African countries and the RECs towards better regulatory convergence so that intra-African trade is enhanced durably.

One of the constraints in assessing the extent of the regulatory divergence that exists among African countries is the lack of data. UNCTAD has developed an innovative, yet simple approach of measuring such divergence based on what is termed "regulatory distance" which measures whether or not a regulation of the same type is applied by two different countries to the same product. The measure of regulatory distance can serve to assess the extent of regulatory dissimilarity among Member States in Africa. It is clear that the tool can prove to be very useful in the context of ACTReF towards reducing the regulatory distance among Member States but the data has to be compiled first.

Regulatory dissimilarity can also be through over-regulation or under-regulation. Over-regulation and under-regulation can be assessed when regulations (e.g. SPS and TBT measures) imposed by a given country are compared with the requirements of international standards. Both over-regulation and under-regulation are equally undesirable, albeit for different reasons – over-regulation because it is economically costly, and under-regulation because it may cause health and safety risks. A model study from Asia-Pacific show that over-regulation and under-regulation is quite common, often for the same country. It would appear that such a study has not yet been done in Africa. Again the lack of data and accessibility pose problem. The UNCTAD TRAINS database on SPS and TBT measures show data only for 22 African countries while data are absent from most of the SADC, EAC and COMESA members. Moreover, the data show that, even among this small number of countries, there is considerable variation in the number of SPS and TBT measures imposed by different African countries. ACTReF should consolidate such data at the level of the Continent in order to target the right approach towards regulatory convergence.

There are several reasons for the weak regional trade performance in Africa, one of which is that the approach to regional integration on the continent has so far focused more on the elimination of trade barriers and less on the development of the productive capacities necessary for trade. If Governments of African countries want to achieve their objectives of boosting intra-African trade, they have to create more space for the private sector to play an active role in the integration process. An analysis of the World Bank's worldwide governance indicators in 2017, with regard to regulatory quality, show that only 4 of the 54 African countries for which these indicators have been compiled show an index slightly above zero on a scale ranging from –2.5 and +2.5, with higher values corresponding to better governance. The regulatory quality indicator captures perceptions of the ability of governments to formulate and implement sound policies and regulations that permit and promote private sector development. This means that African countries have a deficit in using regulation effectively to create the necessary business environment for the private sector. This may result in under-regulation or over-regulation in the area of technical regulations, the latter possibly bringing an increase in production and transaction costs, including for demonstrating compliance, in the domestic market. Similarly, ineffective regulatory environments in export markets hinders predictability and

trade enhancement in addition to increasing costs of compliance. By bringing better regulatory convergence, the ACTReF may enhance private sector dynamism.

The African Union recognizes 8 RECs. There is a need for ACTReF to bring an alignment of the continental-level technical regulatory framework with those of these RECs. In West Africa, WAEMU and ECOWAS have both been working on regional QI construction since 2001 through the implementation of the West African Quality Program (WAQP). As a result, the coexistence of two regional policies involving two sets of regional standards may not contribute to improving efficiency and uniformity across the West African territory. In Southern Africa, the SADC agreements do not contain a binding obligation to "domesticate" the relevant SADC instruments to make them part of the national legal systems and thus essentially leaves it to national governments to "adopt adequate measures to promote the achievement of the objectives of SADC". The danger is, of course, that such a decentralized approach can easily become uncoordinated, fragmented and ineffective, especially in the area of technical regulations. As for the EAC, the regulatory capacity review undertaken by the World Bank in 2011 underlined important weaknesses in the regulatory system. In particular, there is no overall regulatory strategy consistent with the common market; instead, regional regulation is being developed through slow, negotiated, and inefficient harmonization efforts. With regard to ECCAS, studies have shown that the community is yet to attain its objectives given that the organization is defined or classified by being weak institutionally and organizationally in terms of capacity.

The scope of the ACTReF encompasses the continental, regional and national levels although TRs are developed and implemented mainly at national and, sometimes, regional (REC) levels. For national regulatory systems to be effective and efficient, the three following aspects have to be carefully considered and implemented: institutional structures, procedural and managerial systems, and legal forms. The ACTReF should take into account these aspects when guidance is being developed for Member States to set up their national technical regulatory frameworks (NaTReFs).

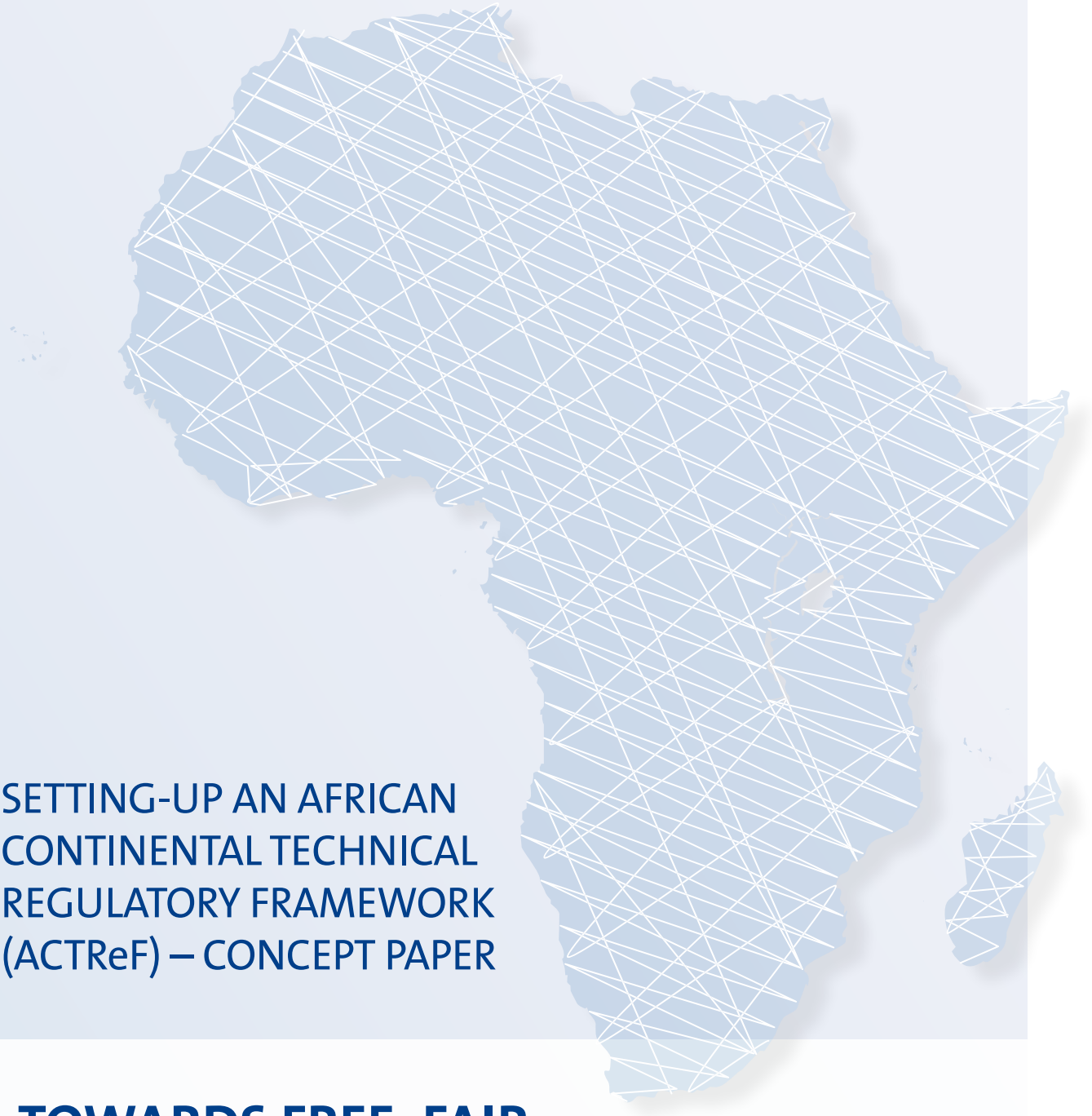
National authorities would prefer not to regulate, unless absolutely necessary, given the costs and complexity of the process. Actually, sometimes national authorities have no say in the matter and the need for regulation is imposed through the country's external commitments, either bilateral, regional or international. AU Member States who are also members of the WTO have thus to comply with the rules laid down under the TBT Agreement, including those to prevent the inappropriate use of technical regulations. The TBT Committee has further called on its members to (voluntarily) institutionalize the various mechanisms, processes and procedures of regulatory practice through laws and regulations, as well as through the creation and designation of institutions within Member governments to oversee regulatory processes. The observance of the TBT Agreement rules not only concerns individual WTO members but is the norm for regional trade agreements (RTAs). The results of a review of 81 RTAs by the OECD, as well as the examples of the EU, ASEAN, MERCOSUR and APEC have provided useful information that have been integrated in this concept paper.

The ACTReF, in its goal of furthering the objectives of the AfCFTA, can build on certain strengths and opportunities in the African context, in particular a long-standing culture of strong regional cooperation among its RECs and their trade agreements. The AfCFTA also provides a strong opportunity to have a holistic look at intra-African trade and deal with the regulatory constraints at the level of the continent. The principles upon which the ACTReF is planned to be built are those of the WTO, the AfCFTA and the EU.

One of the critical aspects for the effective implementation of the ACTReF concerns its institutional structure. The governance is vested with the Council of Ministers of the AfCFTA and it will be managed by a unit under the administrative authority of the

head of the AfCFTA secretariat. The technical management responsibility of the ACTReF unit will be under the AfCFTA Sub-Committee on Technical Barriers to Trade. ACTReF tasks expected to be carried out at the national level under NaTReFs will be coordinated by the National Focal Points on NTBs working under the National Monitoring Committees on NTBs (NMNTB) created under Article 6 of Annex 5 of the AfCFTA.

Several regulatory approaches are proposed for ACTReF, including several levels of harmonization and mutual recognition. These are not all mutually exclusive, so the ACTReF should come up with a balanced set of approaches to apply in Africa. This will be part of another phase of this project



# SETTING-UP AN AFRICAN CONTINENTAL TECHNICAL REGULATORY FRAMEWORK (ACTReF) – CONCEPT PAPER

## TOWARDS FREE, FAIR AND SAFE TRADE IN AFRICA

# 1 BACKGROUND

The African Union Commission (AUC) adopted the Africa Quality Policy (AQP) as a high level policy document to ensure that the continental Quality Infrastructure (QI) continually operates in a coherent and effective manner while meeting international requirements constantly. An effective QI (see Box 1 for a definition of QI) has been identified as a critical element for achieving Africa's goals of enhancing industrial development and increasing intra-African trade.

The aim is to align the AQP with the Member States' and REC-level quality policies (QP) which define how their respective QIs operate. The alignment works in both directions, meaning that Member States' and REC-level QPs constitute building blocks for the continental AQP while at the same time the AQP lays down guidance for the former. The interlinkages are meant to ensure that the whole system remains a dynamic structure, constantly adapting to new challenges and needs.

The PAQI is another important partner in the implementation of the AQP since the Conference of AU Ministers of Industry (CAMI), at their meeting held on 10–14 June 2013 in Nairobi, Kenya, had already recognized the PAQI as the continental platform for all matters related to standardization, metrology, accreditation and conformity assessment.

Consolidating this continent into a single market through the African Continental Free Trade Area (AfCFTA) provides great opportunities for trading enterprises, businesses and consumers across Africa. UNECA estimates that AfCFTA has the potential both to boost intra-African trade by 52 per cent by eliminating import duties, and to double this trade if non-tariff barriers are also reduced[1]. The Protocol on Trade in Goods of the AfCFTA provides for cooperation in the area of quality infrastructure while Annex 6 on Technical Barriers to Trade (TBT) lays down the modalities for such cooperation, including in the area of technical regulations, which are documents that lay down product characteristics with which compliance is mandatory.

This concept paper proposes an African Continental Technical Regulatory Framework (ACTReF) as stipulated in the AQP and as one of the 7 elements of the continental QI.

1 African Continental Free Trade Area - Questions & Answers (Compiled by the African Trade Policy Centre (ATPC) of the Economic Commission for Africa (ECA) in association with the African Union Commission)

### WHAT IS A QUALITY INFRASTRUCTURE (QI)?

It is a system comprising the organizations (public and private) together with the policies, relevant legal and regulatory framework, and practices needed to support and enhance the quality, safety and environmental soundness of goods, services and processes.

The QI enables a country, a region or continent to set and achieve quality objectives. These objectives cover both national requirements as well as requirements imposed in regional, continental and international trade agreements. The QI provides acceptable evidence, recognized at the international level; that products, services, processes, systems, persons or bodies conform to stated requirements.

An **effective** QI results from the continual and satisfactory fulfilment of all the 7 elements listed below.

- Setting a quality policy
- Standardization
- Setting and implementing a Technical regulatory framework
- Conformity assessment
- Accreditation
- Metrology
- Quality promotion and use

The paper is structured as follows:

a) a foreword describing the policy at the African Union level that governs the development of an ACTReF,

b) an explanation of the relevant concepts of law as they apply to the context of this paper,

c) a review of the regulatory issues that hinder intra-African trade and which a TRF could address,

d) an examination of the elements that drive the need for regulation and examples of TRFs at regional and international levels,

e) the proposed profile of the ACTReF, i.e. the policy aspects, the principles and a SWOT overview in the African context,

f) a proposed institutional structure for the ACTReF, building on structures already provided under the AfCFTA,

g) a description of different regulatory approaches proposed for the ACTReF, and

h) the next steps in developing the ACTReF.

# 2 RELEVANT CONCEPTS OF LAW

## 2.1 National and international law

The objective of this project is to bring about cooperation and regulatory convergence among African States. It is therefore pertinent that a few concepts about laws and regulations be explained both from the national and international points of view so that there is a common understanding of the issues.

Basically, laws are generally understood to be rules and guidelines that are created and enforced through governmental institutions to regulate conduct. The need for laws arises from the need for establishing rules and guidelines to satisfy a particular objective or to influence a particular behaviour.

The source of national laws is the constitution, written or tacit, of the country and the latter may influence the formation of laws in line with the rights encoded therein. Laws are passed by the legislature, e.g. the parliament in the UK or the Congress in the USA. To make the link between national laws and international laws, it has to be noted that beginning in the second half of the 20th century, there was a growing tendency in many countries to allow the direct operation within their constitutional systems of international laws and the laws of special international organizations to which they belonged. The constitutions of Germany and Italy, for example, require the legal system to conform to international customary law. Because both constitutions are rigid, this means that ordinary national statutes conflicting with such law are unconstitutional[2]. So, African countries need to ensure that they have the proper national legislation for implementing international laws.

International law consists of rules and principles governing the relations and dealings of nations with each other, as well as the relations between states and individuals, and relations between international organizations[3]. Public international law can be formed by international organisations, such as the United Nations, the International Labour Organisation, the World Trade Organisation, or the International Monetary Fund. The international law is enshrined in conventions, treaties and standards[4]. Treaties may be seen as 'self-executing', in that merely becoming a party puts the treaty and all of its obligations in action. Other treaties may be non-self-executing and require 'implementing legislation' – a change in the domestic law of a State party that will direct or enable it to fulfil treaty obligations. If a treaty requires implementing legislation, a State may be in default of its obligations by the failure of its legislature to pass the necessary domestic laws[5]. Public international law has a special status as law because there is no international police force, and courts lack the capacity to penalise disobedience. However, a few bodies, such as the WTO, have effective systems of binding arbitration and dispute resolution backed up by trade sanctions.[6] The European Union law is the first and, so far, only example of an internationally accepted legal system other than the UN and the World Trade Organisation. Given the trend of increasing global economic integration, many regional agreements – especially the African Union – seek to follow a similar model[7] as the EU.

## 2.2 Primary legislation

Primary legislation is the general term used to describe the main laws passed by the legislative bodies, e.g. the national parliament or national assembly. An Act (also called a statute) is a law made by the legislative body which start debating on the text in the form of a "bill".

2 https://www.britannica.com/topic/constitutional-law/Classifying-states-as-federal-or-unitary

3 https://www.law.cornell.edu/wex/international_law

4 https://www.un.org/en/sections/issues-depth/international-law-and-justice/

5 https://en.wikipedia.org/wiki/Treaty

6 Petersmann, The GATT/WTO Dispute Settlement System International Criminal Court cited in Wikipedia

7 Chalmers, D.; Barroso, L. (7 April 2014). "What Van Gend en Loos stands for". International Journal of Constitutional Law. 12 (1): 105–134, cited in Wikipedia.

When a bill has been agreed by the legislative body, it becomes an Act. Acts are known as 'primary legislation' because they do not depend on other legislative authority.

## 2.3 Secondary legislation

Secondary legislation is law created by ministers (or other bodies) under powers given to them by an Act (primary legislation). Secondary legislation is also known as 'delegated' or 'subordinate' legislation and often takes the form of statutory instruments, which are detailed orders, rules or regulations. Secondary legislation is used to fill in the details of Acts (primary legislation). These details provide practical measures that enable the law to be enforced and operate in daily life[8]. In many African countries whose legislature is based on the British legal system, the main type of secondary legislation is called a "regulation".

## 2.4 Legal framework

The most appropriate definition of the word framework in the context of this paper is found in the Macmillan dictionary – "a system of rules, laws, agreements, etc. that establish the way that something operates in business, politics, or society". Hence we can refer to frameworks in the context of legal/regulatory/constitutional/institutional frameworks.

A legal framework thus includes not only the core component of the legislation itself, but also the institutional, administrative, political, social and economic conditions or arrangements, which make the legislation available, accessible, enforceable and therefore effective.

A national legal framework[9] is composed of the

- international obligations,
- legislation,
- legislature,
- judicial system,
- regulators,
- regulated,
- beneficiaries (public),
- social support mechanisms,
- political commitment to implement the law, and
- resources to apply and enforce the law.

It is important to pinpoint that the State's international obligations are also part of the legal framework.

## 2.5 Concept of regulation

The concept of regulation ranges from, at the one end, viewing regulation as a strict legal concept in which laws and regulations are determined in black and white through to a more fluid behavioural concept in which regulation is seen as a focused attempt at controlling the behaviour of others. Thus, regulation can be initiated in all sectors of society – in the business sector, in civil society as well as by government![10] Ayers and Braithwaite (1992), cited in Graeme Hodge (2007)[10] suggest that regulation in practice comprises a pyramid of mechanisms ranging at the top with hard law regulatory strategies to soft law self-regulatory strategies at the bottom. Notably, the middle regions of the pyramid include many non-law mechanisms such as guidelines, codes of conduct and best practices.

In the strictly legal sense, regulation can be viewed as a narrow, top down "command and control" function carried out mostly by government. The more fluid concept of regulation includes industry self-regulation (ISR) for example. A study[11] conducted by the Organisa-

8 https://www.parliament.uk/site-information/glossary

9 Regulatory Tools: Legal & policy framework, Cranfield University, 2006

10 Regulatory Frameworks for Urban Services, Professor Graeme Hodge, Monash University, 2007

11 OECD (2015-03-01), "Industry Self Regulation: Role and Use in Supporting Consumer Interests", OECD Digital Economy Papers, No. 247

tion for Economic Co-operation and Development (OECD) has shown that Governments, businesses and consumers can all benefit from ISR. For example, ISR could be more cost-effective for governments, to the extent that enforcement and monitoring burdens are lightened and/or shifted to business.

Regulation by Government does not exist by itself – it is part of the legal framework. However, as mentioned earlier, the process of regulation goes beyond purely Government intervention and encompasses actions by many other parties. At the national level regulation is a key tool for achieving the social, economic and environmental policy objectives of governments that cannot be effectively addressed through voluntary arrangements and other means. Governments have a broad range of regulatory powers reflecting the complex and diverse needs of their citizens, communities and economy.

Considering the regulatory functions of government and the various tools available to it, States can act in many ways as regulators. These tools include governmental activities as an economic actor (such as taxing or through quotas), a party (where governments influence behaviour through contractual conditions for minimum wages for example), as a facilitator (through markets or say, licensing), as an information provider (through product labelling or disclosing interest rates for example), or through the more traditional and familiar legislator role (where laws, rules and regulation are made and implemented).[12]

In conclusion on the concept of regulation, it is worthwhile to pinpoint that a "regulation" also refers to a published secondary legislation enforceable by law (terminology used mostly in the British legal system and applied to this day in many African countries and even by the East African Community[13]). On the other hand, the terminology for legal instruments used in French-speaking African countries may differ from those used in countries having legal systems based on the British legal system terminology.

## 2.6 Regulatory framework

How can we define a regulatory framework? Just type the words "definition of regulatory framework" on your favourite web browser and you end up with a wealth of information without finding a clear definition. How can we formulate an effective regulatory framework if the concept is not clear to everyone? Regulation in not only about law, as indicated in subsection **2.5**. In particular, a technical regulation, which lays down mandatory product characteristics, is the result of a convergence between a legal framework and a technical specification, and therefore must be understandable by producers, consumers, exporters and regulators alike.

The two words that make up the term regulatory framework implies that we are dealing with regulation, in its broadest sense as mentioned in **2.5** above, and that this is done within a defined framework.

A regulatory framework is therefore a system with defined rules that establish how the regulatory function is carried out. When the regulatory function is carried out at the level of a State, it is the regulator, designated by law, who holds the responsibility for enforcing the regulation. Regulators are entities authorised by statute to use legal tools to achieve policy objectives, imposing obligations or burdens through functions such as licensing, permitting, accrediting, approvals, inspection and enforcement[14].

A regulatory framework can be either at the level of an individual State, or a group of States formally involved in a regional integration agreement, or an inter-governmental organi-

12 Freiburg (2006) cited in Graeme Hodge (2007)

13 For example, The EAC standardization, quality assurance, metrology and testing Act 2006 contains the provision to make subsidiary regulations

14 OECD (2014), The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy

zation (IGO). For obvious reasons, the rules that a regulatory framework imposes are more easily enforced at the level of a State than at the level of a regional integration organization (RIO) or an IGO. For effective enforcement, the RIO or the IGO should be vested with supranational powers. A supranational power is one that goes beyond the authority or jurisdiction of one national government. One of the best examples of a regional group having supranational powers is the European Union while the World Trade Organisation (WTO) is an example of an IGO having such powers. Indeed, the WTO agreements are the legal ground-rules for international commerce and are implemented through a set of rules and principles that constitute the Multilateral Trading System (MTS).

## 2.7 Technical regulatory framework (TRF)

The WTO TBT Agreement defines a technical regulation (TR) as a document which lays down product characteristics with which compliance is mandatory. Technical regulations, because of their mandatory nature, have the potential to become technical barriers to trade (TBT).

A technical regulatory framework is a system that establishes how technical regulations are developed and enforced. The way this is done has to conform to the requirements of the WTO TBT Agreement as it is an obligation for WTO Members.

Standards also define product characteristics but they are of voluntary application and therefore constitute less of a technical barrier to trade. However, when standards are referenced in technical regulations, they become mandatory. That is why the WTO TBT Agreement also lays down rules for development of standards.

# 3 THE NEED FOR A CONTINENTAL TECHNICAL REGULATORY FRAMEWORK FOR AFRICA

## 3.1 African context

The AfCFTA Agreement, in its Annex 6 on Technical Barriers to Trade, stipulates that the "WTO TBT Agreement shall form the basis of this Annex" and that "State Parties reaffirm their rights and obligations under the WTO TBT Agreement in respect of the preparation, adoption, and application of standards, technical regulations, conformity assessment procedures and related activities". The AfCFTA thus imposes nothing more than what African countries which are WTO members have already agreed to with respect to technical regulations.

Just like the WTO TBT Agreement, the AfCFTA advocates the use of international standards or parts thereof as the basis for formulating the content of technical regulations. TRs developed in this manner are deemed not to create unnecessary obstacles to international trade. To illustrate the range of differences that might exist in Africa in the area of technical regulations, let us consider the cases of two African regional economic communities (RECs) such as the Economic Community for West African States (ECOWAS) and the East African Community (EAC). On the one hand, ECOWAS is aligned with the WTO TBT and AfCFTA requirements in terms of the policy of using international standards as basis for TRs but, on the other hand, the EAC require Partner States to base their TRs on East African Standards (EAS). Although, one of the objectives of the "EAC standardization, quality assurance, metrology and testing Act 2006" is to harmonise EAS with international standards, EAC partner States continued to use national standards in their technical regulations, which hinders intra-EAC trade. This is one of the findings of a study conducted in 2013 by the East African Business Council[15]. Now, consider that the EAC is classified as the top performing REC on regional integration overall according to the Africa Regional Integration Index Report 2016[16] published by UNECA. Thus, if intra-EAC trade is still hindered through a lack of regulatory convergence despite this favourable classification, one can only imagine what the situation is like in other RECs that have achieved a lower level of integration according to the UNECA Report.

The foregoing illustrates the fact that there is a need for active cooperation in matters of technical regulations at continental level. Although technical regulations are mostly developed, applied and enforced at the national level, at least one regional economic community, namely the EAC, may also develop and implement technical regulations. Indeed, the EAC can declare East African Standards as compulsory, which is the same as declaring the compulsory standard as a technical regulation. The challenge to bring the different African countries and the RECs to be on the same level in the function of developing and enforcing technical regulations is thus huge. It is all the more challenging that there is no continental level supranational entity, such as the EU, which can bring the desired level of harmonisation. This is why the AQP has a policy focus on setting and implementing an African Continental Technical Regulatory Framework (ACTReF). The ACTReF aims at building a coherent system at the level of the whole continent for developing and enforcing TRs in line with international requirements and best practices. The effective implementation of ACTReF, whose progress shall be measured against clear objectives and performance indicators, is expected to bring better regulatory convergence so that intra-African trade is enhanced durably.

## 3.2 Issues addressed through an ACTReF

### 3.2.1 To increase intra-African Trade

Intra-African trade remains at a very low percentage of African trade with the world. In developing Africa, the share of intraregional exports amounted to 10.9 % of world African exports in the period from 2007 to 2011, while

15 A report of the Study on the Prioritization of EAC Standards and Technical Regulations for Development, Harmonization, Revision or Withdrawal, EABC, 2013

16 Africa Regional Integration Index Report 2016 UNECA

the share of intraregional imports to world African imports was 12.7%. These proportions are lower than those in other developing regions, namely developing America (20.6% for exports and 21.1% for imports respectively) and developing Asia (50.1% and 53% respectively)[17].

The United Nations Economic Commission for Africa[18] estimates that AfCFTA has the potential both to boost intra-African trade by 52% by eliminating import duties, and to double this trade if non-tariff barriers (NTBs) are also reduced. Among the NTBs, technical barriers to trade (TBT) are prominent, including the potentially wrong use of standards, technical regulations and conformity assessment procedures.

African countries also impose non-tariff barriers in the form of price controls, product standards, discriminatory foreign exchange allocation, imposition of quotas, non-automatic licensing, administrative hurdles, excessive and unnecessary document requirements and unnecessary delays. It is widely believed that these barriers have a negative effect on intra-African trade and need to be addressed. Empirical evidence suggests that this could indeed be the case. In the Southern African Development Community (SADC), for example, econometric evidence suggests that non-tariff barriers reduce intra-SADC trade, while increasing exports of non-SADC countries into the community[19]. As a result, non-tariff barriers have created a perverse incentive structure which penalizes instead of encouraging intra-SADC trade. In this context, African countries need to take more proactive steps to address the issue of non-tariff barriers inhibiting intra-African trade.

An ACTReF could provide the mechanism that would enable AU Member States and RECs to reduce TBT and thus increase intra-African and international trade through the harmonization of procedures for the development and implementation of technical regulations and by adopting good regulatory practices as recommended by the WTO.

### 3.2.2 Improved regional and continental integration

Regional trade agreements (RTAs) have proliferated in the past decades. As of 1 June 2020, 303 RTAs were in force. These correspond to 490 notifications from WTO members, counting goods, services and accessions separately[20]. In Africa, the African Union recognizes 8 regional economic communities (RECs), namely the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); 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) and the Southern African Development Community (SADC). The EAC, COMESA and SADC members have further signed up to the Tripartite Free Trade Area (TFTA) which is yet to enter in force. These RECs already have a long history of efforts at integration and harmonizing non-tariff measures (NTMs) and reducing TBT. Furthermore, at the continental level, the AfCFTA aims to level the playing field across the whole continent through one of its specific objectives of progressively eliminating non-tariff barriers to trade in goods.

The AfCFTA presents a huge possibility for African countries to address the constraints that have hampered the continent's progress in producing and trading goods. Both the AfCFTA and the TFTA do observe the principle of preserving the acquis, which means that existing REC trade regimes would continue. The AfCFTA also provides that State Parties that are members of other RECs, regional trading arrangements and custom unions, which have attained among

17 The Economic Development in Africa Report 2013, UNCTAD

18 African Continental Free Trade Area - Questions & Answers (Compiled by the African Trade Policy Centre (ATPC) of the Economic Commission for Africa (ECA) in association with the African Union Commission)

19 Keane J, Cali M and Kennan J (2010) cited in The Economic Development in Africa Report 2013, Intra-African Trade: Unlocking Private Sector Dynamism, UNCTAD/ALDC/AFRICA/2013

20 https://www.wto.org/english/tratop_e/region_e/region_e.htm

themselves higher levels of regional integration than under AfCFTA, shall maintain such higher levels among themselves. These are political compromises reached through negotiations but they could derail overall African integration efforts under the AfCFTA unless careful measures are taken to bring all African countries to the same level of technical harmonization, which is a pre-requisite for intra-African trade. Indeed, trade integration without trust in the quality and safety of the products traded is difficult, if not impossible.

The depth of non-tariff measures (NTMs) commitments in regional agreements, particularly regarding SPS and TBT measures, depends on several factors. One is the partner States' relative income levels, as harmonization and mutual recognition of conformity assessment results tend to be easier when countries are at similar levels of development. Another is the agreement's overall integration depth. Customs unions and common markets go more easily beyond WTO commitments than free trade agreements. A third factor, which relates to the first two, is the prior degree of similarity between regulatory approaches, as harmonization or mutual recognition is much easier when regulations are *ex ante* similar. The United Nations Conference on Trade and Development (UNCTAD) has developed[21] an innovative, yet simple approach of addressing this third factor based on what is termed "regulatory distance" which will be described in detail in sub-subsection **3.2.4** below. The regulatory distance measures can serve to assess the extent of regulatory dissimilarity among Member States in a given REC and thus help to map the way for achieving regulatory integration as effectively as possible. While regulatory distance measures can be of immediate interest for a group of more or less homogeneous countries within a REC, the tool can also be used to assess all AU Member States' technical regulatory frameworks with a view to reducing the regulatory distance among them. Therefore, regulatory distance data could be a significant indicator of regulatory convergence among African countries in view of the implementation of the AfCFTA.

### 3.2.3 Over-regulation and under-regulation

What is the correct level for regulating? Are there too many regulations or too little? The purpose of regulation is to achieve certain objectives in the most cost-effective and efficient manner. Both over-regulation and under-regulation are equally undesirable, albeit for different reasons – over-regulation because it is economically costly, and under-regulation because it may cause health and safety risks.

A model study from Asia-Pacific show that over-regulation and under-regulation is quite common, often for the same country. It would appear that such a study has not yet been done in Africa. The methodology is described in detail in the publication referred to in the footnote[22] but the principle is as follows.

SPS measures and TBT that are regulated through mandatory legislation in a given country are compared with what international standards recommend. The international standards used for the study are those of the "three sisters" international standardizing bodies (ISBs), i.e., the Codex Alimentarius for food safety, the World Organisation for Animal Health (OIE) and the International Plant Protection Convention (IPPC) for plant health. The 57 categories of SPS measures and TBT distinguished in the International Classification of NTMs (ICNTM) maintained by UNCTAD are used for a comparison across many countries and products. The ICNTM has also been endorsed by the African Organization for Standardization (ARSO)[23]. The country-level mandatory legislation with which the ISB recommendations are compared are maintained

21 Deep regional integration and non-tariff measures: A methodology for data analysis by Olivier Cadot, Alan Asprilla, Julien Gourdon ,Christian Knebel, Ralf Peters (UNCTAD RESEARCH STUDY SERIES No. 69), 2015

22 ASIA-PACIFIC TRADE AND INVESTMENT REPORT 2019 – Navigating Non-tariff Measures towards Sustainable Development, UNCTAD/ESCAP

23 Criteria for Classification and Identification of Non-Tariff Barriers in Africa – Concept note, ARSO

in the UNCTAD Trade Analysis and Information System (TRAINS)) database[24] on Non-Tariff Measures (NTMs).

To illustrate the TRAINS database contents, Table 1 illustrates part of the TBT measures imposed by Nigeria as they appear in the database. Unfortunately, only 22 African countries' NTM data (including SPS and TBT measures) appear in the database, which makes the kind of analysis done above for Asia-Pacific impossible for Africa at this stage.

With regard to the Asia-Pacific study, the analysis goes as follows. When the mandatory regulation and the ISB recommendations match for a given country A, this is considered as regulatory similarity. When country A applies certain product quality requirements in its regulation whereas ISBs do not recommend such a requirement, this case is considered "over-regulation" vis-à-vis the ISB recommendations. Similarly, an opposite case where country A does not require hygienic production practices while ISBs recommend this, amounts to "under-regulation". Through aggregation across NTM types and products, counting cases of over-regulation and under-regulation separately, gives a general idea of the overall adherence by countries to ISB recommendations. As a point of reference, the "three sisters" ISBs recommend, on average, 13.6 NTMs per product. The calculations for the Asia-Pacific study show, for example, that the Republic of Korea over-regulates about 6.8 NTMs per product and under-regulates 5.4 NTMs per product; in total, 12.2 differences from the ISB recommendations. Australia over-regulates about 5.5 NTMs per product and under-regulates 6.6 NTMs per product, in total, 12.1 differences from the ISB recommendations.

Countries that tend to over-regulate are likely to have higher import and consumer prices, whereas countries that under-regulate may expose their population to higher health or environmental risks. The Study shows that countries such as China, India, the Republic of Korea and Viet Nam tend to over-regulate more than they under-regulate.

Table 2 lists all the SPS and TBT measures imposed by the 22 African countries for which data exist in the TRAINS database. The first element that jumps out at the reader is that data are absent from most of the SADC, EAC and COMESA members despite the fact that these RECs are supposed to have been practicing integration for a long time and more so since they are now linked by the Tripartite FTA. Hopefully

| Country imposing | Partner affected | Category | NTM Code | In force | Measure description | Product description |
|---|---|---|---|---|---|---|
| Nigeria | All Members | TBT | B31 | 2005-06-27 | Label to be affixed to cosmetics | Cosmetics |
| Nigeria | All Members | TBT | B31 | 2005-06-27 | Adequate labelling required for all drugs | Drugs |
| Nigeria | All Members | TBT | B31 | 2005-01-01 | Labelling required: Name, location and address of the manufacturer | Pre-packed food |
| Nigeria | All Members | TBT | B7 | 2005-01-01 | The product shall have the characteristic colour, aroma and flavour of the fruit juice | Fruit juice and Nectar |

Table 1: TBT measures as recorded in TRAINS database for Nigeria

24 https://trains.unctad.org/

| UNCTAD Trains database | | |
|---|---|---|
| **Africa** | **SPS** | **TBT** |
| Algeria | 114 | 122 |
| Benin | 27 | 34 |
| Botswana | 61 | 85 |
| Burkina Faso | 39 | 5 |
| Cameroon | 42 | 51 |
| Cabo Verde | 31 | 28 |
| Côte d'Ivoire | 69 | 7 |
| Ethiopia | 103 | 213 |
| Ghana | 20 | 25 |
| Guinea | 35 | 19 |
| Liberia, Republic of | 23 | 21 |
| Mali | 34 | 27 |
| Mauritania | 98 | 55 |
| Mauritius | 318 | 358 |
| Morocco | 208 | 91 |
| Niger | 14 | 21 |
| Nigeria | 51 | 26 |
| Senegal | 70 | 13 |
| The Gambia | 77 | 50 |
| Togo | 10 | 23 |
| Tunisia | 96 | 117 |
| Zimbabwe | 169 | 407 |
| **Africa Total** | **1709** | **1798** |

Table 2: SPS and TBT measures by African countries
Source: UNCTAD TRAINS online database, June 2020

the information is available somewhere but their absence in an international database indicates a lack of transparency at some level. The second element that one notices is that there is considerable variation in the number of SPS and TBT measures imposed by different African countries. As a note of caution though, the actual number of measures do not say anything about the stringency of these measures because 5 measures imposed by a country A, for example, could be more stringent than 20 simple measures imposed by country B. Nevertheless, the question remains as to what extent African countries are either over-regulating or under-regulating with respect to international standards. The data need to be collected to allow steps to be taken during the implementation of the ACTReF to bring TRs in line with international standards' requirements or alternatively with ARSO harmonized standards where international standards do not exist.

### 3.2.4 Dimensions of regulatory convergence – Regulatory distance

#### 3.2.4.1 Distance between regulatory structures in two countries

In 2015, UNCTAD developed a methodology and toolkit[21] for measuring distance in regulatory structure or simply "regulatory distance" between pairs of countries, i.e. it measures whether or not a regulation of the same type is applied by two different countries to the same product. Regulatory distance lies between zero and one and is typically a small number. In the sample used for the UNCTAD report, it ranges from 0.009 between Madagascar and the United Republic of Tanzania and 0.304 between China and Nepal. The regulatory distance can easily be disaggregated to a product or sector level. Comparisons can be made between two or more countries, or entire regional groups can be benchmarked against each other. Results show that the average regional trade agreement (RTA) cuts distance in regulatory structures by 41% which is quite significant. Data for SADC and COMESA show that regulatory distance between their respective members are reduced by 57% and 41% respectively.

The toolkit connects vast amounts of hard-to-grasp NTM data to a practical regulatory distance measure. The distance in regulatory structure is capable of comparing patterns of NTM regulation; in other words, do countries apply the same types of NTMs to imported products? Policymakers can use the tool to assess the status quo of NTM-related integration and to assess and benchmark the effectiveness of RTAs in fostering regulatory convergence. For instance, is there already a "core" of similar regulatory structures within a regional group, and, if so, which countries diverge from it? Related to this, is there a "shortest" way

to bring the whole group to a common NTM structure. The regulatory distance measure is a powerful tool that can provide answers to these questions.

#### 3.2.4.2 Distance between national technical regulations and ISB recommendations

The foregoing paragraphs covered regulatory distance between regulatory structures in pairs of countries. But the same concept of regulatory distance can be used to measure the distance between NTMs, e.g. technical regulations applied in a given country, and ISB recommendations.

Sub-subsection **3.2.3** distinguishes between over-regulation and under-regulation as the two sides of "regulatory difference". In the Asia-Pacific study[22] mentioned therein, the regulatory distance due to over-regulation and the regulatory distance due to under-regulation are combined into a single indicator of aggregate regulatory distance. The objective is to employ this aggregate indicator to simultaneously compare ISBs requirements with countries' technical regulations, and countries with each other. Cases of over-regulation and cases of under-regulation are counted equally towards the aggregate indicator of regulatory distance. The rationale for this step is that over-regulation and under-regulation are counted as being equally undesirable. Analysis yields a single indicator of regulatory distance between each pair of countries, and between each country and the "three sisters" ISB recommendations.

Results from the Asia-Pacific study covering several countries[25] reveal that in most of the cases only developed countries come close to the reference point of "three sisters" ISB recommendations (see Figure 1). Figure 1 plots all bilateral distances between countries and ISBs in a two-dimensional map. The interpretation

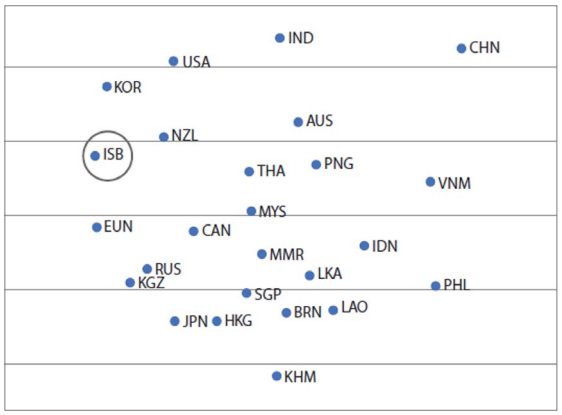



Figure 1: Overall regulatory distance map
Source: UNCTAD and ESCAP

focuses entirely on distances between the indicated points for countries/ISBs.

The indicator provides interesting information for policy makers involved in regional integration and countries can also be compared. For example, while the Republic of Korea and the Russian Federation are both relatively close to the ISB recommendations, they are quite far apart from each other. This would indicate that they achieve similarity to international standards, but in such different ways that it does not lead to trade promoting regulatory similarity between them. Conversely, most other ASEAN member States[26] appear in a cluster of relative proximity, but notably those ASEAN members with a lower share of intra-ASEAN trade (Viet Nam, Cambodia, the Philippines, and Indonesia) appear more distant from the rest of the group. In this latter case, it is possible that the lower participation of these 4 countries in intra-ASEAN trade could be due to the bigger distance of their regulatory requirements compared to ISB requirements. The indicator can thus unearth underlying regulatory dissimilarities hindering trade so that policy makers can take action towards better integration efforts.

25 Australia; Brunei Darussalam; Canada; China; European Union; Hong Kong, China; Indonesia; India; Japan; Kyrgyzstan; Cambodia; Republic of Korea; Lao People's Democratic Republic; Sri Lanka; Myanmar; Malaysia; New Zealand; Philippines; Papua New Guinea; Russian Federation; Singapore; Thailand; United States; and Viet Nam.

26 BRN – Brunei Darussalam; KHM – Cambodia; LAO – Lao People's Democratic Republic; MMR – Myanmar; MYS – Malaysia; PHL – Philippines; SGP – Singapore; THA – Thailand; and VNM – Viet Nam

### 3.2.5 Country governance indicators in regulatory quality

The UNCTAD Economic Development in Africa Report 2013[27] mentions that there are several reasons for the weak regional trade performance in Africa, one of which is that the approach to regional integration on the continent has so far focused more on the elimination of trade barriers and less on the development of the productive capacities necessary for trade. While the elimination of trade barriers is certainly important, it will not have the desired effect if it is not complemented with policy measures to boost supply capacities. The limited role of the private sector in regional integration initiatives and efforts has also contributed to the weak trade performance of the continent. Although trade agreements are signed by Governments, it is the private sector that understands the constraints facing enterprises and is in a position to take advantage of the opportunities created by regional trade initiatives. Admittedly, African RECs are increasingly making efforts to incorporate the private sector into their structures and action plans, for example through the establishment of business councils. Nevertheless, Governments are the only active driver of regional integration in Africa and the private sector remains a passive participant in the process. If Governments of African countries want to achieve their objectives of boosting intra-African trade, they have to create more space for the private sector to play an active role in the integration process. Some important milestones have recently been achieved under this score under the AfCFTA, e.g. the formation of an African Manufacturers Association (AMA), the African Business Council (ABC) and general engagement with national and regional business councils and chambers. Besides, the private sector have set themselves up to galvanise the AfCFTA through formation of bodies like the AfroChampions Initiative who are mobilising a trillion dollars for AfCFTA investments.

An analysis of the World Bank's worldwide governance indicators[28] in 2017, with regard to regulatory quality, show that only 4 of the 54 African countries for which these indicators have been compiled show an index slightly above zero on a scale ranging from –2.5 and +2.5, with higher values corresponding to better governance (see Table 3). The regulatory quality indicator captures perceptions of the ability of governments to formulate and implement sound policies and regulations that permit and promote private sector development. This means that African countries have a deficit in using regulation effectively to create the necessary business environment for the private sector. This may result in under-regulation or over-regulation in the area of technical regulations, the latter possibly bringing an increase in production and transaction costs, including for demonstrating compliance, in the domestic market. Similarly, ineffective regulatory environments in export markets hinders predictability and trade enhancement in addition to increasing costs of compliance.

The foregoing calls for better regulation initiatives in close consultation with the private sector.

One notable initiative concerns the Economic Diplomacy Programme at the South African Institute of International Affairs (SAIIA) which is currently engaged in a GIZ-initiated project **"Regional Business Barriers: Unlocking Economic Potential in Southern Africa"**.[29] It aims to, firstly, identify case studies, and, secondly, advance practical remedies for the barriers to trade which are preventing regional economic integration in the SADC region. A central feature of the research concerns the involvement with and focus on the private sector. SAIIA believes that the best model for NTB resolution in SADC in cases where the Tripartite NTB online reporting mechanism has reached stalemate status is to create a forum for facilitated dialogue where private-sector and government actors can discuss the issue and reach

27 The Economic Development in Africa Report 2013, Intra-African Trade: Unlocking Private Sector Dynamism, UNCTAD/ALDC/AFRICA/2013

28 https://info.worldbank.org/governance/wgi/#doc

29 https://saiia.org.za/toolkits/sadc-business-barriers/regional-business-barriers-unlocking-economic-potential-in-southern-africa/

| Country/Territory | Estimate | Country/Territory | Estimate | Country/Territory | Estimate |
|---|---|---|---|---|---|
| Mauritius | 1,00 | Mali | −0,57 | Comoros | −1,04 |
| Botswana | 0,46 | Tanzania | −0,58 | Guinea−Bissau | −1,18 |
| South Africa | 0,23 | Djibouti | −0,64 | Algeria | −1,20 |
| Rwanda | 0,15 | Niger | −0,68 | Chad | −1,21 |
| Ghana | −0,14 | Madagascar | −0,69 | Congo, Rep. | −1,33 |
| Senegal | −0,15 | Mozambique | −0,73 | Equatorial Guinea | −1,40 |
| Seychelles | −0,18 | Malawi | −0,75 | Congo, Dem. Rep. | −1,47 |
| Namibia | −0,19 | Mauritania | −0,78 | Central African Republic | −1,48 |
| Cape Verde | −0,20 | Gabon | −0,79 | Sudan | −1,56 |
| Uganda | −0,22 | Togo | −0,79 | Zimbabwe | −1,56 |
| Kenya | −0,23 | Cameroon | −0,82 | South Sudan | −1,94 |
| Morocco | −0,23 | São Tomé and Principe | −0,83 | Eritrea | −2,20 |
| Lesotho | −0,32 | Burundi | −0,84 | Libya | −2,21 |
| Côte d'Ivoire | −0,36 | Guinea | −0,84 | Somalia | −2,29 |
| Tunisia | −0,41 | Egypt, Arab Rep. | −0,86 | | |
| Burkina Faso | −0,44 | Nigeria | −0,89 | | |
| Gambia, The | −0,45 | Sierra Leone | −0,92 | | |
| Benin | −0,47 | Liberia | −0,95 | | |
| Zambia | −0,47 | Ethiopia | −1,01 | | |
| Eswatini | −0,56 | Angola | −1,04 | | |

Table 3: Indicators for regulatory quality

an amicable solution. Currently, the Tripartite NTB online reporting mechanism makes no provision for such a forum to take place when there is disagreement between the regulatory authority and the private sector regarding the appropriateness of an NTB.

### 3.2.6 Need for alignment of REC and AfCFTA regulatory frameworks

#### 3.2.6.1 West Africa

In West Africa, the West African Economic and Monetary Union (WAEMU) and the ECOWAS have both been working on regional QI construction since 2001 through the implementation of the West African Quality Program (WAQP). This programme was implemented in several phases and is still active to this day in 2020. During 2001–2005, it was implemented in the eight WAEMU Member States, while the second phase (2007– to date) included all the ECOWAS Member States as well as Mauritania. The first phase resulted in the implementation of a framework for the harmonization of accreditation, certification, standardization and metrological activities across the WAEMU Member States and it was enacted in the highest level of community legislation, i.e. through a WAEMU regulation. Under the regulation, four regional entities were created for implementing a regional QI, namely: the "Comité Régional de Coordination de la Qualité (CRECQ)" for overall coordination, the "Organisme Régional de Normalisation, de Certification et de Promotion de

la Qualité (NORMCERQ") for the harmonization of standards and testing procedures, the "Secrétariat Ouest Africain de Métrologie (SOAMET)" for increasing calibration capacity and the "Système Ouest Africain d'Accréditation (SOAC)" for providing accreditation services to laboratories, certification bodies and inspection bodies.

One of the programme's key outcomes was the adoption of the ECOWAS Quality Policy (ECOQUAL) in 2013. The ECOQUAL aims at providing a crucial foundation for the harmonization and development of national quality policies, which will guide the establishment of quality infrastructure in the Member States that are suitable, efficient and of internationally accepted standards. Furthermore, a guidance document entitled "Model and Principles of Harmonization of Standards (ECOSHAM)" has also been adopted laying down the basic principles, procedures and mechanisms by which the ECOWAS Technical Harmonization Committees (THCS), the ECOWAS Commission and the ECOWAS Member States are to harmonize and maintain standards within the ECOWAS. However, despite this encouraging progress, some Member States continue to face challenges in fully implementing common standards by simply not applying the mutual recognition and/or equivalence principles inherent to the WTO TBT Agreement. Accordingly, ECOWAS and WAEMU also continue to face challenges in the administration of their regional quality policies. In this regard, the coexistence of two regional policies involving two sets of regional standards may not contribute to improving efficiency and uniformity across the West African territory.[30]

Besides, ECOWAS Member States have not fully implemented the agreed harmonized NTMs in the areas of SPS, TBT and Rules of Origin (RoO). This has been stated by several analytical papers and research studies carried out on regional integration in Africa, and in West Africa more specifically[31]. The findings show limited translation of regional integration commitments into Member States' domestic law. There is a need for strengthening the regional institutions which could positively reflect on the enforcement mechanism[32].

Given the weaknesses of the regional judicial enforcement mechanism, other alternative solutions have been found to ensure implementation of NTMs provisions. The WAEMU and ECOWAS Commissions have resorted to mediation and conciliation mechanisms to informally resolve disputes between Member States. The solution so far has proved to be partially effective. Another solution used by the ECOWAS Commission is to informally send a letter to a Member State involved in the infringement of a Community provision. The idea behind it is to sensitize the Member State on the importance of implementing the provision. According to the Commission, this approach has proved to have a deterring effect on certain policies or practices[30].

#### 3.2.6.2 SADC

A proper understanding of SADC requires recognition of the fact that the implementation formula for obligations in the SADC legal instruments is a "decentralized" one. The Member States have to give effect to their obligations through their own efforts. In this they are often hampered by bottlenecks in technical capacity and resources. Furthermore, the SADC agreements do not contain a binding obligation to "domesticate" the relevant SADC instruments and to make them part of the national legal systems. Article 6 of the SADC Treaty (amended version) contains the Member States' General Undertakings and essentially leaves it to national governments to "adopt adequate measures to promote the achievement of the objectives of SADC". SADC does not have the equivalent of the European Commission with its supranational powers. The danger is, of course, that such a decentralized approach can

30 Regional Integration and Non-Tariff Measures in the Economic Community of West African States (ECOWAS), UNCTAD/AfDB, 2018

31 ECOWAS VANGUARD-NANTS/182 (2015). Journal of West African Integration, Vol. 1. No.1 January, 2012) cited in [30]

32 Mackie et al., Joining up Africa, Support to regional integration, ECDPM, July 2010 cited in [30]

easily become uncoordinated, fragmented and ineffective, especially in the area of technical regulations. This, in a nutshell, is the implementation dilemma in SADC.[33] Most SADC Member States are also members of other regional economic communities (RECs). This results in legal uncertainty and difficulties with regard to the implementation of obligations and programmes in the same area of integration. Overlap of membership creates conflicts, particularly in the harmonization of policies, such as SPS and TBT, within the RECs. It must be mentioned that SADC is part of the Tripartite FTA also involving EAC and COMESA to even out such membership conflicts (see **3.2.6.4**).

#### 3.2.6.3 EAC

The regulatory capacity review of the EAC[34] undertaken by the World Bank in 2011 underlined the following important weaknesses in the regulatory system. The regulatory capacities of the EAC institutions are not yet ready to meet the needs of the Common Market. The current regulatory system in the EAC is top-heavy in both decision authority and expertise, funnelling regulatory decisions upward into the political institutions dominated by the national ministries. The development of draft regulations inside the Secretariat is not governed by any quality control procedures except for reviews of the quality of legal drafting. There are no requirements for impact analysis, consideration of alternatives, or consultation with stakeholders. There are no clear quality principles to guide the selection of options or to reject bad options. There is no overall regulatory strategy consistent with the common market; instead, regional regulation is being developed through slow, negotiated, and inefficient harmonization efforts. The weakest part of the EAC arrangements is the link between regional policies and implementation on the ground, the mechanisms of monitoring and enforcement of compliance by Partner States with EAC regulations, and other incentives for compliance. These weaknesses, identified quite some years back now, should not obscure the tremendous progress made in developing the legal framework and policies of the EAC.

The publication of Non-Tariff Barriers in EAC (available on the EAC Web site for download[35]) and the close collaboration with the East African Business Council (EABC)[36] for monitoring NTBs is an effective strategy. Indeed, the private sector is at the forefront when NTBs hinder trade and they are also the direct beneficiary of initiatives to reduce NTBs. But it is not enough to identify NTBs quickly and effectively – the mechanisms for addressing NTBs and resolving them should also operate effectively. A World Bank report in 2012[37] found that the absence of a clearly defined monitoring mechanism with time limits for action meant that each Partner State was responsible for voluntarily removing or reforming listed NTBs without being subject to possible sanctions for non-compliance. The "moral suasion" approach to removing NTBs within the EAC has, to date, failed to yield significant progress. This may be contrasted with the more formal legally binding mechanisms with sanctions that are practiced by the European Union. The EAC is also part of the Tripartite FTA and it is quite likely that additional efforts will be deployed to tackle this issue.

#### 3.2.6.4 The Tripartite FTA (TFTA)

On 12 June 2011, the Members/Partner States of EAC, COMESA and SADC agreed to negotiate the establishment of a tripartite FTA consisting of all threes RECs. As at February 2020, the TFTA Agreement had been signed by 22 member countries and eight countries had ratified it. The Agreement requires 14 ratifications to enter into force[38]. Thus, the TFTA does not yet exist as a formally established arrangement.

33 Non-Tariff Measures and Regional Integration in the Southern African Development Community, UNCTAD/DITC/TAB/2014/5

34 Regulatory Capacity Review - East African Community, World Bank, 2011

35 https://www.eac.int/documents/category/non-tariff-barriers

36 Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC, East African Business Council (EABC), 2007

37 De-Fragmenting Africa - Deepening Regional Trade Integration in Goods and Services, World Bank, 2012

38 https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html

But to the extent that these three RECs are in the meantime cooperating in addressing NTBs is already a big step forward.

The TFTA has been envisaged in order to pursue the general benefits of liberalized trade more widely in Africa and to deal with the problems of overlapping membership. This objective includes eliminating NTBs applicable to intraregional trade within the broader eastern and southern African region.

The Tripartite NTB online reporting mechanism is a web-based system[39] which allows all interested parties to report any NTB they have encountered in the region. The resolution and elimination of a reported barrier is then monitored. Under this mechanism as of November 2016, out of the 543 complaints that were posted, 490 had been resolved. That is roughly 90 %.

The new FTA also needs legal recognition from the AU and other international treaty bodies like the WTO and the UN. The AU has a specific Protocol on the Relations between the AU and the RECs. The WTO also requires notification of any RTA established under the provisions of Article XXIV. If successful, the tripartite FTA will definitely lead to deeper integration.

#### 3.2.6.5 ECCAS

Though established in 1985, ECCAS[40] actually became active in 1999, having signed the initial protocol on relations between the African Union and RECs. The renewed mandate gave ECCAS a mandate to form a Free Trade Area (FTA) as part of the African Economic Community (AEC), as foreseen under the Abuja Treaty[41]. The Article 6 of the Treaty Establishing ECCAS indicates the creation of a free trade area and a customs union in twenty-years. In July 2004, ECCAS launched its free trade area with the aim of establishing a customs union of common external tariff by 2008. The timetable for establishing the free trade area was however postponed due to the weak domestication of agreed procedures by member States. On average, member States reduced only 34 per cent of tariff lines on intra-ECCAS tariffs to zero, making ECCAS the region to have the lowest share of intra-regional trade in terms of gross domestic product compared to Africa's five sub-regions[42].

Studies on ECCAS have shown that the community is yet to attain its objectives given that the organization is defined or classified by being weak institutionally and organizationally in terms of capacity (Ndomo (2009) cited in[43]).

#### 3.2.6.6 AfCFTA

While several programmes and institutional creation proliferated, the level and rate of implementation of trade integration programmes of many RECs faltered. Weak implementation at the RECs level meant that efforts towards building up the continental community also wavered. With a view to reviving and launching the continental integration project, the Organisation of African Unity (OAU) Abuja Treaty Establishing the African Economic Community was adopted in June 1991. It articulated the formation of a continental free trade area as a stepping stone toward the realisation of the African Economic Community. Momentum towards implementing this objective gathered speed with the formation of the African Union (AU) in 2002, replacing the OAU. AU member States paid greater attention to continental integration. In fact, Article 3 in the AU's Constitutive Act, establishes that the third objective of the AU is to "accelerate the political and socio-economic integration of the continent".[43]

Hence, efforts enhancing regulatory convergence of trade regulations or elimination of NTMs need to follow in parallel to the process of liberalizing market access conditions.

39 https://www.tradebarriers.org/about

40 Angola, Burundi, Cameroon, Central African Republic, Chad, Democratic Republic of the Congo, Republic of the Congo, Equatorial Guinea, Gabon, Rwanda, Sao Tome and Principe

41 Economic Regionalism in Africa: A Study of ECCAS, Prof. Dr. Nurettin Can, Abubakar Aliyu Maigari, Nile University of Nigeria

42 https://www.uneca.org/oria/pages/eccas-trade-and-market-integration

43 AfCFTA: Policy and Negotiation Options for Trade in Goods, UNCTAD (UNCTAD/WEB/DITC/2016/7)

It would also help to promote greater convergence among African countries on non-tariff trade measures affecting trade, such as TBT and SPS measures. UNCTAD has undertaken some analyses on reducing regulatory distance between African countries in terms of NTMs.[44]

Deep regional economic integration requires addressing NTMs and needs strong political support from all involved States. Harmonizing NTMs and eliminating barriers is challenging and depends on the development and implementation of appropriate procedures and mechanisms. The objective of this paper is precisely to take stock of as many existing mechanisms as possible and propose a concept for a technical regulatory framework for the whole African continent. However, with adequate political support it is possible to make substantial progress, as some regions such as the European Union have demonstrated. Regional integration through such a bottom-up approach appears possible as the experience from other regions such as the voluntary and non-binding forum of the Asia-Pacific Economic Cooperation (APEC) shows.

### 3.2.7 Institutional arrangements for developing/enforcing TRs

The scope of the ACTReF encompasses the continental, regional and national levels although TRs are developed and implemented mainly at national and, sometimes, regional (REC) levels. There is no supranational entity at the level of the continent tasked with the responsibility of developing TRs. However, one of the objectives of Annex 6 of the AfCFTA is to 'establish mechanisms and structures to enhance transparency in the development and implementation of standards, technical regulations, metrology, accreditation and conformity assessment procedures'.

For State Parties, Annex 6 of the AfCFTA stipulates that, in the development and implementation of technical regulations, they shall promote

a) compliance with the WTO TBT Agreement,

b) the use of international standards and / or parts thereof as a basis for technical regulations, and

c) the application of Good Regulatory Practices.

In accordance with the AQP, all AU Member States should develop a national technical regulatory framework (NaTReF) precisely to develop and enforce TRs at the national level.

With regard to RECs, the EAC, through the EAC SQMT Act 2006, can declare compulsory EAC standards which actually means they declare technical regulations without calling it such[45]. Compulsory standards are directly enforced by the EAC Partner States through a nationally appointed regulatory authority. On the other hand, the Tripartite FTA establishes cooperation among COMESA, EAC and SADC, including 'in identifying and assessing instruments for trade facilitation such as the harmonisation, and or equivalence of technical regulations'.

For the regulatory systems to be effective and efficient, Ogus (2002) says that at least the three following aspects[46] have to be considered and the best arrangement made at national level:

- institutional structures, for example whether the regulator is a branch of government or an agency, to a greater or lesser extent independent of government, and the principles of accountability;
- procedural and managerial systems, for example any requirements of transparency of decision- making and internal systems of considering costs and benefits;
- legal forms, the instruments which are used to pursue regulatory goals.

44 UNCTAD, March 2015, "Non-Tariff Measures and Regional Integration in the Southern African Development Community" (UNCTAD/DITC/TAB/2014/5)

45 THE EAST AFRICAN COMMUNITY STANDARDISATION, QUALITY ASSURANCE, METROLOGY AND TESTING ACT, 2006

46 COMPARING REGULATORY SYSTEMS: INSTITUTIONS,PROCESSES AND LEGAL FORMS IN INDUSTRIALISED COUNTRIES, Anthony Ogus, University of Manchester, 2002

The ACTReF should take into account these aspects when guidance is being developed for Member States to set up their NaTReFs. As mentioned earlier, the legal systems in Member States could be slightly different depending on whether they are based on British or French legal systems but the continental framework should still be able to address the needs of all Member States equally.

### 3.2.8 Better regulation and regulatory governance

Good regulatory governance relies on a system of institutions, with the necessary authority, legal framework and tools to drive better regulation. These tools could include regulatory impact assessment (RIA), public consultation, review of the stock of existing regulation, simplification, alternatives to regulation, and measures to promote regulatory transparency, access, and user friendliness.

Regulatory governance is a government-wide effort and therefore the system should be able to influence all regulators towards using the tools for better regulation. It is sometimes difficult in the public service for one government body to enforce rules when dealing with another body higher up in the hierarchy of ministries/institutions. Therefore, any oversight body exercising the role of overseeing, coordinating, and monitoring regulatory policy and quality should be as near as possible to the centre of power – perhaps a unit forming part of the office of the Prime Minister, for example.

# 4 DRIVERS FOR TECHNICAL REGULATORY FRAMEWORKS AT THE REGIONAL AND INTERNATIONAL LEVELS

As we have seen, authorities would prefer not to regulate unless absolutely necessary given the costs and complexity of the process. But there will always be market failures and undesirable economic behaviours that will require governments to intervene. Actually, sometimes national authorities have no say in the matter and the need for regulation is imposed through the country's external commitments, either bilateral, regional or international. In the subsections below we review the drivers for technical regulations which either impose regulatory action at the national level or which provide good examples as to how certain rules can be useful to tackle certain issues.

## 4.1 The WTO

As indicated earlier in this paper, the WTO Agreements are the legal ground-rules for international trade and are implemented through a set of rules and principles that constitute the Multilateral Trading System (MTS). The WTO TBT Agreement defines the rules to prevent the inappropriate use of technical regulations, standards and conformity assessment procedures so that they do not constitute technical barriers to trade and hinder the free flow of goods across borders. One of the means recommended by the WTO TBT Committee is to encourage Member countries to use Good Regulatory Practice (GRP), which describes best practices and procedures developed by governments and organizations to improve the quality of regulation, including technical regulations. GRP is applicable not only to individual countries but also to other organizations developing and implementing technical regulations, for example the EU or African RECs.

The TBT Committee has further called on its members to (voluntarily) institutionalize the various mechanisms, processes and procedures of regulatory practice through laws and regulations, as well as through the creation and designation of institutions within Member governments to oversee regulatory processes. Effective internal policy coordination, including among regulators, with standardizing bodies and trade officials implementing the TBT Agreement, has been stressed as another important component of GRP, along with the use of Regulatory Impact Assessments (RIAs)[47].

However, it is not enough to adopt GRP in the formulation of technical regulations at the national level – there should be regulatory convergence towards equivalent technical regulations at the international level so that international trade is enhanced. Technical regulations may differ among countries, based inter alia on risk perceptions and level of acceptance of such risks according to public policy, but such difference should be based on science.

GRP elements have been incorporated in recommendations by international organizations, such as OECD/APEC[48] and OECD/UNECE[49], and have therefore become mainstream thinking. The WTO is therefore the biggest driver leading countries to adopt best practices in the development and implementation of TRs.

## 4.2 Role of RTAs

The OECD has reviewed 81 regional trade agreements (RTAs)[50] with a view to understanding whether regional approaches hinder or reinforce the Multilateral Trading System and hence the rules agreed at the international level in the WTO. The African RTAs reviewed were the Central African Economic and Monetary Union (CEMAC), SADC and WAEMU.

47 Good Regulatory Practice (GRP): Voluntary Mechanisms and related principles, JOB/TBT/119/Rev.1

48 APEC-OECD integrated checklist on regulatory reform – A policy instrument for regulatory quality, competition policy and market openness, 2005

49 OECD/UNECE (2016), "International Regulatory Co-operation and International Organisations: The Case of the United Nations Economic Commission for Europe (UNECE)", OECD and UNECE.

50 Lesser, C. (2007), "Do Bilateral and Regional Approaches for Reducing Technical Barriers to Trade Converge Towards the Multilateral Trading System?", OECD Trade Policy Papers, No. 58, OECD Publishing

WTO Members have increasingly engaged in bilateral, regional and plurilateral free trade agreements and custom unions (referred to here as "RTAs") which often include TBT provisions too. The approaches to reducing TBT most frequently promoted in the reviewed RTAs are the (mutual) recognition of conformity assessment results and transparency requirements. The latter require members to notify each other about new technical regulations and conformity assessment procedures or modification to existing regulations and procedures when these differ from international standards or are likely to affect trade. Other approaches used include the harmonisation of technical regulations, standards and conformity assessment procedures among Parties, and, to a lesser extent, acceptance of technical regulations of other Parties as equivalent (when these differ in terms of technical specifications). These different approaches are compatible with each other, so that a specific RTA sometimes includes provisions pertaining to several of these principles. Yet, none of the reviewed agreements includes provisions for the mutual recognition of technical regulations and standards, which only prevails in the EU Single Market. Indeed, mutual recognition of TRs and standards can be a quite complex and expensive endeavour and certainly not the easiest approach.

RTAs that strive for deeper economic (and political) integration, such as custom unions or agreements aimed at establishing a single market and economic association agreements, often have more far-reaching goals than the WTO TBT Agreement and seek a (gradual) harmonisation of technical regulations, standards and conformity assessment procedures, and to some extent, of metrology measures. Many of such RTAs involve the establishment of joint monitoring and co-operation mechanisms, such as regional standardisation and accreditation bodies (e.g., the ASEAN Consultative Committee on Standards and Quality or the ECOWAS Accreditation System or the EAC Accreditation Board), which are not prescribed by the WTO TBT Agreement.

The majority of TBT provisions in RTAs can be said to converge towards, and strengthen, the multilateral trading system. First of all, most RTAs concluded after 1995 re-affirm the Parties' rights and obligations under the WTO TBT Agreement and make reference to its objectives. Likewise, harmonisation requirements encourage, in their vast majority, convergence towards international standards and guides. Such initiatives can in fact support and enhance the implementation of the WTO TBT Agreement and set the pace for improved regulatory practices and domestic reforms in RTA Parties, hence acting as building blocks to the multilateral trading system.

From the above, we can see that convergence towards international requirements is the norm but that different paths lead towards that objective. It is up to every regional group to determine the right path for it considering effectiveness and efficiency as well as other constraints typical to the region.

## 4.3 The EU

The European Union comprises one of the largest single economic areas in the world and it has set the ultimate example of regional integration, which many other regions of the world hope to replicate, including the African Union. As such, the regulatory system built by the EU over the years is of particular interest to Africa. The objectives of the first harmonisation EU directives focused on the elimination of barriers and on the free movement of goods in the single market. Policies and legislative techniques have evolved over the last 40 years of European integration. Historically, EU legislation for goods has progressed through four main phases[51]:

- the traditional approach or 'Old Approach' with detailed texts containing all the necessary technical and administrative requirements,

51 The 'Blue Guide' on the implementation of EU products rules 2016 (Text with EEA relevance) (2016/C 272/01)

- the 'New Approach' developed in 1985, which restricted the content of legislation to 'essential requirements' leaving the technical details to European harmonised standards,

- the development of the conformity assessment instruments made necessary by the implementation of the various Union harmonisation acts, both New Approach and Old Approach, and

- the 'New Legislative Framework' (NLF) adopted in July 2008, which built on the New Approach and completed the overall legislative framework with all the necessary elements for effective conformity assessment, accreditation and market surveillance including the control of products from outside the Union.

The 4 stages leading to the current NLF were supposed to have closed the loop to ensure safe products right from conception, production to consumption. The NLF saw the adoption of a variety of EU directives and regulations on various topics regarding product rules as and when required.

Yet still, in 2000, the Ministers for Public Administration from EU Member States approved a Resolution on improving the quality of regulation within the European Union. Subsequently, a high-level **Advisory Group on Quality of Regulation** was formed with 16 experts, representing each of the then 15 countries of the Union and also the Commission, under the chairmanship of Mr. Mandelkern. The "Mandelkern Group" was given a "mandate to develop a coherent approach to this topic and to submit proposals to the Ministers, including the definition of a common method of evaluating the quality of regulation."

The Mandelkern Group produced a series of principles and guidelines that could be applied at both national and European level. It also stressed the need for structures within the Union, with the necessary authority and oversight, which would ensure that the procedures to bring improvements in the quality of regulation were effectively implemented.

In line with the principles formulated by the Mandelkern Group, the EU system is made up of regulations and directives built on a set of 7 flagship principles adopted by the EU – necessity, proportionality, subsidiarity, transparency, responsibility, accessibility and simplicity. In accordance with the mandate, these principles are applied at both national and European level. The ACTReF should make use of these principles, if necessary after adaptation to the African context.

But the most severe comments from the Mandelkern Group concern the structures and the institutional framework for overseeing application of European legislation. They write "The majority of European administrations (i.e. national governments and the European Commission) have developed an array of fairly well designed tools for better regulation, though they vary significantly across the Member States. Each administration uses a unique mix of these tools, though none uses them all. Where the same tool is in use in a variety of administrations, the degree of development and sophistication varies. The fact that we still face considerable problems almost everywhere is clearly and primarily due to severe implementation deficits. In many administrations existing tools are either applied insufficiently or without the necessary skill. Awareness of such tools and/or of their basic efficiency is clearly underdeveloped. Commitment to applying them can also be lacking, with mechanisms that formally are mandatory being practically ignored. The application of pre-defined procedures (if they are applied at all) often amounts to nothing more than a reluctant bureaucratic exercise carried out with the minimum of effort and added value. This bears the risk of a "virtual reality" where the requirement for better and simpler laws is, at best, complied with formally, but disregarded in terms of substance".

It is noteworthy that even in the most supranational entity such as the EU, endowed with all the resources needed, there still remain challenges to better regulation. In the African context, it will be a challenge for ACTReF to have the adequate institutional authority and oversight at national, regional and continental levels to give it the best chance for effective operation.

## 4.4 The Association of Southeast Asian Nations (ASEAN)

The ASEAN Consultative Committee on Standards and Quality (ACCSQ) has responsibility for harmonising national standards with international standards (e.g., ISO, IEC and ITU International Standards) and implement mutual recognition arrangements on conformity assessment to achieve its end-goal of "One Standard, One Test, and Accepted Everywhere". ACCSQ has worked on the harmonisation of technical regulations and conformity assessment regimes in four selected sectors (Electrical and electronic; Cosmetics; Pharmaceuticals; and Prepared Foodstuff).

ASEAN's general approach to NTMs is defined in Chapter 4 of the ASEAN Trade in Goods Agreement (ATIGA). In the area of technical regulations, given the heterogeneity of its members' development levels and the lack of strong supranational bodies, ATIGA refrains from an all-encompassing, top-down approach, but instead offers in its Chapter 7 a menu of options that member states are encouraged to take, depending on circumstances. Article 75 spells out good practices for technical regulations that essentially mirror WTO provisions. As for standards, whenever international ones are available, member states shall adopt them; when no international standards exist, member states shall 'align' national standards amongst themselves. However, as noted, there is no body in ASEAN like the EU Commission to set broad directives to guide the alignment of national standards in terms of overall regulatory objectives; thus, the approach contained in Article 74 is not as powerful as the EU's 'new approach' in driving regulatory coherence. Article 73 requires member states to promote the mutual recognition of conformity-assessment results, as well as 'develop and implement ASEAN Sectoral Mutual Recognition Arrangements and ASEAN Harmonized Regulatory Regimes in the regulated areas where applicable'. However, the agreement's wording does not make it entirely clear how compelling these prescriptions are, as its opening sentence states that 'Member States shall take any of the following possible measures' and does not specify any compliance mechanism.[56]

One lesson from ASEAN that is interesting for Africa is as follows. Trade data shows that half of ASEAN countries have 100 percent NTM coverage ratios[52], namely Cambodia, Lao PDR, the Philippines and Viet Nam, which means that these countries regulate all of their imported products. It is obviously a political decision and choice of the Governments based on risk perceptions. What is noteworthy in the coverage-ratio data is that low-income countries like Lao PDR or Cambodia aim at regulating all imports, in spite of very limited administrative capabilities. Such discrepancies between aims and capabilities are bound to create arbitrariness and confusion in the application of rules, especially when those are complex, like SPS or technical regulations. Clearly, this is a case of over-regulation which is not bound to be effective.

## 4.5 The Southern Common Market (MERCOSUR)

The MERCOSUR is composed of Argentina, Brazil, Paraguay and Uruguay, Venezuela and Bolivia as State Parties. The MERCOSUR agreement explicitly aims to identify "offending" technical regulations and to eliminate the obstacles they create through regional harmonisation, to make national conformity assessment structures compatible (through mutual recognition), and to develop a common methodology for elaborating a common MERCOSUR voluntary standards regime.

The Agreement states that "in the process of preparing and reviewing technical regulations, MERCOSUR must use as a basis the general principles and guidelines established in the WTO TBT Agreement, particularly with respect to transparency, information and notification".

52 NTM Coverage ratio is the ratio of the number of products affected by at least one NTM to the total number of products

MERCOSUR has set up an ad-hoc group to work on the harmonisation of technical regulations and mutual recognition of conformity assessment procedures. For voluntary standards, the Agreement establishes a MERCOSUR Standardisation Committee. The Committee has a Governing Board made up of representatives from the standardization bodies of Argentina, Paraguay, Brazil, Uruguay and Chile (an associate member), and sets up Sectoral Standardisation Committees to carry out its work in specific areas of interest.

An UNCTAD study[53] found that eliminating NTBs and reducing the impact of technical NTMs through regulatory convergence entail significant welfare gains. For all MERCOSUR members, the biggest welfare gains emanate from addressing technical measures such as SPS and TBT. Instead of elimination, regulatory convergence can substantially reduce the effective impact on trade, while fully maintaining regulatory benefits. Increasing regulatory convergence at least doubles the welfare gains compared with the mere elimination of outright barriers. The smaller MERCOSUR members benefit even more.

Trade increased rapidly among member countries, reaching 21% of their total trade in 1995 (with a peak in 1998), but by 2008 it had declined sharply to 15%. One of the reasons for this decline is that when faced with external shocks, like repeated financial crises, the main partners in MERCOSUR have resorted to diverse forms of protectionism, including non-tariff restrictions to trade. MERCOSUR's effectiveness as an integration tool has also been limited by a tendency to avoid incorporating into national legislation any MERCOSUR agreements that are not politically palatable at the national level[54]. Of 840 norms approved by MERCOSUR, only 180 had been incorporated by all member countries into their domestic legislation and norms as of year 2000. Lack of coordination in macroeconomic policies has also been a factor.

## 4.6 The Asia-Pacific Economic Cooperation (APEC)

APEC is the forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. It is a non-binding forum with non-treaty obligations established in 1989. Member economies[55] are connected loosely with one another and their activities are basically based on voluntary initiatives, which is different from the European Union. Decisions made within APEC are reached by consensus and commitments are undertaken on a voluntary basis.

In 1994, five years after the establishment of APEC, more concrete goals of activities were adopted by the member economies' leaders in order to accelerate free and open trade and investment in the Asia-Pacific areas. Target years to achieve the goals were set for 2010 for developed economies and for 2020 for developing economies. In order to achieve goals in standards and conformance, a Subcommittee on Standards and Conformance (SCSC) was established in 1994. It aims to promote cooperation on standards and conformance, to reduce negative effects on trade, and to encourage greater alignment with international standards.

As APEC is a non-treaty and non-binding forum, its activities remain at the voluntary area such as cooperation in standards. The operation of the cooperation can be interesting on another dimension, namely, the extent of cooperation among such a diverse group of developed and developing economies. However, this is not of immediate interest for Africa.

53 Non-Tariff Measures in Mercosur: Deepening Regional Integration and Looking Beyond, UNCTAD/DITC/TAB/2016/1

54 REGIONAL TRADE BLOCS- THE WAY TO THE FUTURE? ALEJANDRO FOXLEY, Carnegie Endowment, 2010

55 Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; Philippines; Russian Federation; Singapore; Chinese Taipei; Thailand; United States; Viet Nam.

# 5 POSSIBLE PROFILE OF THE CONTINENTAL TECHNICAL REGULATORY FRAMEWORK

## 5.1 Policy

### 5.1.1 Policy focus

The AQP indicates that the AU will

- request Member States to establish a national technical regulatory framework (NaTReF) with a view to applying a set of mechanisms and related principles of GRP recommended by the WTO TBT Committee;
- encourage RECs and Member States to align NaTReFs with any REC-level technical regulatory framework with a view to assuring regulatory coherence and regulatory harmonization aimed at minimizing TBT; close collaboration will be maintained in this process with the AfCFTA Sub-Committees on NTBs and TBT established under the AfCFTA Annexes 5 and 6 respectively; as well as with REC NTB Coordination Units;
- encourage Member States and RECs to use international standards and ARSO African Harmonized Standards as relevant as basis for technical regulations;
- encourage Member States and RECs to be linked and to share information and data on counterfeit and sub-standard goods in their markets;
- establish a continental early warning system to enhance the effectiveness of market surveillance systems operating at Member State or REC levels with a view to alerting all African countries when imports of sub-standard or dangerous goods on African soil are encountered.

### 5.1.2 Policy measures

After the adoption of the AQP by AU, the AUC will

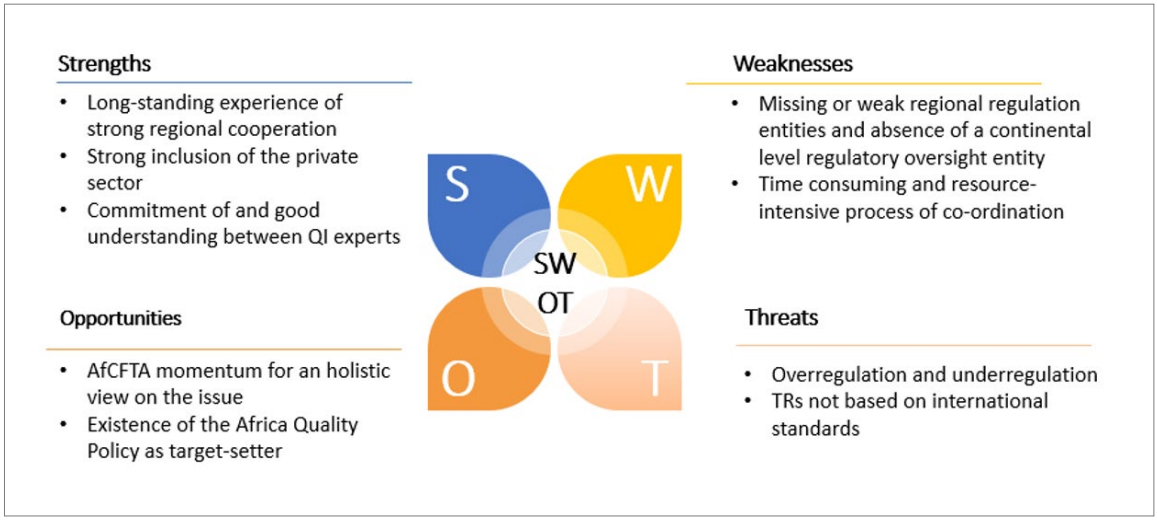
- set up a committee composed of REC representatives, PAQI institutions and the African Union Commission – Department of Trade and Industry (AUC DTI) to develop guidance on setting up national technical regulatory frameworks (NaTReF) at the level of Member States; the Committee should ensure that the NaTReF is based on features of high-quality regulation such as effectiveness and efficiency; transparency and accountability; proportionality and consistency;
- work with RECs to organize awareness and training programmes for national regulators on the NaTReF guidance document to help them understand and apply GRP, regulatory impact assessment (RIA) and other tools/principles;
- develop guidance on referencing international standards or African Harmonized Standards in technical regulations with a view to train regulators on referencing only the essential requirements of a standard necessary to meet the desired objectives of the technical regulation;
- facilitate the sharing of information, through the AU Trade Observatory, on findings of national market surveillance authorities on dangerous goods.

## 5.2 African context

### 5.2.1 Strengths, weaknesses, opportunities, threats (SWOT)

Africa can boast of a long-standing culture of strong regional cooperation among its RECs and their trade agreements. As we have seen earlier in this paper, operations of these RECs may not have been optimal but there is no doubt that the constraints that are hindering intra-Africa trade are well known and documented thanks to years of experience trying to navigate through the systems. However, a summary review of SWOT elements (see Figure 2) indicates that there is a real opportunity to build on the strengths of the Continent to achieve better integration.

The continent probably has a pool of very capable professionals in the area of trade regulation but perhaps no entity has endeavoured to look at the issues under a magnifying glass to properly assess the constraints and act on it. The absence of such an entity has probably been due to the lack of a regulatory strategy up to now and this is a significant weakness. The recent development of the AQP is a major step in that direction. The problem has been com-




plemented because of excessive red tape in the setting up and operation of technical regulatory frameworks at the national level. Lack of coordination among regulators is yet another major weakness. When reading about the inadequacies of the EU framework as underlined by the Mandelkern Group in **4.3** above, we could almost transpose the findings to the African context. This only reinforces the idea that such a situation can be overcome with the right mix of policies, directions and resources. The involvement of the private sector in the effort to identify and resolve non-tariff barriers reinforces the insights that African experts have gained through collaboration, e.g. the involvement of the East African Business Council in devising a monitoring mechanism for NTBs.

With the coming up of the AfCFTA, there is a tremendous opportunity to have a holistic look at intra- African trade and deal with the regulatory constraints at the level of the continent. The AUC together with PAQI have developed the AQP which should benefit from support at the highest political level. Developing an ACTReF is one of the objectives of the AQP and it all comes at the right time when the AfCFTA will be taking off.

Perhaps the biggest threat to the ACTReF and its role in supporting the implementation of the AfCFTA is the risk of over-regulation and under-regulation which can both exist within the same country but for different products. National regulatory authorities may not even be aware that they are over-regulating or under-regulating in the absence of comparative data. This problem is further exacerbated if TRs are not based on international standards.

### 5.2.2 Principles

The principles upon which the ACTReF should be built are as listed below. Guidance on how these principles will be observed will be described in the text constituting the framework and other guidance documents.

a) The WTO TBT Committee's principles of Good Regulatory Practice (GRP) adopted at the Sixth triennial review of the operation and implementation of the agreement on technical barriers to trade:

I. transparency and public consultation mechanisms;

II. mechanisms for assessing policy options, including the need to regulate (e.g. how to evaluate the impact of alternatives through an evidence-based process, including through the use of regulatory impact assessment (RIA) tools);

III. internal (domestic) coordination mechanisms;

IV. approaches to minimizing burdens on economic operators (e.g. how to implement mechanisms that ensure reflection of the TBT Agreement's substantive obligations in the design and development of regulations);

**V.** implementation and enforcement mechanisms (e.g. how to provide practical, timely and informative guidance needed for compliance);

**VI.** mechanisms for review of existing technical regulations and conformity assessment procedures (e.g. how to evaluate the effectiveness and continued adequacy of existing measures, including with a view to assessing the need for amendment, simplification or possible repeal); and,

**VII.** mechanisms for taking account of the special development, financial and trade needs of developing Members in the preparation and application of measures, with a view to ensuring that they do not create unnecessary obstacles to exports from developing Members. (Note 2: In the context of Africa, this notion of "developing Members" is not relevant but one can consider categorizing AU Member States for the purpose of channelling resources and technical assistance on a priority basis under this project. The feasibility of this approach will have to be agreed upon by the AUC).

b) The WTO TBT Committee's 6 principles for the development of international standards, guides and recommendations, namely, transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and addressing the concerns of developing countries (Note 3: The same comment as for Note 2 above applies with regard to reference to developing countries).

c) The 12 principles of Article 5 of the AfCFTA:

**I.** driven by Member States of the African Union;

**II.** RECs' Free Trade Areas (FTAs) as building blocks for the AfCFTA;

**III.** variable geometry;

**IV.** flexibility and special and differential treatment;

**V.** transparency and disclosure of information;

**VI.** preservation of the acquis;

**VII.** Most-Favoured-Nation (MFN) Treatment;

**VIII.** National Treatment;

**IX.** reciprocity;

**X.** substantial liberalisation;

**XI.** consensus in decision-making; and

**XII.** best practices in the RECs, in the State Parties and International Conventions binding the African Union.

d) The 7 flagship principles adopted by the EU for better regulation, i.e. necessity, proportionality, subsidiarity, transparency, responsibility, accessibility and simplicity.

## 5.3 Institutional structure for the ACTReF

### 5.3.1 Governance

The ACTReF should be under the responsibility of the Council of Ministers of the AfCFTA, through the Committee on Trade in Goods (CTG). The Council has as function to "make regulations, issue directives and make recommendations in accordance with the provisions of this (AfCFTA) Agreement".

The functions and responsibilities related to Governance will be elaborated in the ACTReF proposal.

### 5.3.2 Administrative form and location

The ACTReF will be managed by the Office of Legal Counsel at the AfCFTA secretariat, working together with the Unit responsible for implementation of the AfCFTA Agreement Annex on TBT.

The functions and responsibilities related to administration will be elaborated in the ACTReF proposal.

### 5.3.3 Technical management

The Sub-Committee on Technical Barriers to Trade (SCTBT), created under Article 13 of

Annex 6 of the AfCFTA, shall exercise technical oversight on all the work related to implementation of the ACTReF.

The functions and responsibilities related to technical management will be elaborated in the ACTReF proposal.

#### 5.3.4 National technical regulatory framework (NaTReF)

The NaTReF will be the managed by the National Focal Points on NTBs working under the National Monitoring Committee on NTBs (NMNTB) created under Article 6 of Annex 5 of the AfCFTA. Alternatively, State Parties which feel that the scope of the NaTReF goes beyond the strict management of technical regulations in relation to NTBs and embraces wider regulatory review, management and governance could consider establishing a more representative inter-ministerial committee to oversee the NaTReF.

Close collaboration will be maintained between the Sub-Committee on Technical Barriers to Trade and the Sub-Committee on Non-Tariff Barriers to Trade created under Article 4 of Annex 5.

#### 5.3.5 Functions and responsibilities of ACTReF and NaTReF managers

These will be drafted in the ACTReF proposal.

#### 5.3.6 Functions and responsibilities of SCTBT and NMNTB

The terms of reference (ToR) for SCTBT and NMNTB already exist. The detailed functions and responsibilities with respect to the implementation of the ACTReF will be drafted in the ACTReF proposal.

## 5.4 Elements of regulatory approaches for the ACTReF

#### 5.4.1 Harmonisation of TRs

Harmonisation of technical regulations among a number of a countries can best be carried out effectively if there is a supranational entity such as the EU or through inter-governmental negotiations.[56] The 'Old Approach' used by the European Union for the purposes of technical harmonisation made the adoption of such legislation so unwieldy that it is now only used in special circumstances. The complexity of harmonizing technical regulations among countries is simply too big given that countries have many regulations on the books and achieving harmonisation in such a way would be an arduous task, not counting the fact the harmonized text would be rigid and could stifle innovation and progress.

Harmonisation of technical regulations at world level is bound to be rare, outside a system like the EU. However, it is important to promote 'harmonised or compatible technical regulations' in case a regulation is prepared of 'equivalent scope', that is, either a new one or a major revision. A special mechanism to make this possible has to be built into the ACTReF.

#### 5.4.2 Harmonisation of regulatory objectives

Harmonisation of regulatory objectives is possible since every Government should know precisely what outcomes they expect from regulation. Harmonisation of regulatory objectives between or among countries brings about the concept of equivalence of technical regulations, hence mutual recognition of one another's technical regulations. Mutual recognition (MR) means that countries agree that the proper way of reaching those regulatory objectives is to regulate performance rather than the detail of technical specifications. For MR to work, member countries need to trust each other's enforcement capabilities, which is easier when they are at similar levels of development. In Africa, the heterogeneity of the economies poses a challenge to this pre-requisite, so the necessary regional mechanism has to be set up within the ACTReF. Another issue is that MR reverses a crucial burden of proof – under the origin principle, it is no longer up to firms to prove compliance with the destination country's regula-

56 Regional Integration and Non-Tariff Measures in ASEAN Jakarta, Economic Research Institute for ASEAN and East Asia, 2019

tions. Instead, it is up to the latter's authorities to prove that a product designed to satisfy the regulations of another member country violates a substantial provision of its own regulations[56]. This would seem counterintuitive in the African context. Indeed, why should an African country Y be responsible for the costs and trouble of proving that a product from another African country Z is not in compliance with its requirements? Given the rarity and high costs of conformity assessment services in Africa in general this could look problematic.

### 5.4.3 Harmonisation of standards

Harmonisation of technical regulations is also possible by harmonizing standards which are then referred to in the TRs. The same principle is followed by the EU where presumption of conformity to essential requirements in regulations is left to compliance with European harmonized standards. It should be mentioned, however, that not every regulator understands the proper way of referencing standards in TRs. Sometimes, the whole standard is referenced in TRs, even non-essential requirements. This makes testing and compliance processes more costly without any added advantage for the consumer. Better information and training is required for regulators to achieve better regulation.

ARSO, recognized in Annex 6 of the AfCFTA, has a critical role to play in this area and fortunately this organisation is very much at the forefront of African integration efforts to be able to pave the way for African Harmonized Standards to play their role fully.

### 5.4.4 Mutual recognition

#### 5.4.4.1 Technical regulations and conformity assessment

One of the objectives of Annex 6 on TBT to the AfCFTA Agreement is to 'identify and assess instruments for trade facilitation such as harmonization of standards, equivalence of technical regulations, metrology, accreditation and conformity assessment' but its provisions for mutual recognition cover only conformity assessment. There is also a need for mutual recognition of the equivalence of technical regulations to attain regulatory convergence. Despite a lack of such a provision in the AfCFTA, the ACTReF should address this aspect.

#### 5.4.4.2 Standards

Mutual recognition of national standards between countries is problematic. An interesting paper[57] prepared by the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC) when the USA and EU were discussing the Transatlantic Trade and Investment Partnership'(TTIP) nicely sets the scene about the challenges and risks posed by the mutual recognition of voluntary standards referenced in TRs.

On the face of it, mutual recognition of standards can appear to be an attractive proposition, avoiding the need to create a single standard. However, by definition, mutual recognition means that the two standards must be different (otherwise they would not need to be recognized as equivalent; they would be identical). Mutual recognition of standards would lead to more standards in circulation in the market place, not fewer, and this goes against the principle of harmonization as a means to reduce the number of conflicting standards. Mutual recognition could be easily possible if the different national standards set for mutual recognition were identical to international standards that have been adopted as national standards. This basis for mutual recognition simply confirms the principle of harmonization through international standards. However, if national standards not identical with International Standards are submitted for mutual recognition, it becomes quite complex to determine their equivalence. Slight differences in the requirements stated in the standards could bring a lot of difference in the performance of products conforming to the two different standards. The best approach in this area is to proceed with harmonisation of different national standards to create one standard. Fortunately, Africa has the mechanism through ARSO and therefore this approach should be followed in the ACTReF.

57 https://www.cencenelec.eu/News/Policy_Opinions/PolicyOpinions/TTIP__std_mutual_recognition.pdf

#### 5.4.4.3 Accreditation

The TBT Agreement stipulates that WTO members have to ensure that procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade. In that respect, WTO Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, provided that there is assurance of adequate and enduring technical competence of the relevant conformity assessment bodies in the other Member, for instance through accreditation.

Accreditation is therefore the ultimate element that builds trust in trade as to the conformity of goods to requirements, e.g. technical regulations. Accreditation is the perfect example where mutual recognition is the norm. Indeed, the recognition of national accreditation is achieved through processes known as mutual recognition arrangement (MRA) or multilateral recognition arrangement (MLA) operated by the two main international accreditation cooperations, namely the International Laboratory Accreditation Cooperation (ILAC) and the International Accreditation Forum (IAF). Fortunately, the situation of accreditation in Africa has made great strides. A multi-economy accreditation body in SADC (SADC Accreditation Services, SADCAS) delivers accreditation services to multiple countries, thus even removing the need for mutual recognition among these countries. The West African Accreditation System (SOAC) also is geared to provide services to multiple countries. And all this happens under the umbrella of the African Accreditation Cooperation (AFRAC) recognized in Annex 6 of the AfCFTA.

### 5.4.5 Choosing the regulatory approach for ACTReF

Sub-subsections 5.4.1 to 5.4.4 have laid out various approaches for the ACTReF. They are not all mutually exclusive, so the ACTReF should come up with a balanced set of approaches to apply in Africa. This will be part of another phase of this project.

### 5.4.6 Application of the principles of necessity, proportionality, subsidiarity, transparency, responsibility, accessibility and simplicity

This paper has underlined the current situation regarding the status of intra-African trade and the various regulatory approaches in developing and enforcing TRs. The context has also highlighted the heterogeneity among African countries as well as the functioning of the various RECs. With the AQP and the ACTReF, the aim is to rationalize and consolidate the regulatory system to bring about better regulation practices and fill the gaps in a carefully planned manner with clear priorities. The paper has also described useful indicators developed by competent bodies such as UNCTAD to help countries better target areas of intervention. In light of the principles above, the ACTReF should ensure that any effort or action is taken based on reliable data. Therefore, steps to acquire data should be among the top priorities for this project in its effort to deploy the ACTReF after it is approved. The most useful indicator for the implementation of the ACTReF, particularly for prioritising resources and technical assistance, would be the regulatory distance measure developed by UNCTAD. Since the data necessary for calculating this indicator has not been compiled for Africa as a whole, it would be useful to consider a collaborative effort between UNCTAD and the AUC in the near future to collect this data.

## 6 NEXT STEPS

After the concept for ACTReF described in this paper is agreed upon at the level of the AUC, PAQI and PTB, the next step will consist of drafting the proposal for the framework based on the concept.