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Can Rules of Origin in Sub-Saharan Africa be Harmonized?

A Political Economy Exploration

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Abstract

The number of preferential trade agreements has increased sharply over the past decade as a response to stagnant multilateral trade negotiations. Political economy features centrally in these negotiations, for instance in the context of the Continental Free Trade Agreement (CFTA), which resulted from the most extensive negotiations for a preferential trade agreement ever to take place in Africa. In this paper, we discuss the challenges of rule-of-origin harmonisation in this process, which is a critical element for any further integration initiative in the continent. In particular, we review different approaches to the formulation of rules of origin, determining which firms qualify to take advantage of negotiated concessions. We focus on the experiences of the three African regional economic communities (COMESA, EAC and SADC) that are busy merging into the Tripartite Free Trade Agreement (TFTA) and assess their potential for harmonisation, drawing also on the examples of similar efforts being made around the globe, such as for the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). Strict rules of origin – as implemented by the European Union and the United States – require strong state institutional capacities to implement them and for competitive firms to incur high compliance costs. These two conditions are absent in most African countries. We hence caution against adopting rules of origin for the South African model in the CFTA on the basis of their restrictive nature and the high level of institutional and organisational capacities required for implementing them. Furthermore, we argue that rigid approaches risk undermining the very objectives they seek to achieve, since – for the most part – Africa's private sectors are comprised of small and informal enterprises that are ill-equipped to take advantage of rigorous rules of origin.

Contents

Abbreviations

1	**Introduction**	**1**
2	**Understanding rules of origin**	**3**
3	**Sub-Saharan African rules of origin regimes – the TFTA**	**5**
3.1	The Common Market for Eastern and Southern Africa (COMESA)	5
3.2	The East African Community	6
3.3	The Southern African Development Community	6
3.4	Challenges for harmonisation of the COMESA, EAC and SADC rules of origin	8
3.4.1	Generic challenges	9
3.4.2	Challenges specific to the TFTA parties	10
3.4.3	Accommodation of the views of the private sector	10
3.4.4	Broader political economy factors and the rules of origin outcomes	11
3.5	Outstanding issues to be resolved in the TFTA rules of origin negotiations	12
3.5.1	The lists	12
3.5.2	The legal texts: Annex 4 on rules of origin	13
3.6	Lessons for the Continental Free Trade Area	14
4	**Rules of origin in the EU and EPAs**	**15**
4.1	Elements for determining the origin of goods	15
4.2	The importance of the EU combined nomenclature	15
4.3	Non-preferential rules of origin	16
4.4	Preferential rules of origin	16
4.5	The EU EPAs	17
4.6	Determining elements for preferential origin of goods	18
4.7	Implications for the Continental Free Trade Area	18
5	**Rules of origin in the TPP and TTIP**	**19**
5.1	General rules of origin provisions in the TPP	19
5.2	Textiles and clothing in the TPP	21
5.3	A footnote on rules of origin in TTIP	22
5.4	Implications for the Continental Free Trade Area	22

6 Recommendations for the CFTA parties and developing countries 23
6.1 Recommendations for accelerating and improving the CFTA rules of origin negotiations 23
6.2 Broader recommendations for developing countries 24

References 25

Appendix: Rules of origin info graphic 29

Abbreviations

ACP	African, Caribbean and Pacific
CCT	Combined Customs Tariff
CET	Common External Tariff
CFTA	Continental Free Trade Area
CN	Combined Nomenclature
COMESA	Common Market for Eastern and Southern Africa
CTH	Change in Tariff Heading
EAC	East African Community
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreement
EU	European Union
GSP	Generalised System of Preferences
GVC	Global Value Chain
LDC	Least-developed Country
PTA	Preferential Trade Agreement
REC	Regional Economic Community
RVC	Regional Value Chain
SADC	Southern African Development Community
Taric	Integrated Tariff of the European Union
TFTA	Tripartite Free Trade Agreement
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
TWG	Technical Working Group

1 Introduction

Preferential trade agreements (PTAs) continue to gain popularity around the world as multilateral trade negotiations remain deadlocked. In recent years, their importance has been boosted by major trading powers turning towards so-called mega-regional PTAs, particularly the Trans-Pacific Partnership (TPP) (between the United States and 11 Pacific countries) and the Transatlantic Trade and Investment Partnership (TTIP) (between the United States and European Union (EU)).

These two PTAs in particular are generating widespread reactions around the world, and to some extent in Africa. Consequently, the issue of inter-regional economic integration in Africa has seen a resurgence in political and economic agendas in the form of the consolidation of the continent's existing regional economic communities (RECs). In October 2008, the heads of state and government of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) held the first tripartite summit in Kampala, during which it was agreed that the three RECs would begin work towards a merger into a "single REC",[1] the Tripartite Free Trade Agreement (TFTA). Negotiations were officially launched in Johannesburg in June 2011, and in June 2015 the Tripartite Free Trade Area was officially launched in Sharm El Sheikh, Egypt.

PTAs can contain many different elements, ranging from import tariff concessions to – in the case of the mega-regionals especially – intrusive regulatory changes. Traditionally, these are divided into commitments governing the treatment of goods "at the border" and those governing what happens "behind the border" of the contracting parties. African PTAs are largely focussed on the former and, consequently, tend to be limited to tariff concessions and light regulatory commitments.

The preferential treatment of goods at the border in the context of a PTA hinges on the rules of origin agreed to by the contracting parties. The basic purpose of preferential rules of origin (COMESA-EAC-SADC Tripartite Summit, 2008)[2] (hereafter, rules of origin) is to prevent trade deflection, whereby a set of rules and administrative procedures are used by countries in a PTA to determine the origin of imported goods. Simply put, the economic national identity of a good hinges on which geographical area (state, nation, economy) contributed the most value to the imported, or exported, good.

Rules of origin negotiations are not clinical exercises devoid of contextual factors. Rather, contextual factors determine the design of rules of origin. Furthermore, models that are intended to promote ideals such as regional industrial development and regional value-chain (RVC) integration can be designed to advance other types of objectives unrelated to preventing trade deflection, such as industrial policy, or to pressure governments to protect certain industry interests.

1 The heads of state further highlighted that this was in line with the "objective of fast tracking the attainment of the African Economic Community", and in line with the goal the continent set for itself in the 1980 Treaty Establishing the African Economic Community (the Abuja Treaty), and the Lagos Plan of Action.

2 For the purposes of this paper, they are to be distinguished from non-preferential rules of origin.

Consequently, rules of origin have become more complex over time, more difficult for the private sector to take advantage of and, thus, more controversial. These side-effects render the insertion of the countries – and companies – covered in the PTA into global value chains (GVCs) more difficult. Indeed, this may be the underlying purpose of some governments and lobby groups as they construct rules of origin regimes in PTA bargains. After all, rules of origin are intended to retain and promote production capacities in the PTA region concerned, and so the emphasis is rather on RVCs.

In this light, rules of origin should not be considered as benign technical instruments. Rather, they reflect underlying political economy forces – and an ensuing balance of economic power – in the construction of PTAs. For example, in the case of the clothing and textiles industry in the TPP, discussed below, political logic often outweighs economic logic – by far. So we should not be surprised to find that political economy features centrally in the African rules of origin negotiations currently underway, particularly the TFTA and the envisaged Continental Free Trade Area (CFTA) – the ultimate focus of this paper – which involves negotiations that include 54 African countries and are scheduled to conclude in 2017.[3]

We first "peek under the hood" of several key PTAs that are influential in, or to, African economic integration processes. We begin with the three RECs that are busy negotiating the TFTA. First, their broad approaches to rules of origin are described. Then the potential for harmonisation among them in the context of the TFTA is briefly assessed before the latest efforts in that regard are outlined.

Then we consider the EU's relations with sub-Saharan Africa via the prism of rules of origin contained in the recently concluded Economic Partnership Agreements (EPAs). Given the continued importance of the EU in many African states' trade and investment relations, the substance of their agreements with what is often their main trading partner is influential – at the national, regional and continental levels. In this light, we also consider the recently concluded TPP, since that region – and particularly the United States – is an important trade and investment partner for many African states, so its rules of origin preferences have a bearing on how rules of origin may evolve in Africa. We add a brief footnote on the TTIP – brief since, in the time available, we could not source primary (texts) or secondary materials on the state of negotiations on rules of origin.

Throughout the paper, we draw lessons and implications for African countries negotiating the CFTA. Overall, we are concerned that developed-country norms for negotiating rules of origin are taking root in the TFTA, and that these are likely to become the default approach in the CFTA. Our concern hinges on the restrictive nature of these norms and the high institutional / organisational capacities required to implement them. The former concern relates to what we see as the broader drift of African trade politics away from openness to the world – as expressed in trade and industrial policies that would favour integration into GVCs – and towards more inward-looking approaches favouring RVCs. The second concern relates to weak governance capacities in African states generally, in relation to the implications of adopting developed-country approaches to rules of origin. The risk of corruption, in particular, looms large. Furthermore, such rigid approaches risk undermining the very objectives they seek to achieve, since, for the most part, Africa's

3 For more detail on the CFTA's background, objectives and processes, see Ajumbo and Briggs (2015).

private sectors are comprised of small and informal enterprises that are ill-equipped to take advantage of rigorous rules of origin.

These are the key implications developed in the final section, along with recommendations for improving CFTA negotiations on rules of origin. Before getting there, however, we begin with a brief technical exploration of the arcane world of rules of origin.

2 Understanding rules of origin

Rules of origin set out a series of requirements and conditions that products need to meet in order for them to be considered as originating from a state or territory in order to benefit from tariff concessions. The requirements and conditions differ from one agreement to the next but are typically modelled according to some combination of these core criteria (see the Appendix for an infographic explaining the issues):

- the wholly obtained rule
- the material content rule
- the value addition rule
- transformation of goods resulting in a tariff heading classification
- specific process rules

Other rules and principles that commonly complement the core rules and criteria include:

- cumulation rules
- tolerance (or *de minimis*) rules
- product-specific, or list, rules

The simplest criterion of "originating goods" is the **wholly obtained** or wholly produced criterion. This relates to goods that are entirely the product of one country and do not have inputs from non-contracting parties in the production process. The wholly obtained goods category mainly refers to natural products and goods made from natural products that are obtained entirely in one country (World Customs Organization [WCO], 2015).

The **material content** rule states that the value of non-originating materials (imported from non-contracting parties) should not exceed a certain percentage of materials used in the production of the good claiming origin. In the COMESA and EAC regions, the threshold is 60 per cent.

The **value addition** criterion requires that value addition from production in a contracting party be – in the COMESA and EAC regions – at least 35 per cent of ex-factory costs. This is on top of the total value of the product being exported and includes the value of the individual components or parts of the product. In the SADC, value-added percentages vary depending on the product, as prescribed in Appendix I of Annex I of the SADC Trade Protocol.

Origin can also be conferred on imported goods considered to be substantially transformed through a **change in tariff heading** (CTH). This means the final good should be of a

different tariff heading than the imported goods used in the production of the product, according to the "Harmonised System goods nomenclature", which classifies goods into 21 sections, 96 chapters (HS 2-digit level), and more than 1,200 product headings (HS 4-digit level). A good needs to change from one tariff code to a tariff code other than that of the imported goods used in the production of the final good. This transformation can be quite extensive or very simple and cheap, depending on the criterion laid out in the particular CTH rule.

The **specific process** rule defines and describes – on a product (or product group) basis – specific manufacturing or processing operations that are necessary to confer origin (positive test), and also processes that are not considered sufficient for conferring origin (negative test). Specific process rules are very specific, and quite prescriptive, which makes their requirements clear for producers. The higher the number of processing specifications, the more exact they can be for complying with the rules for that particular product or product group. Additionally, the attendant processes and documentation for proving specific process compliance can be burdensome to comply with (Brenton, 2010, p. 164). Lastly, because of the necessary involvement of domestic industries in the development of specific process rules, this rule is particularly susceptible to industry capture (ibid. See also Brenton, Flatters, & Kalenga, 2005). Among the three RECs, only the SADC utilises specific process rules.

Originating status can also be conferred through **cumulation,** which allows non-originating inputs to qualify as originating if they are imported from other PTA members. Cumulation is sometimes considered a kind of derogation or exception to the main rules of origin criteria (see Kalaba, 2009). But it has also been described as a mechanism through which countries that are part of a PTA can "*share production*" and "*jointly comply with the relevant rules of origin provisions*" (see WCO, n.d.). In this sense, cumulation plays an important role as a driver of regional integration. There are three cumulation possibilities:

- Bilateral cumulation allows two partner countries to treat materials originating in the other partner country as their own materials;
- Diagonal cumulation permits countries within a regional grouping to treat materials originating in a specified third country as their own materials; and
- Full cumulation extends not only to materials, but also to working or processing. Any processing operations carried out in any of the participating PTA countries may be considered for cumulation purposes.

Another derogation from the core rules – particularly in product-specific rules of origin models – are the **tolerance,** or ***de minimis***, rules. This allows for a specific share of the value or volume of the final product to be non-originating, without the final product losing its originating status. In the COMESA-EAC-SADC grouping, this rule operates only in the SADC, where it is applied in relation to a change of tariff heading and specific manufacturing rules.

Product-specific (or list) rules apply to headings, subheadings and split subheadings of products on the Harmonised System. They take precedence in reverse order, meaning that if a product-specific rule applies for a product heading, but a different set of rules applies to a subheading within that product-heading group, the subheading-specific rules apply. Compared to general approaches, list rules manifest in detailed, and sometimes complex,

rules. These can therefore be more restrictive than necessary to prevent trade deflection (see Brenton, 2010, p. 170; Brenton et al., 2005, generally).

3 Sub-Saharan African rules of origin regimes – the TFTA

Here we focus on developments in what some have called "Africa's mega-regional": the TFTA. Covering 26 countries and 4 RECs – including the Southern African Customs Union, which does not have a seat at the negotiating table – it is broadly representative of the kinds of challenges likely to be encountered should the CFTA negotiations take off. We begin by discussing the broad approaches to rules of origin in the three main RECs, namely COMESA, EAC and the SADC.

3.1 The Common Market for Eastern and Southern Africa (COMESA)

COMESA employs a largely generic approach to governing rules of origin. This approach is generally regarded as liberal and relatively easy to comply with, an important consideration bearing in mind the underdeveloped private sectors characteristic of COMESA parties.

The approach is underpinned by five criteria: the wholly produced rule, the material content rule, the value addition rule, the change in tariff heading rule and a "goods of particular economic importance" rule.

In terms of COMESA's material content rule, the value of non-originating materials (imported from third countries) should not exceed 60 per cent of materials used in the production of the good claiming origin. Goods could also qualify for preferences under the value addition rule, which requires that value addition from production be at least 35 per cent of ex-factory costs. Lastly, as an alternative, origin can be conferred on imported goods considered to be substantially transformed through a CTH.

COMESA rules allow for derogation from the value-added rule for a category of products deemed important to the economic development of member states. The "goods of particular economic importance rule" allows for value addition of only 25 per cent to suffice for conferring origin. Products falling under this category are contained in a list approved by the Council of Ministers (of Trade). This concept does not exist in the other two RECs.

COMESA rules also allow for full cumulation of production.

COMESA rules have not been without their problems. There has been a history of unilateral digression from the value-added threshold, most notably by Egypt. Instead of the prescribed 35 per cent, Egypt has, in practice, been applying a 45 per cent threshold to its COMESA trading partners and has shown continued recalcitrance on the matter. Egypt is not the only offender. Other COMESA members have occasionally also unilaterally increased their thresholds – although in all of the later cases, the countries in question did so only briefly, or have since ceased to do so.

The issue points to the need to ensure better enforcement of compliance with rules of origin, which is certain to be an important issue in the TFTA. COMESA member states

have not used enforcement mechanisms allowed for within the rules to rectify the situation (with the exception of isolated retaliatory actions). Instead, they have adopted a diplomatic-style approach to dispute resolution. It was only recently that the block decided to take a rules-based response, on the basis of rules governing non-tariff barriers.

3.2 The East African Community

EAC rules are very similar to COMESA rules. As with COMESA, the EAC applies a generic approach. The key difference between the two is that the concept of "goods of particular economic importance" does not exist within the EAC rules. Otherwise, the thresholds for material content and value addition are the same in the two RECs.

However, on the level of the product-specific rules (exceptions to the base rules), COMESA and EAC rules can – depending on the product – be very different from each other.

The EAC rules, as with the COMESA and SADC rules, also allow for full cumulation of production. As already noted, full cumulation allows for deeper integration by permitting fragmentation of production processes. However, in order to be utilised, detailed evidentiary information relating to suppliers of inputs is required to support its application in a particular case. This means that, in practice, diagonal cumulation might be easier to activate, as the latter would only require regular certificates of origin that accompany the imported inputs. According to Brenton, this makes a case for traders to be offered a choice between diagonal or full cumulation (Brenton, 2010, p. 167). The new (2015) EAC rules cater to this scenario. In addition to full cumulation, Rule 8 includes provisions for the utilisation of alternative permutations of cumulation, which include diagonal cumulation.

On the whole, challenges in the EAC relate to issues of verification or origin, administrative procedures, compliance difficulties for small-scale producers, and the fact that they often create confusion for producers in partner states that belong to multiple RECs or export to countries that belong to multiple RECs.

3.3 The Southern African Development Community

Instead of general rules, the SADC uses product-specific rules of origin. They are based on the so-called list approach, which is derived largely from the European Union model. The SADC list rules are based on three broad criteria: the value-added rule, the CTH rule and specific process rules.

The purpose of this approach to rules of origin is to make trade deflection more difficult, thus confining access to the preferences conferred by the PTA to producers actually located in the region. Negotiations are conducted on a sector and product-specific basis and, as a result, take much longer to conclude than the liberal COMESA / EAC approaches.

The value-added percentages differ on a product-by-product basis, as specified in Annex I of the SADC Trade Protocol. Where percentage criterion rules are used, these are based on *ex-works* prices.[4]

The specific process rules, which, in the context of the TFTA negotiations, are unique to the SADC, specify qualifying manufacturing or processing operations that confer origin for each product or product group (positive test), and/or manufacturing or processing procedures that do not confer origin (negative test). The positive test entails detailed descriptions – on a per product basis – of the manufacturing processes required for that particular product to qualify for preferences. By way of illustration, Chapter 62 (articles of clothing and apparel) includes some of the following specific processing instructions:

> *Making up followed by printing accompanied by at least two preparatory or finishing operations (such as scouring, bleaching, mercerising, heat setting, raising, calendering, shrink resistance processing, permanent finishing, decatizing, impregnating, mending and burling) where the value of the unprinted goods of heading Nos. 6213 and 6214 used does not exceed 47.5% of the ex-works price of the product;*

and

> *Laying out and cutting of uncut fabric; assembly of cut components by stitching or other appropriate methods; necessary finishing, including addition of trim and other findings, washing and pressing etc.; and packaging of finished items.*

The negative test is assessed against an illustrative list of operations, which includes: simple packing operations; diluting and mixing; simple assembly; minor operations; and/or any combinations of these.

SADC rules permit full cumulation of origin among member states. This means that, for purposes of determining origin, member states are considered to be one territory. It makes it possible for them to jointly comply with rules of origin. Any processing operation carried out in any of the member states may be considered for cumulation purposes, with origin attributed to the country in which final processing or manufacturing takes place. As already noted, full cumulation is considered to be the most liberal form of cumulation. In theory it alleviates the individual compliance burden for member states, allows for greater fragmentation of production processes in the region and allows the SADC's participating countries to use their complementary strengths in the production of final products. In practice, however, it has been opined that cumulation in the SADC region has not been fully exploited.[5]

The SADC also has a value tolerance (or *de minimis*) rule, which allows a certain percentage of non-originating materials to be used without affecting the origin of the final

4 Excluding the costs of getting the good to the buyer, notably transport and insurance charges.

5 The view has been expressed that the impact of full cumulation can sometimes be limited in groupings such as the SADC, where the levels of economic development among most members are similar. According to Naumann, writing in 2008, SADC member states enjoy few complementarities, or suffer from similar shortages of materials, and similar variables around the availability, quality and prices of inputs. It has been suggested that these factors, together with high transportation costs and other cross-border constraints, have limited the ability of producers to benefit fully from full cumulation. See Naumann (2008, p. 28).

product. The rule, which applies in the main to CTH and the specific manufacturing rules, allows for a maximum of 15 per cent (also *ex works*) of non-originating inputs, without affecting qualification for preferences. This rule is effectively a relaxation that assists producers by making it slightly less onerous to comply with the rules. Textiles, clothing and automotive materials are excluded from the concession.

The SADC also applies a double-stage transformation rule, meaning two changes in tariff headings for clothing and textiles – a rule that South Africa, in particular, insists upon. Although this could incentivise regional sourcing (and thus deepen integration), what is also clear is that domestic industrial policy imperatives played a role here, particularly South Africa's desire to protect its labour-intensive, relatively high-wage clothing industry.[6] Albeit for a limited period, the SADC bloc did acknowledge the restrictiveness of the rule for its least-developed members, allowing Mozambique, Malawi, Tanzania and Zambia to qualify for a single-stage transformation rule until the end of a transitional period in 2009. Although negotiations are still ongoing, it would appear that the use of this rule has come up against some opposition in the TFTA negotiations.

In relative terms, these rules of origin are complex and more restrictive (although they were significantly simplified in places following the SADC's mid-term review). In comparison with the COMESA and EAC rules, they do not meet the criteria of least trade restrictiveness, substantive and administrative simplicity, and ease of application laid out by the SADC subcommittee on Customs and Trade. The prevailing opinion is that aspects of the list approach do not appear to be best suited to the circumstances of developing-country parties to a preferential trade agreement. Accordingly, over the years, there has been a great deal of analysis of the SADC rules of origin and their impact on trade. By and large, commentators have been of the view that the SADC rules of origin are so strict and complex that they could inadvertently undermine regional trade (see *inter alia* Flatters, 2002; Brenton et al., 2005; Flatters, 2012). The predominant view is that these rules could be simplified, without affecting their efficacy or substantive value.

3.4 Challenges for harmonisation of the COMESA, EAC and SADC rules of origin

Some commentators have argued that, following the mid-term review of the SADC rules of origin, the SADC rules are – on a substantive level – no longer that different from COMESA and EAC rules (see, for example, Flatters, 2012, pp. 5–6, 22). In other words, even though they remain more complex, they are not necessarily more efficacious than COMESA and EAC rules for preventing trade deflection. This suggests that fears in the TFTA harmonisation process that COMESA rules are lax or lack in rigor – on account of being "simpler" than the SADC rules – have been unwarranted.

However, it is clear that the process of harmonising rules of origin in the COMESA-EAC-SADC TFTA has been fraught. To see why, it is important to start with what was agreed

6 It has also been observed that SADC members in negotiations for enhanced market access with developed-country partners advance a single-stage transformation rule for themselves. Therefore, it can be argued that whatever reasons they have used to advance their case for the indulgence in those instances should also pertain in the region – given the economic disparities among economies within SADC itself, and across the three RECs.

to in the early part of the TFTA negotiations. Then, the subcommittee on Customs and Trade had agreed, in principle, that the TFTA rules of origin should:

- not restrict trade;
- be simple, flexible and easy for customs administrations to administer as well as businesses to comply with at a reasonable cost;
- not to be more stringent than existing rules under the regional trading arrangements of the RECs and EPAs;
- promote trade and enhance global competitiveness; and
- enable diagonal cumulation.[7]

This approach favours openness, and integration into GVCs. However, this open stance has been turned on its head over the course of the negotiations. In our assessment, there are two sets of factors that explain this turn of events: generic challenges in negotiating rules of origin, particularly in weak institutional contexts found in many developing countries; and political economy factors unique to the TFTA parties.

3.4.1 Generic challenges

- **The absence of an agreed global set of rules (or parameters) guiding the design of rules of origin**

The TFTA partners had to harmonise three sets of rules of origin that are based on two vastly different models. With no universally agreed model, a multiplicity of factors has influenced the process. Other than broad indices of restrictiveness and technical soundness – and principles concerning the best models for PTAs involving developing countries – there is no scientific method for knowing what the best model is in a particular case. This leaves the design of rules of origin subject to vagaries of trade negotiations, and the added influence of certain political economy factors (briefly discussed below).

- **Striking the right balance between an efficacious rules of origin model and one that goes further than is necessary to meet its objectives**

Striking the balance between when rules of origin are legitimate instruments to prevent trade deflection and when they start to go beyond what is necessary is increasingly difficult in practice. At the point where rules of origin become more trade restrictive than necessary to serve their intended purpose, they end up harming preferential trade among the partners. Every PTA finds its own balance in this regard.

Many of the issues around the issues of transhipment are better resolved at the level of customs administration. There is, in that regard, a need for improved customs cooperation in risk assessment as well as endeavours to ease the burden of administration, with a view to improving enforcement across the RECs.

7 Tripartite Sub-committee on Customs and Trade meeting, held in Mombasa on 24–25 July 2009.

3.4.2 Challenges specific to the TFTA parties

- **The dissimilarity between the COMESA and EAC rules, on the one hand, and the SADC rules on the other**

The models in operation for the SADC rules, on the one hand, and the COMESA and EAC rules, on the other, are vastly different, as are their respective different methodologies for determining origin. The fundamental differences between the list rules of the SADC and the generic rules of COMESA and the EAC meant that harmonisation was inevitably going to be difficult. The SADC rules of origin are fundamentally product-specific, whereas COMESA and EAC follow a general (across-the-board) approach to rules of origin. Where there are product-specific rules in the latter two RECs, these deviations from the base rules are contained in a closed list of exceptions.

- **Specific issues concerning known sensitive sectors**

Sectors such as fisheries and clothing and textiles, for example, are known to be economically sensitive in a number of countries in the region, and therefore are subjected to stricter, and/or varying, rules of origin. The fisheries sector exhibits different approaches in the RECs to the determination of origin for fishing vessels, whereas the clothing and textiles sector attracts different approaches to CTH requirements for products qualifying for preferences.

3.4.3 Accommodation of the views of the private sector

Through the leadership of the COMESA Business Council and the Tripartite Private Sector Platform, the private sector has been an active contributor to the negotiations on rules of origin. As it is the key stakeholder on matters pertaining to rules of origin, it is significant that the private sector has been given the opportunity to participate. However, the issue of representivity has never been fully clear. The private sector, firstly, is far from homogeneous on matters pertaining to rules of origin. There are some among them, such as in the clothing industry, who feel that their interests will be best served by restrictive rules of origin; they will probably not support the private sector bodies' calls for simplified, general rules that treat sector- or product-specific rules as the exception. There are also groups that might find little value in advocacy at the regional level if they would achieve better outcomes for themselves domestically. This is particularly the case with the South African organised business (and organised labour) community, which is influential in the domestic advocacy space. It is worth noting that, in the time since the TFTA negotiations were launched, most governments in the region have generally endeavoured to consult their respective private sectors on matters pertaining to the negotiations.

Although the private sector groups have been advocating for it, there has been no apparent particular emphasis on easing the burden of compliance for small and medium-sized businesses. There was some respite in the 2010 version of Annex 4 (the TFTA Annex on Rules of Origin), at least for small cross-border traders, who – in that version – would have been exempt from proof of origin for goods valued up to US$ 2,000. The exception appears to have fallen away from subsequent versions. It is not immediately clear why.

Overall, this failure to address the needs of SMEs and cross-border traders in the construction of rules of origin in the TFTA is particularly disturbing, given the widely

accepted fact that most sub-Saharan economies contain private sectors that predominantly consist of precisely these kinds of operations. Hence the establishment of rules of origin that overwhelmingly favour relatively large-scale South African companies is a particularly poor result.

3.4.4 Broader political economy factors and the rules of origin outcomes

Perfunctorily, the COMESA and EAC rules align with those models considered more suited to trade agreements involving developing countries. The COMESA model has been described by some commentators as an "an excellent model" for developing economies, given *inter alia* its "*economic effects and administrative simplicity and transparency*" (Brenton et al., 2005). Moreover, the COMESA and EAC rules most closely match the criteria laid out by the subcommittee on Customs and Trade. The SADC rules, by contrast, are lengthy and complex. They have been described as not being well suited to the circumstances of the developing-country participants. This reflects the fact that South Africa, which boasts the largest and most diversified economy in the SADC, is particularly apprehensive about its negotiating partners being used as conduits for transhipped goods, and thus insists on more stringent rules.

Given the dissimilarities between COMESA and EAC rules, on the one hand, and the SADC ones, on the other, harmonisation of rules of origin was set to be, at the outset, among the more challenging aspects of the TFTA negotiations. In the early phases, it was proposed that the COMESA general rules be adopted as the base rules, with list rules applying to sensitive sectors or only to an agreed set of products. This would have been a kind of hybrid between the COMESA / EAC model and the SADC model. However, SADC member states declined this proposal and instead put forward the SADC rules as the preferred model.

To date, the technical working group (TWG) on rules of origin has held twelve meetings, five or six of which took place in 2015 alone. There was an indicative timeframe of 12 months, from June 2015, for the finalisation of the outstanding issues, and the completion of the process. Ultimately, the SADC approach prevailed.

Considering that 26 countries are negotiating the TFTA, and that two of the constituent RECs implement an open approach to rules of origin – versus the SADC's closed approach – it is interesting that the parties to the TFTA elected to follow the SADC approach. It is also interesting that the eight COMESA members who are also SADC members would push for COMESA rules, then reject them (as SADC members) – in the same negotiating process. This decision has, in itself, been a contributor to the drawing out of the negotiations. The election to take this route has resulted in a painstaking product-by-product negotiation. Although the end result of the process will indeed be harmonisation of rules of origin for the three RECS – in that a single model will now be applicable to all three RECs – the process that has unfolded is better described as a renegotiation on a line-by-line basis. This is at variance with what was envisioned by the negotiating partners who had put forward the COMESA model. It had been their expectation that the process would be one in which generic rules would govern the rules of origin regime, with only selected (sensitive) sectors being opened to product-by-product negotiations.

South Africa has been particularly resolute on the adoption of SADC-style rules. So it is likely that South Africa's particular influence within that bloc (and *vis-à-vis* the other blocs), and/or its refusal to yield on its position, ultimately resulted in the adoption of the SADC-style approach.[8] It is worth pointing out that conceding to anything less than product-specific rules would not have been acceptable to South Africa's domestic constituencies, notably the labour unions and business lobbies. Furthermore, the lead government department charged with trade negotiations, the Department of Trade and Industry, is known to favour inward-looking approaches to domestic and regional development, favouring an RVCs perspective over a GVCs perspective.[9] Furthermore, in setting all trade negotiating positions, the Department of Trade and Industry is under obligation to obtain its mandate from the National Economic Development and Labour Council – a tripartite government-business-labour institution. Any private-sector positions that are at variance with the government stance, on any matter, will typically be fully debated and resolved within this process. So, when it comes to trade negotiations, the private-sector position is already intrinsic to the position that is presented. Consequently, given its preponderant economic and institutional weight in the negotiations – and the fact that it constitutes the largest market[10] – South African views were always likely to be influential.

3.5 Outstanding issues to be resolved in the TFTA rules of origin negotiations

With the plethora of outstanding issues, this timeframe appears at this stage to be ambitious. There is, nevertheless, an apparent sense of urgency within the TWG to scale-up its work in order to comply with this timeline. Next, we briefly outline some key outstanding issues.

3.5.1 The lists

The decision to go with an SADC-like model over the simpler (and originally posited) COMESA model, apart from protracting the negotiations, means that the resultant rules will be heterogeneous and complex. However, it is worth pointing out that the generic approach could have effectively led to a similar outcome if the list of exceptions had ended up being particularly long.

When negotiations on the list rules commenced, the TWG decided to truncate the process by agreeing to not open any negotiations on product rules that were common to all three RECs. But the effect of this, in terms of shortening the process, has been marginal. The matrices that resulted after a cross-REC analysis of common rules was about 50 pages long. The

8 It was also the influence of South Africa, which in the initial negotiation of SADC rules, led to the bloc moving from a COMESA-style model to its current EU-style list model. See Flatters (2012); Brenton et al. (2005).

9 Based on authors' personal experiences working in the Department of Trade and Industry, and negotiating with them and other parties in the context of the National Economic Development and Labour Council.

10 South Africa reportedly front-loaded its tariff offer in exchange for its rules of origin model being adopted.

matrices on similar and dissimilar rules, however, were respectively more than 100 pages long. As of November 2015, negotiations on the dissimilar rules were still ongoing.

Significant progress is reportedly being made. However, if the experience of the SADC is anything to go by, the challenges of finalising line-by-line rules of origin could well continue, even into the implementation of the free trade area. To this day, the SADC bloc continues to work on outstanding rules of origin issues.

3.5.2 The legal texts: Annex 4 on rules of origin

The initial TFTA legal text on rules of origin (Annex 4) was based on generic (COMESA-style) rules. However, as the negotiations evolved, an SADC-style list-based model was ultimately adopted. This also changed the fundamental character of the legal text. The annex has now gone through several iterations. And significant changes have, over the course of the last few years, been made to the substantive and procedural provisions. As of the launch of the free trade area in June 2015, the legal provisions in the annex on rules of origin (Annex 4) still being negotiated, with a number of articles reportedly not yet close to being agreed.

Much of the commentary on outstanding rules of origin has focussed on the product-specific negotiations. The impression might be that there is not much outstanding in terms of the base legal rules in the annex. Indeed, a lot of progress has been made, and most of the administrative and procedural provisions are reportedly agreed – or close to being agreed. However, agreement is still pending on a few substantive provisions. These include: the definitions of simple processes (not conferring origin); simple milling processes; the interpretation article; some of the provisions concerning origin criteria. We briefly highlight pertinent issues:

- Origin criteria

  Wholly obtained products

  With the exception of rules on fishing vessels, rules on wholly obtained products have been relatively uncontentious. Negotiations on origin criteria for fishing vessels appear to be tied to issues relating to percentages of qualifying criteria; the nationalities of the crew and officers on the vessel; and the nationalities of holders of equity in the vessels.

- Rules on sufficiently worked or processed goods

  Provisions on value of originating and non-originating materials

  Given that list rules are now being used, it is not surprising that the provisions around these issues are still outstanding. Earlier versions of the text had contained general percentage rules, in accordance with the COMESA / EAC approach. These have been deleted and are currently being renegotiated, line by line. It is expected that the final agreed provisions will resemble Rule 2.2 of the SADC's Annex I to the Trade Protocol.

  Value tolerance / *de minimis* rule

  At this stage it is not clear whether a tolerance rule has made it into the annex.

- Cumulation

  The revised drafts of Annex 4 – as was the case with the 2010 version – are believed to still contain a cumulation provision. On the basis of reports issued as the meetings of the TWG have unfolded, it is expected that the provision will allow for diagonal cumulation.

3.6 Lessons for the Continental Free Trade Area

In parallel to the TFTA's launch in June 2015, the African Union Summit, also held in June 2015, adopted the negotiating guidelines and roadmap for the creation of the CFTA, with an indicative conclusion date of 2017.[11] The course that the TFTA negotiations have taken will have a bearing on the progression of rules of origin negotiations in the CFTA negotiations. As noted above, various observers proposed that CFTA negotiators should aim for rules of origin that are simple, transparent and the least trade restrictive (United Nations Conference on Trade and Development, 2015; United Nations Economic Commission for Africa [UNECA], 2013). For example, in a 2013 report on Regional Integration (chapter on Rules of Origin), the United Nations Economic Commission for Africa – an influential voice in intra-Africa discussions concerning trade – suggested that generic rules should be the point of departure, with product-specific rules being considered only on specific products: ideally, according to the report, those whose production involves countries outside of the CFTA (UNECA, 2013, pp. 7–8).

But given that the TFTA rules, which are the expected basis on which the CFTA rules will be built upon, are now modelled on a list rules approach, it can be expected that the CFTA will be approached from a list-based perspective. What this means is that some of the challenges from the TFTA process will be inherited by the CFTA. A bloc such as the Economic Community of West African States (ECOWAS), for example, utilises a general approach – similar to those of COMESA and the EAC. It is, therefore, expected that extensive negotiations, on a product-by-product basis, will ultimately need to take place. It is also to be expected that this approach to rules of origin will strain institutional capacities in many African states, since they are ill-equipped to manage complex, technical rules of origin in the context of porous borders. Furthermore, since Africa's private sectors tend to be weak and predominantly informal, there is a strong chance that such rules of origin will undermine the very purpose they are purportedly being set up to achieve – building industrial capacities.

11 Declaration on the Launch of the Negotiations for the Establishment of the Continental Free Trade Area (CFTA), Doc. Assembly/Au/11(XXV), Assembly/AU/Decl.3(XXV), June 2015; and Decision on the Launch of Continental Free Trade Area Negotiations, Doc. Assembly/AU/11(XXV), Assembly/AU/Dec. 569(XXV), June 2015.

4 Rules of origin in the EU and EPAs

After a lengthy, and often fraught, period, the EU finally concluded EPAs with five African groupings in 2014. Since the EU remains the main trade and investment partner of most African countries, these agreements are significant, and the lessons learnt in negotiating them are influential in terms of African regional economic integration.

The EU's concept of origin of goods comes from the idea that goods have an economic national identity that is determined through the various elements under each trade pact the EU has with individual states, geographically grouped states, trading blocs or groups of countries. The European Commission further distinguishes between two types of origin of goods: those with preferential access and those with non-preferential access. Preferential origin is afforded to goods deemed to have "originated" from certain countries that attract a reduced or zero rate of duty. Non-preferential origin goods are subject to a myriad of commercial policy measures, including anti-dumping measures and quantitative restrictions or tariff quotas. Therefore, the purposes of distinguishing between preferential and non-preferential goods are to: protect the EU economy from unfair competition, affect informed commercial policy and – as is discussed in more detail in the following section – provide developmental support for developing and least-developed states. [12]

4.1 Elements for determining the origin of goods

Goods entering or exiting the Community are identified via the Combined Nomenclature (CN) using headings, sub-headings, sub-sub-headings and so forth to determine which rate of customs duty applies and how the goods are treated for statistical purposes. The classification of goods is critical in determining not only the rate of duty but also which rules of origin threshold apply to the specific good.

4.2 The importance of the EU combined nomenclature

The CN, Common Customs Tariff (CCT) and Integrated Tariff of the European Union (Taric) regulation is a critical component of the harmonised EU trade system. Its purpose is to ensure unanimity of application of the common external tariff (CET), and therefore of origin determination and recognition. With the CN in place, CCT and external trade requirements can be applied for imports and exports. The CN is based on the Harmonised System goods nomenclature, with its own supplements, and is the result of the merger between the CCT nomenclature and the EU Statistical Nomenclature. Each CN subheading has a ten-digit code. The first six digits refer to the Harmonised System headings and subheadings, with the seventh and eighth digits representing the CN subheadings. The ninth and tenth digits represent Taric subheadings, which are used to describe goods according to the implemented legislation and where specific customs duty rates – depending on the origin of the goods or other trade policy – will apply.

12 The EU periodically reviews its rules of origin. In the 2003 European Commission Green Paper (European Commission, 2003), which initiated the review, it was noted that its model was no longer tenable in present conditions. It was also acknowledged that the rules had initially been designed in a manner that "afforded adequate protection for the EU interests concerned".

The CN and CCT duty rates are managed by the European Commission, assisted by the Customs Code Committee, which is comprised of representatives of the EU countries and chaired by a Commission representative. They are responsible for reproducing the CN and CCT annually while taking into account Council and Commission amendments, and for examining all questions on the CN, Taric nomenclature and any other nomenclature based on the CN.

Therefore, critical components for harmonised rules of origin – and, more broadly, a harmonised trade system – are: a common nomenclature, a managing commission and a supporting committee.

4.3 Non-preferential rules of origin

A distinction is made between goods that are considered wholly obtained from within a country – in which case determining origin is a non-event – and goods whose production is involved in more than one country. Again the rules and thresholds for the latter differ from pact to pact, but the general rule of thumb is that the country where the goods underwent their last substantial, economically justified processing is seen as the originating country. This rule is further specified for particular products with detailed descriptions of the operations that confer origin; in other words, the list system applies.

4.4 Preferential rules of origin

The EU has fairly similar rules of origin for both autonomous preferences granted to Generalised System of Preferences (GSP) and transitory Market Access Regulation for African, Caribbean and Pacific (ACP) countries, on the one hand, and the different PTAs it has concluded with various countries and regions around the world, on the other. These are referred to as the EC old standard rules.

In these rules, distinction is again made between wholly obtained goods and goods whose production involved more than one country. The latter refers to a product list in which concrete rules are defined product by product and are based on a CTH, a value-added criterion or specific technical operations, with local content requirement thresholds of 50–75 per cent, depending on the product.

Cumulation is another important feature of the EU's rules of origin. The recently negotiated EPAs with the ACP states include the most favourable cumulation treatment ever granted by the EU. This cumulation scheme allows for cumulation with all other EPA countries, with Overseas Countries and Territories, with the EU's GSP beneficiary countries, and with current and future EU PTA partner countries. The rules of origin for Overseas Countries and Territories were also revised in order to bring them in line with the approaches adopted pursuant to the EU's reform of its rules of origin regime, enacted in 2011. Of course, cumulation is partner sensitive, subject to product-specific rules, and to varying value thresholds depending on the partner. Nonetheless, specific products – notably textiles and clothing and some agricultural and fisheries products – have been granted substantial relaxation from erstwhile cumulation provisions.

4.5 The EU EPAs[13]

In the EU, the threshold of African EPAs for products considered "sufficiently worked" differ from one agreement to the next but generally run along the lines of a percentage *ex-works* value of the product, with reference being made to specific product chapters and lines, whereas other product chapters and lines are subject to a percentage of the weight of the product. All EPAs also have a section dedicated to "insufficiently worked" rules that set the minimum level of transformation required, generally along the 15 per cent threshold. The annexes that detail the thresholds for each product heading (HS 4 digit-level) differ slightly from one agreement to the next as well as the products that are included or excluded from the sufficiently worked annex.

Cumulation, on the other hand, is very similar for all EPAs. All five African EPAs state that bilateral, diagonal and full cumulation – as well as cumulation with other countries benefiting from duty-free / quota-free access to the EU market – are permitted. In other words, the intent is to encourage the development of cross-ACP RVCs. However, as Asche (2015, p. 20) notes, the pressure is still on non-least-developed-country ACP states to sign up to EPAs; if they do not, then their materials cannot be included in diagonal cumulation, and the GSP rules of origin – requiring single-stage transformation – will still apply to their EU-destined exports.

South Africa, also an ACP member, is treated differently. This arises from the fact that South Africa possesses some genuinely competitive industries, which is a matter of concern to their counterparts in the EU. This was the underlying rationale for the EU refusing to extend the same market access to South Africa as it extends to the rest of the ACP, which led ultimately to the negotiation of the bilateral Trade, Development, and Cooperation Agreement, which excluded South Africa's partners in the Southern African Customs Union, leading to a major rift aggravated by the subsequent negotiation of an EPA with the EU. Fortunately, this has now been resolved, since South Africa has signed an EPA with the EU, as part of the Customs Union. Nonetheless, non-Customs Union ACP members are prohibited from cumulating with materials originating from South Africa. Furthermore, certain products originating in South Africa are excluded from cumulation with other EPA states or the ACP, notably: processed agricultural products, basic agricultural products, industrial products (unwrought aluminium and aluminium powders and flakes) and fishery products.

The *de minimis*, or value tolerance, rules are quite restrictive: total added value acquired outside the regions should be less than 10 per cent, and excludes products from Chapters 50 to 63.

Proof of origin is granted to products originating in EPA states upon submission of either a movement certificate (EUR.1) or an invoice declaration.[14] Supporting documents that need to be provided to ensure products have originating status include: direct evidence of the processes carried out by the exporter or supplier; documents proving the originating

13 Based on the EPAs, as published before February 2015.

14 In the cases specified in Article 21(1), a declaration, subsequently referred to as the "invoice declaration" must be given by the exporter on an invoice, delivery note or any other commercial document that describes the products concerned in sufficient detail to enable them to be identified.

status of materials used, issued or made; documents proving the working or processing of materials; movement certificates EUR.1 or invoice declarations proving the originating status of materials used, issued or made out.

4.6 Determining elements for preferential origin of goods

First, the tariff code of a good has to be determined, which can be done by consulting the Taric. Then legislation has to be checked to determine whether a good is subject to policy measures such as anti-dumping or quotas. Products can now be considered for originating status by reviewing list rules, cumulation rules, required minimal operation / transformation rules and general tolerance rules in the relevant trade pact. Additional factors that could influence the originating status of a good include the presence of drawback rules, what territorial or transport rules apply and questions about proof of originating status.

4.7 Implications for the Continental Free Trade Area

It is clear that the EU operates a complex set of rules of origin, with layers of institutions involved in administering it. It is very difficult to envisage most African states being able to implement such complex systems, because the attempt to do so is quite likely to generate avoidance and, therefore, corruption. Again, this raises broader concerns about governance impacts.

The complexity is exacerbated by the fact that the EU also implements a CET, meaning that each member state has to enforce the CN and the Taric. Since the ultimate goal of the CFTA is to create an Africa-wide Common Market by 2063 – if the CFTA parties are serious about the ultimate goal – they would do well to study the institutional requirements and complexities inherent in the EU's CN, CET and Taric. After all, a common market presumes that external tariff regimes have first been unified in the form of a CET. That said, we are sceptical that an Africa-wide Common Market is a realistic goal, not least owing to the vast geographical space entailed (the entire African continent), but also the widely diverging political economies in play and, similarly, state capacities to implement such a complicated system.

Second, although the EU has demonstrated some flexibility in the application of its rules of origin regime for ACP states, notably with respect to cumulation, the essence of the system remains to render trade deflection difficult. As noted in Section 3.6, for states with weak private sectors – in other words, most African states – it remains to be seen what the uptake of EU tariff concessions will be, and the extent to which RVCs will actually be engendered through cumulation provisions. If success is registered on this front, that could augur well for the EU-style rules of origin being negotiated in the TFTA. If not, then it suggests that the original COMESA / EAC formulations are more appropriate.

5 Rules of origin in the TPP[15] and TTIP

To properly appreciate how TPP rules of origin might impact on African producers, it would require a line by line assessment of the TPP's rules of origin provisions, in relation to a detailed trade analysis establishing which African exports to the TPP region are likely to be most affected. Both are beyond the scope of this paper. Consequently, we use a non-published paper to establish broad contours of impact, particularly for the least-developed countries (LDCs) of Africa. And we briefly assess the general rules of origin provisions in the TPP based on reading the relevant chapter.[16]

Fricke et al. (2015) establish that the TPP matters for African LDCs, and by extension for sub-Saharan African countries more broadly. Much of the current export basket for African LDCs covered in the study comprise primary products, which are unlikely to be affected by TPP rules of origin. Potential impacts are likely to be concentrated on four value-added sectors in which there is existing export capacity (Fricke et al. 2015, p. 14): agriculture, particularly fruits and vegetables; textiles and clothing; chemicals; and cultural or art items / handicrafts. The study focussed on the first two, since they have the highest shares in African LDC exports to TPP countries and are among the key product groups within the TPP negotiations. They are also widely acknowledged to be key sectors in which some African countries may enjoy comparative advantage, and therefore rapid development potential. Within these two product groups, textiles and clothing are particularly contentious, worldwide, owing to their labour-intensive potential, and consequently face high tariff barriers and relatively stringent rules of origin when included in PTAs. By contrast, health and safety standards are far more relevant in the fruits and vegetables sector.

Before turning to a detailed consideration of the TPP's textiles and clothing rules of origin, we first briefly review the TPP text's general provisions on rules of origin.

5.1 General rules of origin provisions in the TPP

It was to be expected that the TPP would contain complex rules of origin, since they are based on US rules that are well known for their complexity. The texts do not disappoint. Chapter 3 sets out the general rules and various conditions plus exceptions pertaining to them in three annexes. Two separate annexures cover, respectively, trade in automobiles and automotive parts, and the list, or product-specific, rules of origin. Chapter 4 is devoted exclusively to clothing and textiles trade arrangements, specifically qualifications to the general rules of origin tailored to the clothing and textiles sector. Two separate annexures to Chapter 4 contain the list of products in short supply, and the product-specific rules of origin. We briefly analyse these rules next.

15 This analysis is drawn from Fricke, Freytag, and Draper (2015), and Draper, Lacey, and Ramkalowan (2014), in addition to a review of the TPP's rules of origin chapter.

16 Chapter 3, available at: http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP-text/3.%20Rules%20of%20Origin%20and%20Origin%20Procedures%20Chapter.pdf.

Chapter 3 contains many provisions governing rules of origin and their application. It starts with the general rules for originating goods, which are defined in Article 3.2 as follows:

- wholly obtained or produced entirely in the territory of one or more of the Parties as established in Article 3.3 (Wholly Obtained or Produced Goods). Article 3.3 provides a list of qualifying product categories;
- produced entirely in the territory of one or more of the Parties, exclusively from originating materials; or
- produced entirely in the territory of one or more of the Parties using non-originating materials provided the good satisfies all applicable requirements of Annex 3-D (Product-Specific Rules of Origin).

The chapter then sets out in detail various methods for calculating value for the purposes of determining origin. Subject further to the product-specific rules, which could include change in tariff classification requirements (applicable only to non-originating materials), the methods include a production process requirement and a regional value content requirement. The latter is emphasised, in particular, and stresses materials used in production and their value – to be worked out according to one of three formulae – with a fourth, separate formula to be used for automotive trade. Value calculations are specified in some detail, distinguishing between goods imported by the producer of the good; materials purchased in the territory of the producer of the good; and materials also produced by the producer of the good. This is further conditioned on whether the material is classified as originating or not, with the former allowing the producer of the good to add certain costs to his value calculation, and the latter requiring deduction of certain costs, thus rendering it more difficult to reach the value threshold for the good produced. Determination of value for the auto sector receives dedicated attention, and a four-page set of parameters for calculating value. Accumulation of value across the TPP members is also granted, including consideration – for the producing states' determination – of materials sourced from a non-member state. A 10 per cent *de minimis* rule is accorded, meaning if the value of non-originating materials used in the good is less than 10 per cent, then origin is conferred automatically. However, this is subject to exceptions in Annex C, covering certain dairy, animal, fruit and beverage products.

Further provisions deal with specific circumstances or goods, notably:

- Fungible goods/materials (that are the same, such as a wheat shipment) and on which origin is conferred depending on how the goods are treated for accounting purposes and/or physically stored;
- accessories, spare parts, tools, instructional or other informational materials, which are excluded from value calculations as they are considered integral parts of the product, unless regional value content valuation applies in which case if such items are not invoiced for separately then their value is included;
- packaging materials/containers for retail sale or shipment, also excluded, unless a regional value content methodology is applicable in which case their value is included;
- sets of goods, meaning two or more goods of different tariff headings that are packaged together for retail sale. Under TPP Article 3.17, the set is originating only if each good in the set is originating. In addition, a set of goods is originating if the

value of all the non-originating goods in the set does not exceed 10 per cent of the adjusted value of the set;

- transit and transhipment to the producers' territory, wherein provided that the good transits through a non-member states' territory and does not undergo any procedures barring logistics, or remains under the control of the customs authority of that territory, then the good retains its originating status.

Then the procedures governing establishment of origin, its measurement and verification are set out. These, and the general rules, are then subject to co-management and further development via a rules of origin committee, to be established once the agreement comes into force.

5.2 Textiles and clothing in the TPP

In the TPP clothing and textiles rules of origin negotiations, the key protagonists were the United States and Vietnam. In all its PTA negotiations, the United States aimed to lock in its "yarn forward" rule, which means that all three transformation steps within the production (yarns, fabrics and final garment) process should be produced within the PTA countries in order to get the corresponding benefits. Even within the United States, there are diverse opinions on the rules of origin – whereas the textile industry favours the yarn-forward rule, multinational apparel retailers would benefit from a "cut and sew" rule. The US government reportedly proposed flexibility in application of the rule through the short supply list. This implies that yarns or fabrics that are not available – or only available in considerably limited quantities – within the TPP countries could be sourced from outside the PTA. Then, the final product would be exempted from the yarn-forward rule (Fergusson, McMinimy, & Williams, 2015). By contrast, other TPP members, particularly Vietnam, advocated a less restrictive "cut and sew" rule, which allows products that were manufactured with materials from non-TPP members to benefit from TPP, or "regional value content RoO" provisions[17] (Fergusson et al., 2015). Any move away from the yarn-forward rule could not only be a game-changer in terms of access to the massive US textiles market, but also could revolutionize international supply chains across the entire textiles and apparels industries.

This may also have an impact on the African LDCs, since the TPP region is a major export destination for apparels, yarns and fabrics for some of the LDCs. For example 100 per cent of the yarn exports from Niger and 84.4 per cent of the fabric exports from Uganda are destined for the TPP region (Fricke et al., 2015, Annex 2). However, in order to derive concrete conclusions on the impact of the rules of origin on African LDCs, a detailed assessment of the textile value-chain structures would be required, which is beyond the scope of this paper, unfortunately.

Potential impacts are most likely to be experienced through investment diversion, as producers look to relocate their production into TPP member states. Clearly, trade-diversion potential would have to be investigated, too. Such an analysis could also be

17 "Regional value content RoO" would allow for the use of certain non-TPP-originating inputs as long as TPP-originating inputs make up a certain value of the final product.

focussed on the major TPP market, the United States, and consider the African Growth and Opportunities Act rules of origin as a potential vehicle for mitigation strategies. This would particularly apply to African LDCs, such as Lesotho, that enjoy a relatively liberal "global sourcing" rule of origin for textiles.

5.3 A footnote on rules of origin in TTIP

It is widely expected that the TTIP will take some time to conclude, largely owing to different regulatory preferences on key issues on both sides of the Atlantic. However, it is also expected that, notwithstanding the sheer volume of trade in goods likely to be subject to the agreement, and powerful lobby groups on both sides, the goods part of the PTA will be relatively easy to conclude. Furthermore, both the United States Trade Representative and the Directorate General for Trade of the EU provide no guidance as to how rules of origin negotiations will be constructed, other than to say that both want simpler, more transparent rules applicable only to EU and US products. Our online search did not uncover any material dealing specifically with TTIP rules of origin negotiations, therefore we are not sure where they are at, nor how they will unfold.

Having said that, it is relatively easy to conceive of the parties agreeing on the general rules of origin. As the preceding chapters of this report make clear, the real negotiations will take place around divergences in list rules, not least because both the EU and United States are used to other PTA parties adopting their respective systems and approaches, by and large. But economic power is relatively evenly spread across the north Atlantic, albeit it concentrates in differing amounts in the EU and United States, respectively. Consequently, it is to be expected that a complex political economy of list rules will emerge in time, and that these rules will drive the overall construction of cumulation rules. Given that both the United States and the EU favour cumulation with their own PTA parties, though, it will be interesting to see whether, for example, TPP and EPA parties will be accorded some level of cumulation preference. The *de minimis* threshold, on the other hand, is likely to be set rather low.

Since the rules of origin chapter in the TTIP has yet to emerge, it would be speculative to draw implications for African countries. Nonetheless, the key development issue is whether EPA states will be granted cumulation rights, and if so, at what level(s) relative to other European PTA parties. The more they are included, the greater their prospects for participating in EU-US value chains.

5.4 Implications for the Continental Free Trade Area

In keeping with the theme developed in this paper, two implications of the analysis above stand out. First, both the EU and United States have complex rules of origin, requiring serious institutional capacities to (a) interrogate and (b) apply them. Such institutional capacities, by and large, are missing in sub-Saharan Africa. Therefore, emulating the approaches found in the TPP, and likely to be found in the TTIP, seems to us to be a serious mistake. As consistently argued in this paper, our concerns centre on the implications for governance in African states, and the strong likelihood that complex rules

of origin will not be taken up by Africa's private sectors, thus effectively undermining market access concessions and limiting regional economic integration.

Second, the underlying political economies of the TPP and TTIP differ substantially. In the TPP negotiations, although Japan is a major economy, it is nonetheless less powerful than the United States, in a geopolitical sense, as well as having an economy less than half the size of its counterpart. None of the other negotiating parties come close to matching US power, and all are very keen – for both geopolitical and economic reasons – to deepen their trade and investment relations with Washington. Consequently, power asymmetry was a key feature of the TPP. Clearly, Washington did not have everything its own way, but by and large it was able to secure its regulatory preferences and models (Draper, Lacey, & Ramkalowan, 2014).

The TTIP, by contrast, has a different power dynamic. The EU is more divided in how its member states relate to Washington, geopolitically speaking. But on the economic side of the equation, power is evenly spread. Furthermore, the EU has strong regulatory preferences and a long history of securing those preferences through successive enlargements and negotiations of PTAs. Europe will not simply make way for Washington, meaning that – on an issue as crucial as rules of origin – negotiations will be balanced. In such a scenario, list-based rules of origin will devolve to bargains among key lobby groups on both sides of the Atlantic.

This political economy has a broad, but possibly fascinating, implication for the CFTA. Whereas South Africa was able to secure its preferences in the TFTA rules of origin, to the surprise of many, by including West, Central and North Africa in the mix, it will make for a more diffuse political economy. This interplay is likely to come down to the regulatory preferences of a few key states in the two regions not covered in the TFTA: Nigeria (and possibly Ghana) in West Africa; the Democratic Republic of the Congo (and possibly Cameroon) in Central Africa. How it plays out will be fascinating to watch.

6 Recommendations for the CFTA parties and developing countries

Throughout this paper, we have sketched implications for the CFTA rules of origin negotiations. Accordingly, below we briefly restate them, along with recommendations for developing countries more generally.

6.1 Recommendations for accelerating and improving the CFTA rules of origin negotiations

If the CFTA is to successfully be concluded, then it is almost certain that ECOWAS members will need to sign up to the TFTA / SADC approach to rules of origin. The first recommendation, therefore, is that ECOWAS members conduct a proper analysis of the pros and cons of this relatively intrusive approach, relative to their current generic approach, in relation to the CFTA's stated objective of building intra-African trade and investment.

As stated above, we are of the view that the TFTA / SADC approach is not likely to optimise benefits for all member states, particularly those with weaker institutions and private-sector capacities. Nigeria's orientation towards this issue, given its economic dominance in ECOWAS, becomes crucial. Therefore, the second recommendation is that the Nigerian government needs to work out its own position on the issue in order to provide appropriate leadership in ECOWAS. This will require engaging with South Africa early on in the process.

The same applies to the rules of origin pertaining to EPAs with the EU, which, by the same logic, provide an inappropriate model for intra-African trade contexts. And the same argument applies to the TPP / TTIP approaches to rules of origin.

Finally, assuming that CFTA parties are serious about creating an African Common Market, then they need to be fully cognisant of the associated institutional requirements in relation to establishing, implementing and enforcing a CET, and constructing rules of origin *vis-à-vis* non-African states. In our view, given the great differences among African states in terms of political economy orientations, economic capacities and governance arrangements, the objective is not realistic and should be rethought.

6.2 Broader recommendations for developing countries

Unfortunately, developing countries learn from their developed-country peers, as South Africa did in its trade negotiations with the EU, where the restrictive approach to rules of origin was conferred. Nonetheless, in a world of GVCs and RVCs, to us it seems essential for countries to be able to import as freely as possible in order to export. In the context of PTAs, this requires liberal, uncomplicated rules of origin. COMESA and the EAC adopted this approach from the beginning, but now seem to have abandoned it for reasons that are not entirely apparent to us.

Notwithstanding this evident reality, our advice to developing countries wishing to leverage GVCs and RVCs is to refrain from adopting EU or US approaches to rules of origin. The simpler, the better; the least trade restrictive, the better. Yet, it is equally clear that the more developed the domestic production base is, the more pressure there will be to take away trade concessions through imposing restrictive rules of origin. So the onus is on trade negotiators to push back, in the interests of promoting broader domestic growth. Easier said than done.

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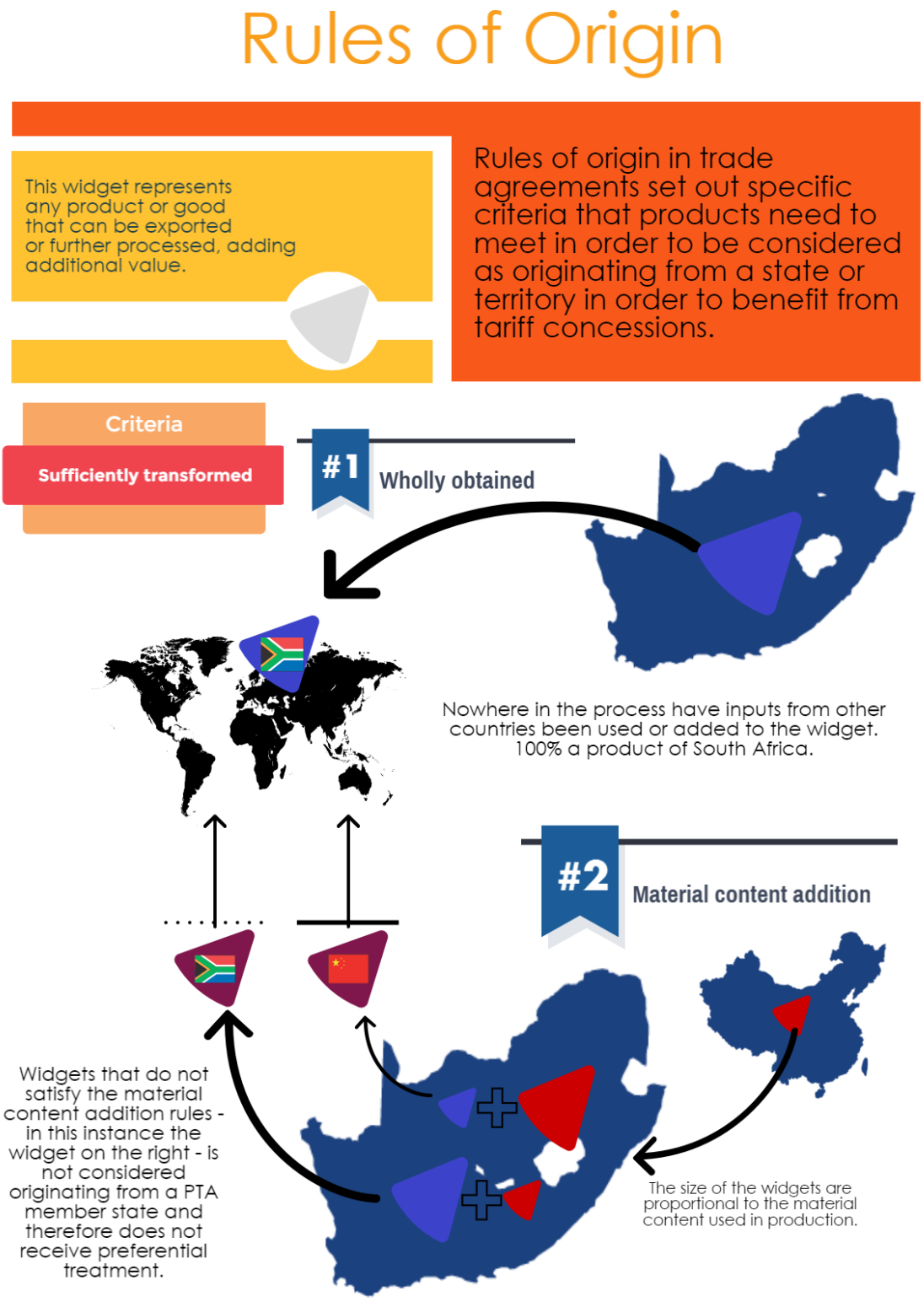
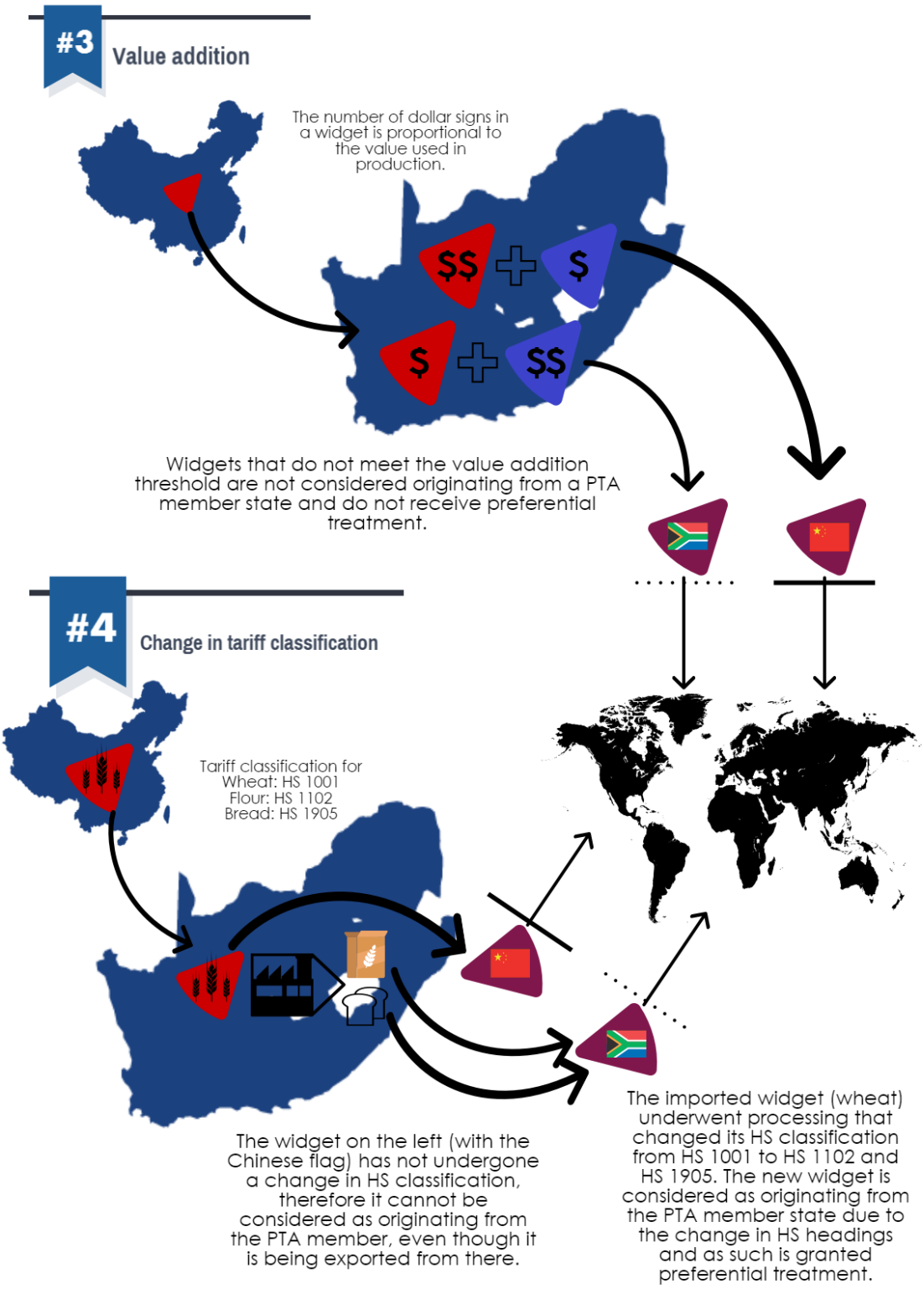
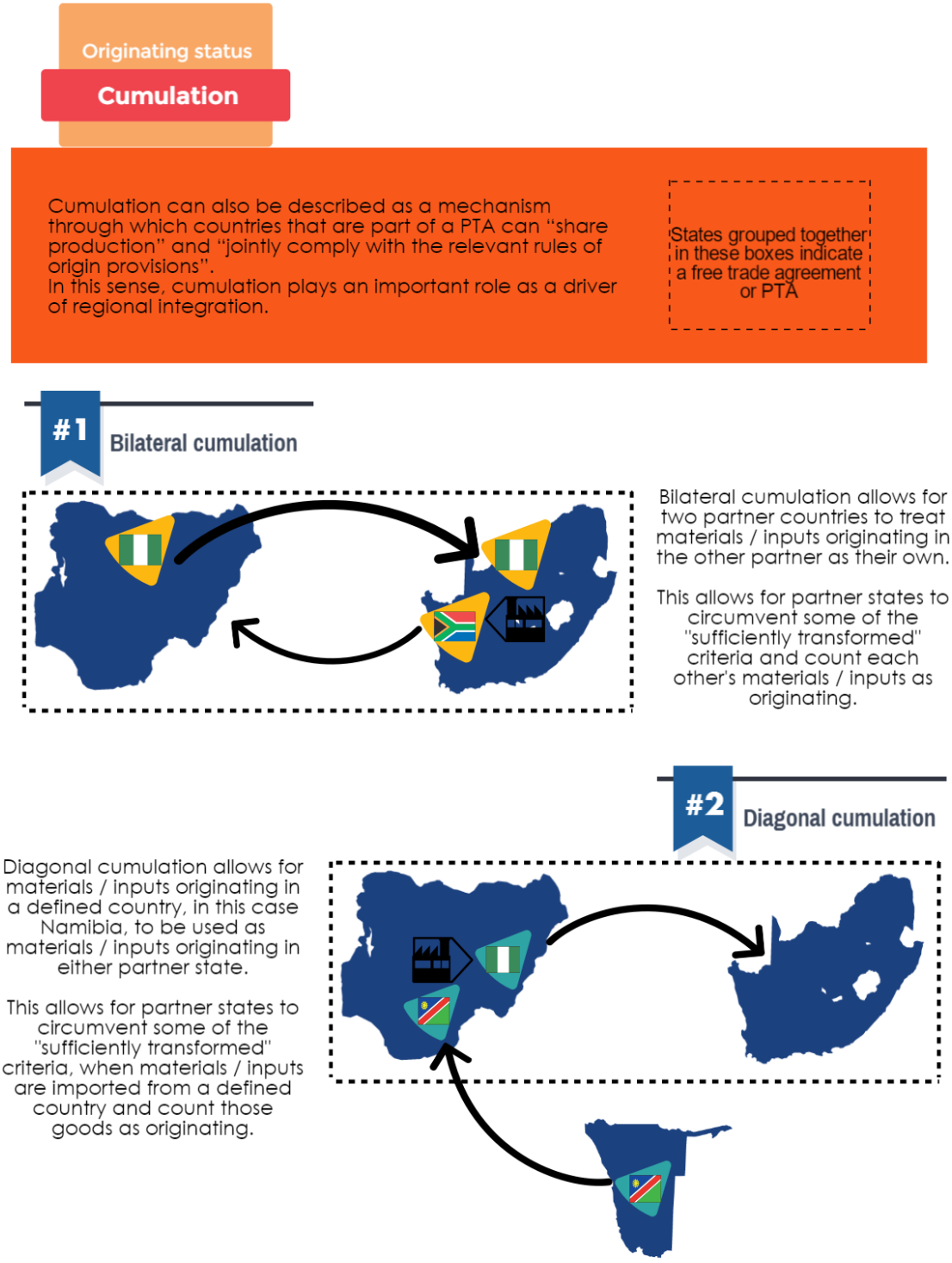
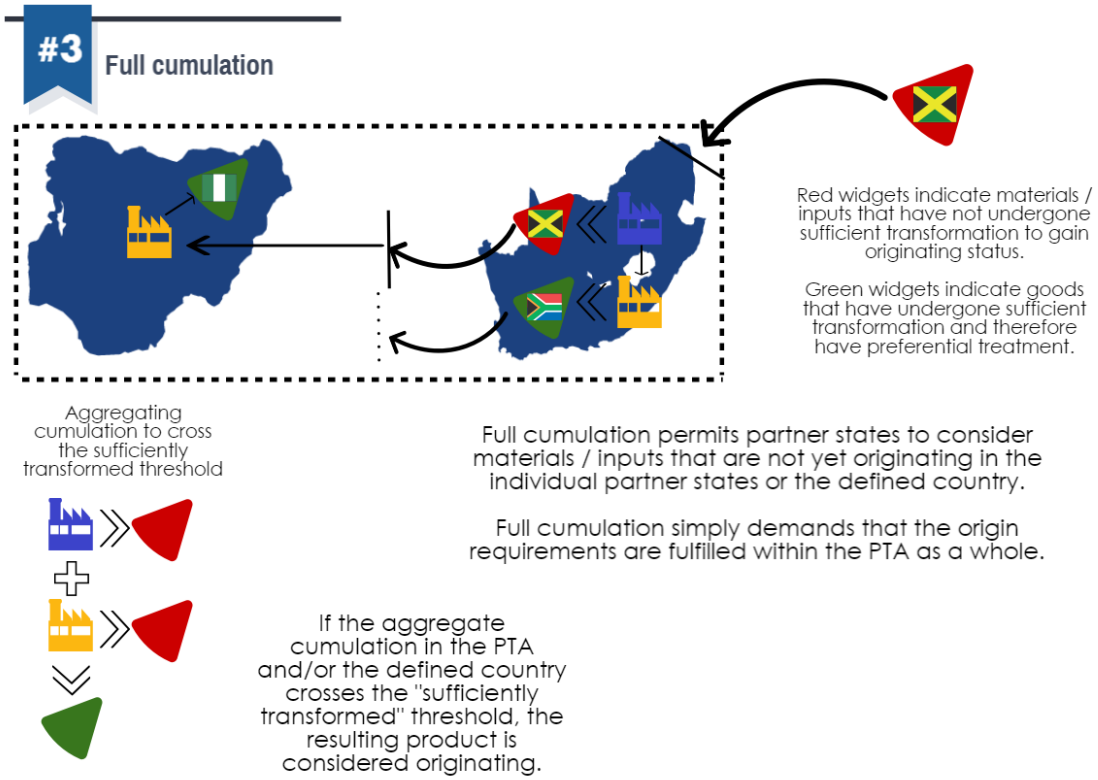
Appendix

Appendix: Rules of origin info graphic




#3
Value addition
The number of dollar signs in a widget is proportional to the value used in production.
$$
$
$
$$
Widgets that do not meet the value addition threshold are not considered originating from a PTA member state and do not receive preferential treatment.
#4
Change in tariff classification
Tariff classification for
Wheat: HS 1001
Flour: HS 1102
Bread: HS 1905
The widget on the left (with the Chinese flag) has not undergone a change in HS classification, therefore it cannot be considered as originating from the PTA member, even though it is being exported from there.
The imported widget (wheat) underwent processing that changed its HS classification from HS 1001 to HS 1102 and HS 1905. The new widget is considered as originating from the PTA member state due to the change in HS headings and as such is granted preferential treatment.


Originating status
Cumulation
Cumulation can also be described as a mechanism through which countries that are part of a PTA can "share production" and "jointly comply with the relevant rules of origin provisions".
In this sense, cumulation plays an important role as a driver of regional integration.
States grouped together in these boxes indicate a free trade agreement or PTA
#1
Bilateral cumulation
Bilateral cumulation allows for two partner countries to treat materials / inputs originating in the other partner as their own.
This allows for partner states to circumvent some of the "sufficiently transformed" criteria and count each other's materials / inputs as originating.
#2
Diagonal cumulation
Diagonal cumulation allows for materials / inputs originating in a defined country, in this case Namibia, to be used as materials / inputs originating in either partner state.
This allows for partner states to circumvent some of the "sufficiently transformed" criteria, when materials / inputs are imported from a defined country and count those goods as originating.


#3
Full cumulation
Red widgets indicate materials / inputs that have not undergone sufficient transformation to gain originating status.
Green widgets indicate goods that have undergone sufficient transformation and therefore have preferential treatment.
Aggregating cumulation to cross the sufficiently transformed threshold
Full cumulation permits partner states to consider materials / inputs that are not yet originating in the individual partner states or the defined country.
Full cumulation simply demands that the origin requirements are fulfilled within the PTA as a whole.
If the aggregate cumulation in the PTA and/or the defined country crosses the "sufficiently transformed" threshold, the resulting product is considered originating.

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