

Training Guide for Vetting International Trade Agreements

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Reintegration Action Plan for the AAAF program

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INTRODUCTION OF THE AUSTRALIA AWARDS IN AFRICA FELLOWSHIP ON INTERNATIONAL TRADE

For more than 60 years, the Government of Australia has supported the education of emerging leaders from developing countries. From the Colombo Plan in the 1950s to today's Australia Awards, more than 80,000 men and women have received an Australian Government scholarship to study in Australia. Each year, the Government invests approximately \$320 million in the Australia Awards program, funding around 3,500 scholarships, fellowships and short courses¹. The African Awards are aimed towards tackling Africa's economic development needs, from the perspectives of capacity- building needs within the continent.

The Trade and Negotiations short course is specifically aimed at addressing the issues facing the continent with respect to regional integration and cooperation. This entails addressing some of the main issues on how African countries respond to the international trading environment within the World Trade Organisation and within the African Free Trade Continental Agreement. The fellowships offered by the Australian government are therefore aimed at building the capacity of government workers in the field of trade as well as strategic private sectors in order to change the landscape of trade in Africa altogether. Trainees are thereafter expected to target one area of their daily work that they can affect with the knowledge that they received from these courses. This is referred to as the reintegration plan.

My integration plan is to prepare this manual/ quick tool kit for lawyers working within the trade team/division of the international and comparative law department. This manual is not targeted to be an alternative to due diligence and research required of the lawyers in the international comparative law department in vetting international trade agreements, but rather to serve as a guide and reference tool to more available material. It would be impossible to cover every aspect of international trade law in this document. It is however aimed at providing the reader with a general overview of the subject as well as serve as a pointer to the key facts surrounding the topics, especially those of a legal nature. It promises to also provide the reader with some perspective and a basic understanding of international trade within the context of Nigeria. I hope that this trade guide/toolkit will assist lawyers currently working in the trade division on how to vet trade documents sent to the Federal Ministry of Justice.

The main source of materials used in preparing this toolkit is the WTO website, as well as the lecture notes that were provided by the 2018 trade and negotiations course facilitators. All references duly provided.

¹ Australia's 2017 Foreign Policy white paper, page 111.

DEFINITION OF KEY CONCEPTS

Tariff

What is a tariff? For our purposes, a tariff can be simply defined as a **TAX** on an imported good. Tariffs are imposed by the Government and serve a variety of purposes. Tariffs may be used as a means to generate income for the government. It can also be used as a means of regulating imports. For example, the federal government of Nigeria in 2015 imposed a high tariff to increase the cost of clearing second-hand cars, to discourage imports and increase local consumption of Nigerian produced/ assembled cars, such as *innosun and Peugeot* Nigeria. The disadvantage however on the imposition of tariffs is that the impact is often felt by the consumer, i.e. Nigerian citizens who pay the cost by purchasing this more expensive good. Under the WTO, member states have bound and applied tariff. Bound tariffs are specific commitments made by individual WTO member governments. The bound tariff is the maximum MFN tariff level for a given commodity line. When countries join the WTO or when WTO members negotiate tariff levels with each other during trade rounds, they make agreements about bound tariff rates, rather than actually applied rates.² The applied rate is the amount which countries use on an on-going basis. This amount must be lower than the bound rate and applied to all WTO member states fairly.

WHAT IS THE DIFFERENCE BETWEEN A TARIFF AND A GOVERNMENT TAX?

The simple difference is that while a tariff is a tax on an imported good, a government tax is a fee on a good already in the country. This can be in the form of VAT (Value added tax) or ad valorem depending on the circumstances.

Quotas

A quota is where the government of Nigeria places a limit on the number of goods that can be imported into the country. Quotas are often difficult to implement, as they require a high level of monitoring systems, which can prove expensive. The World Trade Organisation (WTO) does not support the Quota system and countries that are members to WTO very minimally use quotas. There are however exceptions to this rule, e.g. where countries want to reduce their tariffs using a phase-down period or quota. (I will discuss more about this in a later chapter).

Art. XI GATT 1994 is the main provision regulating quantitative restrictions (QRs). The scope of this provision includes all prohibitions or restrictions other than tariffs or other taxes applied or maintained by a WTO Member on the importation or exportation of goods, which can be made effective through quotas, import or export licensing procedures, or other measures³. Members' have an obligation to quantity restriction notification as well as its WTO justification for the purpose of transparency.

²https://wits.worldbank.org/wits/wits/witshelp/content/data_retrieval/p/intro/c2.types_of_tariffs.htm

Accessed on 10 February 2019.

https://wits.worldbank.org/wits/wits/witshelp/content/data_retrieval/p/intro/c2.types_of_tariffs.htm

³ WTO website 2018, < https://www.wto.org/english/tratop_e/markacc_e/qr_e.htm >accessed on 25th October 2018.

WORLD TRADE ORGANISATION

In brief, the World Trade Organization (WTO) is the only international organization dealing with the global rules of trade. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible⁴. Unlike many other Conventions, the World Trade Organisation consists of several agreements to which member countries must commit to being bound by most of the WTO agreements and some other optional plurilateral related agreements. The Agreements under the World Trade Organisation seek to cover all aspects of trade in goods and services. It has about 32 Agreements in total. Note that the WTO rules are as a result of negotiations between its members. The current set is largely the outcome of the 1986 to 1994 Uruguay Round of negotiations which included a major revision of the original General Agreement on Tariffs and Trade (GATT). Through these agreements, WTO members operate a non-discriminatory trading system that spells out their rights and obligations. Each member receives guarantees that its exports will be treated fairly and consistently in other members' markets. Each promises to do the same for imports into its own market.⁵ Prospective member states have to make commitments particularly under the GATT, General Agreement in Trade in Services (GATS), amongst others in order to be considered for membership. The overall effect is however that upon becoming full-fledged member states, they would then be bound by all other agreements of the WTO. In understanding the provisions of the GATT, the University of Lancaster UK provides a short document available for download online⁶ that assists in summarising all the provisions of GATT. This is a useful tool for any lawyer for easy understanding of the generality of the text.

One important point any lawyer needs to note about the WTO system is the dispute settlement mechanism as this is necessary for understanding the enforcement regime of the WTO. Governments can bring disputes to the WTO against other member states if they think their rights and obligations under the WTO are being violated. A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow WTO members consider to be breaking the WTO agreements, or to be a failure of its obligations. More often than not, a third group of countries can declare that they have an interest in the case and enjoy some rights (this is the category in which Nigeria and many other developing countries have majorly played a role under the WTO system). For more information about the dispute settlement mechanism of the WTO such as statistics, and timelines for cases, please check the WTO site.⁷

Nigeria is a founder member of the WTO, and as such has been a WTO member since 1 January 1995. Since that time; it has had a total of 6 cases to which it has been a third party. So far Nigeria has not initiated a complaint against any member state, nor has it had any country initiate a complaint against it. The 6 cases to which it was a third Party are: the US-

⁴ https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm accessed on 10 February 2019

⁵ WTO IN BRIEF document available on https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.pdf assessed 29 January 2019.

⁶ download document using this link address <http://www.lancaster.ac.uk/staff/ecarar/gatt%20articles.doc>

⁷ See https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ1_e.htm - for additional information on the WTO dispute resolution mechanism.

Shrimp case brought by India Malaysia Pakistan and Thailand against the US (1996)⁸; Australia — Tobacco Plain Packaging cases brought against Australia by Ukraine (2012)⁹, Honduras (2012)¹⁰, Indonesia (2013)¹¹, Cuba (2013)¹² and Dominican Republic (2012)¹³. I will briefly discuss some fundamental/key terms necessary for understanding the WTO system.

a. National Treatment Principle (NTP)

NTP is one of the key principles of the WTO. It means that foreign goods from members states are to be treated no less favourable than like goods/ products of national origin. For example, *garri* imported from Cameroon (WTO member) into Nigeria (WTO member), should not be subject to more regulations than the *garri* produced by the women of Edo and Delta states in Nigeria. Therefore, the conditions for market access given to Edo *garri* should be the same level of market access given to Cameroonian *garri*.

b. Most Favoured Nation (MFN)

The MFN principle is also a very important WTO concept. It implies the principle of non-discrimination with respect to foreign trade partners from member states of the WTO. This implies that whatever favourable tariffs or treatment Nigeria (WTO member) gives to Cameroon (WTO member) must be extended to **ALL** members of the WTO. The implication is that Nigeria cannot choose to give Djibouti a tariff of 5% for its imported mangos, but decide to give South Africa 10% for imported mangos just because it feels that South Africa is a bigger country with more economic vibrancy. The main exemption to the MFN principle is in Article XXIV of GATT which covers free trade agreements¹⁴.

c. Special and Differential Treatment

This is accorded to developing and least developing state in the operationalization of the WTO. Under this principle, member states are given some sort of leeway to comply with the obligations under the WTO. Article XVIII of the GATT exempts developing countries from the same strict trade rules and disciplines that apply to developed countries. The least developed

⁸ Case summary is available here

https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds58sum_e.pdf

⁹ Case summary is available here- https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm

¹⁰ Case summary available here https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm

¹¹ Case summary available here

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm

¹² case summary available here

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm

¹³ case summary available here

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm

¹⁴There are other exceptions to the MFN principle under GATT Article XXIV on goods and GATT Article V on services. There is also some flexibility agreed by WTO members for FTAs between developing countries. There are also exceptions with respect to balance of payment crises, national security exceptions, or general exceptions in areas such as health, environment or public morals (Keith Wilson Director, Institute of International trade, University of Adelaide)

countries are exempt from any reduction commitments and as such have no specific commitments. The WTO has now concretised the implementation of these Special and Differential provisions in a document available on its website.¹⁵

d. Harmonised System (HS) Codes

The Harmonised System (HS) of goods classification is administered by the World Customs Organisation. All WTO Members, and a number of non-WTO Members use the HS codes to define and identify goods. The HS codes are a string of numbers (or digits), the first six of which are standard for all countries, while subsequent digits are determined by individual countries. The HS codes are used by WTO members in their schedule of concessions and in the definitions of product coverage for a number of WTO agreements including the Agreement on Rules of Origin, and the Agreement on Trade Facilitation (a sample of a schedule is provided below with HS codes). The HS codes are also used in all African bi-lateral, regional and continent-wide trade agreements. The HS is normally updated by the world customs organisation every 4-6years.¹⁶

e. Anti-dumping and countervailing measures

Dumping occurs when a company from one country exports goods to another country at a price *below the price it normally charges in its own home market*¹⁷. This leads to unfair competition between the imported good and local good, because the unfair lower price of the imported one is preferred by consumers, to the detriment of the more expensive local products. It is important to point out here that dumping has not occurred if the lower price of the imported good is the normal price charged for that good in its own domestic market.

In order to prevent dumping, The Agreement on Implementation of Article VI of the GATT governs the application of anti-dumping measures by members of the WTO. Anti-dumping measures are unilateral remedies which may be applied by a Member after an investigation and determination by that Member. This investigation must be in accordance with the provisions of the Anti-dumping Agreement, which provides detailed rules on determining if dumping has occurred, what constitutes injury to domestic producers of like products, and the proof required to show a causal link between the dumping and the resulting injury to local producers. A countervailing measure is imposed by a government to counter the effects of dumping and other unfair market practices. It is important to remember here that such countervailing anti-dumping measures can be challenged at the WTO by the exporting country should it consider its company to have been unfairly accused of dumping its goods.

¹⁵ see https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (accessed on 13 April 2019)

¹⁶ https://www.wto.org/english/res_e/reser_e/ersd200802_e.htm accessed on 10 February 2019

¹⁷ https://www.wto.org/english/tratop_e/adp_e/adp_e.htm accessed on 11 February 2019

UNDERSTANDING NIGERIA'S COMMITMENTS ON INTERNATIONAL TRADE AND THE WORLD TRADE ORGANISATION (WTO)

Nigeria is a signatory to the World Trade Organisation and has been since 1995. She is also a member of the Economic Community of West African States (ECOWAS), which is a customs union. Before vetting any Bilateral Agreement or MoU, it is important to bear at the back of one's mind the implications of being within a customs union and its inherent effect on bilateral negotiations. One of the implications of being in a customs union is that Nigeria is bound to apply a common external tariff to all non- ECOWAS members States. Therefore, in conformity to this commitment, Nigeria cannot negotiate for the imposition of tariffs that would be different than what is already in place by ECOWAS. This places a limit on what Nigeria can negotiate with other countries that are not members of the ECOWAS customs union.

In the same vein, Nigeria has made commitments under the WTO. In accordance with the most favoured nation principle, it cannot give any WTO member state a better tariff than those to which it has committed under her schedule of commitments. Kindly refer to the WTO website to see Nigeria's schedule of commitments¹⁸.

A. GATT 1994 and Goods

The General Agreement on Trade and Tariffs was the first worldwide multilateral trade agreement which sought to eliminate tariffs and other barriers to trade.¹⁹ The purpose of the GATT is also to ensure the promotion of free trade, on the foundational principles of most favoured nation (MFN) and the National Treatment principles (NTP). The GATT agreement recognizes conditions under which temporary measures can be put in place that hamper import and export..²⁰ GATT requires that countries make market access obligations through their schedule of commitment. Nigeria's commitment under GATT can be found on the WTO website.²¹ See the sample below.

¹⁸Nigeria's profile and commitments under the WTO can be accessed here- https://www.wto.org/english/thewto_e/countries_e/nigeria_e.htm

¹⁹Amadeo K, 2018, GATT, Its Purpose, History, with Pros and Cons, How GATT saved the world < <https://www.thebalance.com/gatt-purpose-history-pros-cons-3305578>> accessed on 26th October 2018

²⁰ *ibid* pp 1.

²¹ *ibid*

PART I - MOST-FAVOURED-NATION TARIFF

SECTION II - Other Products

Tariff item (HS Codes)	Description of products	Base rate of duty			Bound rate of duty		Initial	Other duties
		Ad valorem (%)	Other	U/B	Ad valorem (%)	Other	Negotiating right	and charges
0305	Dried fish, whether or not salted, not smoked							
0305.51	Cod (gadus morhua, gadus ogac, gadus macrocephalus)		2d per pound weight	B	50		NO	80%
0305.59	Other		2d per pound weight	B	50		NO	80%
2801	Flourine, chlorine, bromine and iodine				60			80%
2802	Sulphur, sublimed or precipitated colloidal sulphur				50			80%
2805	Alkali or alkaline-earth metals, rare earth metals, scandium and yttrium, whether or not intermixed or inter-alloyed; mercury				50			80%
4816	Carbon paper, self-copy paper and other paying or transfer papers, duplicator, stencils and offset plates, of paper, whether or not put-up in boxes				80			80%

These schedules are often drafted by professional economists and negotiated by trade experts. However, the bound tariffs that were negotiated at the point of membership to the WTO are fixed and cannot be changed without the agreement of whichever WTO Member(s) that may object to any change. Remember though that the applied tariff can be lower than the bound tariff but never higher. Remember also that due to its membership of the ECOWAS customs union, Nigeria's applied rate for non-ECOWAS countries will be the agreed ECOWAS common external tariff rate.

B. General Agreement on Trade in Services (GATS)

Both principles of MFN and NTP apply under the GATS agreement. The Agreement came as a result of the Uruguay round of negotiations and was created as a multilateral framework to cover the services sector. Commitments under the GATS just like in the GATT are one way, and members through their schedule of Commitments are free to indicate which sectors they wish to progressively liberalize. Since services are intangible, tariffs cannot be applied to them. This services schedule provides transparency and predictability for investors and other trading partners in member states. GATS recognise four modes of supply as follows²²:

- Mode 1: Cross border supply - from the territory of one member state into the territory of any other member state.
- Mode 2: Consumption abroad- takes place in the territory of one member state which provides service to a consumer from another member state.
- Mode 3: Commercial Presence- by a service supplier of one Member state, establishing its commercial presence in the territory of any other member, this is particularly the case for investments.
- Mode 4: Presence of natural persons - this occurs where individuals from one member state move to the territory of another member state, temporarily and for the purpose of work in the territory of this other member state.

Understanding the Modes of supply can be a bit complicated.

Due to the intangibility of services, GATS has devised the means to regulate a country's position in trading in services by requiring that countries openly commit, via their schedule of commitments, to what specific services they are open to and the ones that they are not. In its services schedule, a country reflects the level of liberalisation it wants to extend using the 4 modes of supply of services listed above. A good example is where Nigeria wants to increase foreign investment in telecommunications. It can do so by liberalising the telecommunication sector through the modes 1-4 above. However, this does not mean necessarily that the sector would be open to all comers- for example; Nigeria could stipulate that only a limited number of Internet Service Providers or mobile phone companies would be allowed to bid for licences to operate. See the table below.

²² See Art.1(2) of the General Agreement on Trade in Services <Wto https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm> accessed on 25th October 2018

TABLE A (Services schedule of a country wishing to liberalise its telecommunication sector)

Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
Telecommunication services	<p>Mode (1) None</p> <p>Mode (2) None</p> <p>Mode (3) Companies wishing to provide mobile phone and related services would require a licence to operate- a maximum of three such licences will be current at any one time. All companies must be registered under the Companies, and allied matters Act LFN 2004</p> <p>(4)None except as stipulated in the Horizontal schedule.</p>	<p>Mode (1) None</p> <p>Mode (2) None</p> <p>Mode (3) None</p> <p>Mode (4) None except as stipulated in the Horizontal schedule.</p>	

Key: Modes of Supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

“Unbound” - means no commitment, i.e. no market access, no national treatment. This sector is closed for any foreign participation.

“Unbound except” – means no commitment except in xyz specific area (*most times schedules would read unbound except as per commitments in the horizontal schedule. The horizontal schedule is where countries give a general picture of their overall/generalist commitments under the four modes of supply in services*)

“None” – means no limitation on access /discrimination. i.e. There is complete liberalisation.

“None except” – means no limitation on access except for xyz (e.g. under mode four a country may state no limitation except for the issuance of a work permit as per horizontal schedule)

In practise, countries would usually stipulate that Mode 4 (relating to managers and technical staff that would be temporarily in their country to implement or administer foreign investment) would enter the country subject to the country’s normal immigration control rules for temporary entrants. This is what the horizontal schedule would stipulate.

C. Trade-related aspects of Intellectual Property Rights (TRIPS)

TRIPS is an agreement under the WTO that covers intellectual property rights. It formed part of the Agreements negotiated during the Uruguay round of 1986-1994. It highlights the significant links between intellectual property and trade²³. The Agreement covers five areas:

- i. The General provision and basic principles as it related to international intellectual property;
- ii. the minimum standard of protection for intellectual property rights (IPRs);
- iii. the procedures member states should provide for the enforcement of the rights within their respective territories;
- iv. how to settle disputes on intellectual property between members of the WTO, and
- v. Special transitional arrangements for the implementation of TRIPS.²⁴

The MFN and NTP also apply under the TRIPS agreement. The general objective of the agreement is to contribute to technical innovation and the transfer of technology to the extent that both the user and the producer are protected. It seeks to protect patents, copyrights, trademarks, geographical indications, integrated circuits layouts designs and trade secrets. Nigeria is a member of the World Intellectual Property Organization (WIPO); we have a copyrights office in Abuja. WIPO is a UN agency that leads the development of an effective international intellectual property system that enables innovation and creativity for the benefit of all²⁵.

SOME ANNEX 1A AGREEMENTS

There are currently 12 more specific subsidiary agreements under the GATT agreement on different aspects of trade in goods, a few examples are discussed below:

AGREEMENT ON AGRICULTURE

The overall aim of the Agreement on Agriculture is to establish a fairer trading system that will increase market access and improve the livelihood of farmers around the world²⁶. It covers Market access, domestic support that stimulates production for export and export subsidies and other government support. Market access ensures that all members abolish quantitative restrictions and non-tariff barriers by replacing these with tariffs. Least developed countries are not obliged to reduce tariffs but must be committed to their bound tariffs²⁷. Domestic support measures are categorised into Amber box (to be reduced), green box (permitted) and the blue box (subsidies to limit production) and Export competition²⁸.

²³ See WTO website on Trips < https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm> accessed on 26th October 2018

²⁴ *Ibid at 6*

²⁵ WIPO website < <http://www.wipo.int/about-wipo/en/>> assessed on 26th October 2018

²⁶ WTO website, 2018, < https://www.wto.org/english/tratop_e/agric_e/agric_e.htm> accessed on 25th October 2018.

²⁷ Khor M. *The WTO agriculture Agreement: features, effects, negotiations and what is at stake*, pp 1. Third World Network, 2003.

²⁸ *Ibid at pp3*

CUSTOMS VALUATION AGREEMENT

The WTO Valuation Agreement is formally known as the Agreement on Implementation of Article VII of the GATT. All members to the World Customs Organization (to which Nigeria is one) adopts the use of Hs 6 Digit coding system on all goods in line with the International Convention on the Harmonized System²⁹. It also commits for all of its goods to be classified with the harmonized system of 4-6 digits product-specific codes as used by all other members of the WCO.³⁰

SANITARY AND PHYTOSANITARY MEASURES AND TECHNICAL BARRIERS TO TRADE

This agreement under the WTO regulates the application of food safety and animal and plant health regulations and standards. Member countries are encouraged to use international standards and guidelines. Such standards must, however, be scientifically justifiable³¹. The Agreement however recognizes and allows different countries use different standards and different methods of inspecting products such as the CODEX, OIE and IPPC organizations.

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

In the Tokyo Round of multilateral trade negotiations (1974-79) the Agreement on Technical Barriers to Trade (TBT) was negotiated. The TBT Agreement seeks to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade³². Though not directly restricted to SPS, it also covers the technical requirements resulting from food safety and animal and plant health measures, including pesticide residue limits, inspection requirements and labelling.

ANTI-DUMPING AGREEMENT

Under Art VI of GATT, member states may apply countervailing duties and other measures to goods originating in other members which are dumped and /or enjoy export subsidies under specific conditions:

- i. A determination has been made that dumping is occurring;
- ii. the domestic industry producing the like product in the importing country is suffering material injury, and
- iii. that there is a causal link between the two.

There has to however be necessary investigation and procedure of rules for the initiation and conduct of investigations.³³

²⁹World Customs organisation 2018, legal text of the international Convention on the harmonised system < http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx> accessed on 25th October 2018

³⁰. Lecture notes prepared by Stoler A. 2018 AAAF, on *what it means to be a WTO member and the obligations of membership*

³¹ WTO website, 2018 < https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm > accessed on 25th October 2018.

³² WTO website 2018< https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm#TRS >assessed on 27th October 2018

³³ WTO website, 2018 < https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm > assessed on 27th October 2018

AGREEMENT ON SAFEGUARD MEASURES

Art. XII GATT recognises the right of members to the use and subsequent removal of emergency trade measures for the purpose of safeguarding the balance of payments position of members. A safeguard action may be in the form of restricting imports temporarily to protect a specific domestic industry³⁴. Unlike anti-dumping and countervailing measures, the application of a safe guard measure does not depend on unfair trade practices but can be due to a surge in imports. However, both countervailing measures and safeguard measures can only be applied temporarily.

Other subsidiary Agreements under Annex 1A on goods include-

- Agreement on trade-related investment measures;
- Agreement on pre-shipment inspection;
- Agreement on rules of origin;
- Agreement on import licensing;
- Agreement on subsidies and countervailing measures, and
- Trade Facilitation Agreement

TRADE FACILITATION AGREEMENT

The trade facilitation agreement is the newest agreement of the WTO. On 27 November 2014, the General Council adopted the Protocol of Amendment to insert the trade facilitation Agreement into annex 1A of the WTO Agreement ('the Protocol') it entered into force on 22 February 2017, and it applies only to WTO members who have accepted it³⁵. The tenet and spirit of this agreement are to ensure that member states take specific steps to progressively facilitate trade, such as publication on information on importation and exportation procedures; establishment of enquiry points; advance rulings³⁶ etc. Overall, Trade facilitation aims to reduce trading costs associated with goods moving across borders. It is therefore mostly focused on goods. The indirect cost of poor trade facilitation is very high. In order to be cost effective, we need to reduce the cost of logistics. Logistics are a function of time. We need to reduce the time and cost of logistics, time delays at borders, customs check points along the roads, clearance through ports. The TFA is more about customs facilitation than trade in general. The Agreement recognises three different levels of categorisation:

- a. Category A- a country can achieve within itself and on its own (in one year all category A provisions should have been concluded)
- b. Category B- I can do it within extra time, but I need technical assistance to achieve this.
- c. Category C, I cannot do it without technical assistance.

It also recognises Customs grouping into colour coded groups. The Green lane, Blue lane, Yellow lane and Red- for determining which level of documentation is required for containers for customs. This helps Customs have a predetermination as to who should be checked and who should not be checked. There is a Safe framework under the world customs

³⁴ WTO E-learning journal, Introduction to Safeguards in the WTO pp 2. Accessed on 25th October 2018 via web link- https://ecampus.wto.org/admin/files/Course_385/Module_1591/ModuleDocuments/SG-L1-R1-E.pdf

³⁵ https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm accessed on 13 April 2019.

³⁶ See Section 9 of the trade facilitation agreement defines an advance ruling as – “a written decision provided by a Member to the applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to: (i) the good’s tariff classification; and (ii) the origin of the good”.

organisation where large companies undergo self-assessment by customs to determine an authorised economic operator to trade within a particular region when a company is granted the cleared status, their goods can travel within the region with preferential treatment.

RULES OF ORIGIN

A very robust understanding of rules of origin (RoO) is key in vetting trade agreements as a trade lawyer. The world is a global village; therefore products often comprise materials/components from more than one country, or origin if you like. This is why a Samsung phone can state on the phone box that it is made in China, even though some of its components and the intellectual property rights may be from other countries.

Three important points about RoO:

- (i) Every trade agreement has its own UNIQUE set of RoO. These rules are established during the negotiations that resulted in the final trade agreement. The implications of this are that a product that qualifies for concessional treatment in one agreement (e.g. AGOA) will not necessarily qualify under any other agreement (such as the AfCFTA). In each case, in order to determine if the goods qualify you need to ask the question “what do the RoO of this specific agreement say about this product?”
- (ii) Trade agreements can have simple RoO or product-specific rules. Simple RoO is where there are a set of common rules that apply to all products regardless of what that product is. An example of an agreement with simple RoO is ECOWAS where the same set of rules apply to all products. An example of an agreement with product-specific rules is the AfCFTA where the rule or combination of rules that apply to each tariff line has to be negotiated and agreed separately. While product-specific rules are more complicated to administer for customs officials, some countries believe that the advantage of having product-specific RoO is that these can be more protective of products that are of special interest to their domestic producers.
- (iii) RoO is often referred to as the “fine print” of trade agreements as they determine which products qualify for the concessions resulting from that trade agreement.³⁷ Only goods which qualify as originating from signatories to the trade agreement can benefit from these concessions. In this way, the RoO in bilateral cooperation or free-trade agreement prevents transshipment of goods from non-signatory countries.

So what determines if specific goods qualify as originating?

While, as we have just noted, each trade agreement has a unique set of RoO that determines which products qualify for its concessions and which do not (i.e. do the goods qualify as originating from one of the parties to the agreement), there are four internationally accepted types of rules that can be applied:

- (i) **Wholly Obtained rules** – in all trade agreements, goods that contain no imported content are considered to be wholly obtained and therefore qualify for the concessions on offer under that trade agreement. For example, mineral products (such as crude oil) mined or extracted from the soil or territorial waters of a state or crops grown and reaped there are considered to originate. However, trade negotiators may agree to qualify these rules. For instance, in some trade

³⁷ Mike Humphrey lecture notes from AAAF 2018 “ Rules of Origin part1”

agreements originating processed chicken products must be produced from chickens that were both born and raised in that country. There are also sometimes specific rules about fish that are caught in oceans within 12 miles of its coastline which are different from those caught in the country's 200-mile exclusive economic zone³⁸.

NOTE: the following rules determine what must be done to the IMPORTED components or content of a final product to enable the final product to be classified as originating in that country. This is known as qualifying transformation.

- (ii) **Change in tariff heading rules** – this is where the rule that applies to that product states that the HS code for the imported contents or components must be different from the HS code of the final product. For example, men's clothing (HS code 6105) made from imported cotton cloth (HS code 5208) would qualify as originating under a rule requiring a change of tariff heading;
- (iii) **Value-added rules** – these are rules where a limit is set on the imported percentage of the final price of the good. These rules can be worded in a number of ways, but they usually define the percentage of imported or local content that is required. There are also a number of different ways that the "price" of the final product can be determined (factory cost, factory gate, FOB, CIF, etc). For instance, goods containing imported content qualify as originating under the ECOWAS RoO 'where their production requires the use of materials which have received a value added of at least 30% of the ex-factory price of the finished goods'. So, in this case, the requirement is that the imported content cannot exceed 70% of the ex-factory price of the final product. Whereas the RoO for nucleic acids and their salts (HS Code 2934) under the ECOWAS-EU EPA requires that the imported 'materials used does not exceed 40% of the ex-works price of the product'; and
- (iv) **Process rules** – these rules require that the imported raw materials or components have a specific manufacturing process applied to them for the final product to be considered to have originated in the country where the process took place. For instance, under the ECOWAS-EU RoO dressed fur skins (HS 4302) must have undergone 'bleaching or dyeing, in addition to cutting and assembly of non-assembled tanned or dressed fur skins'. In this case, the process required to be carried out on the imported non-assembled tanned or dressed fur skins is either bleaching or dyeing AND cutting and assembly of the final product.³⁹

An example of a bad rule of origin clause

Country of Origin shall be determined in accordance with the laws and regulations of each Party and with an International agreement to which both parties are Parties. The Parties reserve the right to request a certificate of Origin when importing any goods.

Leaving the determination to the rules of respective Parties to determine is never a good idea, as this can lead to transshipment if the law of the country where the transshipment occurs does not prohibit same.

³⁸ These limits are defined in the United Nations Convention on the Law of the Sea of December 1982, see Section 2 on the limits of the territorial sea and Part V on the Exclusive Economic zone.

³⁹ It should be noted that rules that state "manufacture in which ..." are not necessarily process rules, as 'manufacture' is not a process as such.

KEY STEPS TO VETTING A BILATERAL TRADE AGREEMENT OR MEMORANDUM OF UNDERSTANDING

As a state counsel within the trade division of the department, sometimes, it might be confusing to ascertain what is really required in vetting a trade agreement. Note that no one size fits all/ blanket approach can be used for all agreements owing to their peculiarities and focus. The following steps may, however, be able to better guide you in identifying loose ends in a trade agreement and with your submission to the directorate.

1. Check whether the other country is a member state of the WTO, ECOWAS or AfCFTA (if it has entered into force). If it is, note that Nigeria would be unable to offer that country preferential treatment, in breach of the MFN and NTP, except if this is a proposal to enter into a free trade agreement between that country and ECOWAS under Art. XXIV of the GATT.
2. Where this is a proposal to enter into a free trade agreement, check the obligation Nigeria has as a member state of the ECOWAS customs union to apply the ECOWAS common external tariff. What is a common external tariff? In a customs union, one of the criteria is that there is a common external tariff that must be applied by all members of the customs union to any non-member state. A good example of this arrangement is at the European Union. This will also guide you vetting of an agreement that purports to give Nigeria a lower tariff than the common external tariff where such a country is a part of a customs union that Nigeria is not a signatory to.
3. Make sure that the rules of origin do not encourage transshipment, where an item can be brought and repackaged and sold with the ECOWAS region as made in Nigeria, meanwhile the goods did not undergo sufficient transformation.
4. Ensure that where the country is a member state of the WTO, the agreement does not contradict Nigeria's commitments made in the WTO. Also, it is important that you check that a country has fully acceded to WTO as a state Party before drafting in provisions of the WTO in their favour such as National treatment, MFN etc.
5. In the vetting of bilateral trade agreements ensure that sufficient attention is paid to the services aspect of the Nigerian economy. Remember that Nollywood and the Nigerian music industry is our second largest source of income as a nation. Ensure that in vetting an agreement on cultural exchange and trade, e.g. ensure that the trading in services are included and couched in such a way that Nigeria would in no way be at a disadvantage.

CONCLUSION

I hope that this guide/ manual has brought you useful perspectives and a fresh understanding of the basics in international trade, I also hope that I will help you in your daily work better understand what is expected from Nigeria in entering into 3rd Party trade agreements as part of a regional and multilateral platform. Always remember to safeguard against contradictory commitments as well as guard against lopsided benefits. Remember that as a country Nigeria is strong as we aim to foster that strength in ensuring that the regulatory regimes of international trade are liberal enough to invite investors but airtight enough to prevent loopholes.