**Table 6 - Applicable tariffs under existing agreements and AfCFTA**

| Tariff line liberalized under existing agreement between Parties | Tariff line liberalized under AfCFTA | Applicable tariff? |
|---|---|---|
| Yes | Yes | As per AfCFTA, with transition period as per existing agreement (otherwise the AfCFTA would be method to delay implementation of already agreed tariff concessions) |
| Yes | No | As per existing agreement for existing agreement between Parties. For other African countries, MFN tariff applies. |
| No | No | MFN tariff |
| No | Yes | As per AfCFTA |

would initially make offers to countries outside existing preferential arrangements.

*4.2 Most Favoured Nation treatment*

Article 37 of the Treaty establishing the African Economic Community, also referred to as the Abuja Treaty[10] provides that

i) The best treatment provided to an African country should be accorded to all African countries

ii) If African countries provide a tariff preference to a non-African country, such tariff preference must be provided to all African countries:

**Article 37 - Most Favoured Nation Treatment**

1. Member States shall accord one another, in relation to intra-community trade, the most-favoured-nation treatment. In no case shall tariff concessions granted to a third State pursuant to an agreement with a Member State be more favourable than those applicable pursuant of this Treaty.

2. The text of the agreements referred to in paragraph 1 of this Article shall be forwarded by the Member States parties thereto, through the Secretary-General, to all the other Member States for their information.

3. No agreement between a Member State and a third State, under which tariff concessions are granted, shall be incompatible with the obligations arising out of this Treaty.

This legal commitment was also incorporated as one of the principles for the AfCFTA negotiations under MFN treatment, agreed by Ministers in 2016[11]:

"Member States shall accord one another, in relation to intra-community trade, the most favoured nation treatment. Any more favourable trade concession accorded to third parties shall be granted to other Member States."

Strict application of this rule would be difficult for various countries. For instance, Tunisia and Egypt have liberalized all their imports from Jordan, a third/non-African country (see Table 7). This implies that according to Article 37.1 of the Abuja Treaty, Egypt and Tunisia must give duty free access to imports from all African countries, without requiring reciprocity from these countries.

Against this backdrop, the Agreement establishing the AfCFTA contains an article titled 'Continental Preferences' which essentially reduced the legal commitment contained in Article 37.1 of the Abuja Treaty:

**Table 7 - Share of tariff lines and imports that remain dutiable for the 3 African countries party to the Agadir Agreement**

| Country | Partner (Country where imports originate) | Share of tariff lines that remain dutiable (%) | Share of imports (value) that remains dutiable (%) |
|---|---|---|---|
| Tunisia | Egypt | 0 | 0 |
| Tunisia | Jordan | 0 | 0 |
| Tunisia | Morocco | 0 | 0 |
| Morocco | Tunisia | 8.7 | 2.7 |
| Morocco | Jordan | 8.7 | 2.2 |
| Morocco | Egypt | 8.7 | 2.4 |
| Egypt | Jordan | 0 | 0 |
| Egypt | Morocco | 0 | 0 |
| Egypt | Tunisia | 0 | 0 |

**Article 18 of AfCFTA Agreement - Continental Preferences**

1. Following the entry into force of this Agreement, State Parties shall, when implementing this Agreement, accord each other, on a reciprocal basis, preferences that are no less favourable than those given to Third Parties.

2. A State Party shall afford opportunity to other State Parties to negotiate preferences granted to Third Parties prior to entry into force of this Agreement and such preferences shall be on a reciprocal basis. In the case where a State Party is interested in the preferences in this paragraph, the State Party shall afford opportunity to other State Parties to negotiate on a reciprocal basis, taking into account levels of development of State Parties.

3. This Agreement shall not nullify, modify or revoke rights and obligations under pre-existing trade agreements that State Parties have with Third Parties.

The implications of Article 18 appear to be the following:

- No obligation to accord the most favourable treatment given to one African country to other African countries. Article 18 applies to preferences extended to third parties.

- The MFN clause only applies to future trade agreements between African and non-African countries. This means for instance that the MFN commitment does not apply to the Agadir Agreement.[12] However, it would apply to countries that are party to an Economic Partnership Agreement (EPA) with the European Union (EU) that will enter into force after the AfCFTA enters into force.

- The extension of preferences is not automatic but subject to reciprocity. This means that another African country can only claim a preference if it gives something in exchange. In a way this inhibits other African countries to benefit from preferences given by an African country to a non-African country. In this context, the 32nd Ordinary Summit of January 2019 "decided that Member States wishing to enter into partnerships with third parties should inform the Assembly with assurance that those efforts will not undermine the African Union vision of creating one African market".[13]

In conclusion, in the area of AfCFTA tariff negotiations where parties liberalize on a reciprocal basis, Article 18 could be of some use for some African countries negotiating with other African countries that have (future) agreements with non-African countries, as it gives the former more leverage in demanding the liberalization of certain tariff lines.

### *4.3 Making schedules of concessions an integral part of the AfCFTA*

Article 7 of the AfCFTA, 'Schedules of Tariff Concessions' stipulates that "each State Party shall apply preferential tariffs to imports from other State Parties in accordance with its Schedule of Tariff Concessions contained in Annex 1 to this Protocol and in conformity with the adopted tariff modalities."

Pursuant to Annex 1 (paragraph 2), "the Schedules of Tariff Concessions shall, once adopted by the Assembly, be appended to this Annex and shall apply to trade among State Parties upon the entry into force of the Agreement in accordance with Article 23 of the Agreement."

The current text implies that tariff concessions would be effective immediately upon adoption by the Assembly once the Agreement establishing the AfCFTA enters into force. In other words, agreed tariff concessions do not to need to undergo a new ratification procedure for them to have legal effect. While this appears expedient, in reality the parliaments in several African countries would probably want to scrutinize agreed tariff concessions, as this is considered the 'meat' of the agreement, as far as it concerns trade in goods.

Furthermore, the current text appears to imply that the adoption of the Schedules of Tariff Concessions is a one-time event. In reality, it would be a challenge to gather all tariff concessions in a big package for adoption by the Assembly, and it would be more probable that the results may take place in steps.

### *4.4 Rules of Origin*

With respect to rules of origin, the outstanding issues, i.e. the issues on which negotiations are yet to be concluded, are listed in Article 42.1 ('Transitional Arrangements') of Annex 2 on Rules of Origin. This includes the substantive rules of origin, as well as various other issues such as treatment of products from Special Economic Zones. Rules of origin will be used to determine the applicability of preferential tariff treatment under the AfCFTA and are also important for the application of trade remedies. The Rules of Origin procedures have been agreed, such as the documentation that need to be submitted to prove origin.

In the absence of agreed substantive rules of origin under the AfCFTA, Article 42.3 stipulates that "Pending the adoption of the outstanding provisions, State Parties agree that the Rules of Origin in existing trade regimes shall be applicable."

This provision appears to safeguard the status quo. At present, a country or customs union might apply different rules of origin depending on the declarations by the importer:

- Non-preferential rules of origin (for MFN imports)

- Rules of origin under regional or bilateral African trade agreements such as the Southern African Development Community (SADC), COMESA, EAC, ECOWAS, or the Morocco-Tunisia FTA.

- Rules of origin under FTAs with non-African countries, such as the Eastern and Southern Africa (ESA)-EU EPA.

At present, the AfCFTA has agreed rules of origin procedures. Once the AfCFTA enters into force, this implies that countries that have ratified the AfCFTA are legally required to make available the following documents for usage by traders: AfCFTA Certificate of Origin (Appendix I), AfCFTA Origin Declaration (Appendix II) and AfCFTA Supplier or Producer's Declaration (Appendix III).

AfCFTA Certificates of Origin shall be issued by a Designated Competent Authority of the exporting State Party on application having been made in writing by the Exporter or, under the Exporter's responsibility, by his authorised representative (Article 19.1 of Annex 2 on Rules of Origin). The AfCFTA Origin Declaration (Appendix II) can be used by 'approved exporters' (as per Article 20) as well as 'any Exporter for any Consignment consisting of one or more packages containing originating Products whose total value does not exceed five thousand US dollars (USD5,000)'. The Origin Declaration is considered a trade-facilitative instrument compared with a Certificate of Origin as it involves lower resource requirements for exporters.

The agreed rules of origin procedures in conjunction with the Transitional Arrangements (in particular Article 42.3, 'Pending the adoption of the outstanding provisions, State Parties agree that the Rules of Origin in existing trade regimes shall be applicable') raise some questions such as:

• For consignments of up to USD 5,000, could exporters from African countries dispense with providing a Certificate of Origin to customs authorities (if that was previously required) and instead fill in the Origin Declaration?

• Could a trader claim applicability of rules of origin contained in an existing FTA that are better than the non-preferential rules of origin? E.g could an importer in Egypt claim applicability of the COMESA rules of origin to products coming from South Africa (not part of COMESA), since COMESA is an 'existing trade regime' of Egypt?

After conclusion of negotiations on the substantive rules of origin, they would be added to Appendix IV ('AfCFTA Rules of Origin') of Annex 2 on Rules of Origin to the Agreement establishing the AfCFTA. How and when would these rules of origin be made legally effective? According to general rules in Articles 28 and 29, the Agreement establishing the AfCFTA is subject to quinquennial reviews which would result in recommendations for amendments, to be adopted by consensus by State Parties. Adopted amendments will enter into force after ratifications by at least 22 State Parties (Article 23 of the Agreement establishing the AfCFTA).

With respect to outstanding issues on rules of origin, State Parties opted for a faster approach, instead of waiting for the next 5 year interval in 2024. Article 42.2 states that "the outstanding provisions referred to in paragraph 1 of this Article shall, upon adoption by the Assembly, form an integral part of this Annex." Yet, this specific rule is silent on when the result of negotiations on the substantive rules of origin and other outstanding issues would enter into force, i.e. when it would be legally binding on the State Parties. This seems to the imply that ratification of the results on the outstanding issues on rules of origin is not needed, as ratification of the initial text covers also whatever is the negotiated outcome in this area.

## 5. Tariff negotiations

The January 2019 AU Summit requested the African Union Ministers responsible for trade to submit the Schedules of Tariff Concessions in line with agreed modalities to the July 2019 summit.[14]

While the end point is clear there are some remaining questions before the achievement of the final objectives. Implementation of the modalities could involve many bilateral tariff negotiations, implying that it could take more time to finalize the tariff schedules.

***5.1 Negotiating partners – who will make and receive offers?***

The tariff modalities state the following about the negotiating parties: [15]

*"10. Member States participating in RECs that are not Customs Unions at the regional level shall negotiate tariff liberalisation with other Member States as individual States.*

*11. Member States that belong to a Customs Union shall negotiate collectively."*

The operational customs unions on the African continent include the Economic Community of West African States (ECOWAS), the East African Community (EAC) and the Southern African Customs Union (SACU). The Economic Community of Central African States (ECCAS-CEEAC), one of the eight Regional Economic Communities (RECs) designated by the African Union as pillars for the implementation of the African Economic Community is in the process of establishing a common external tariff, which is a prerequisite for tabling a common offer. The Economic and Monetary Community of Central Africa (CEMAC), a subset of six countries within ECCAS, has not yet pronounced itself whether its member States will negotiate collectively or as individual member states. All the other countries would have to negotiate individually.

If this is to be executed to the letter, the number of negotiations will be enormous. In a scenario where ECOWAS, EAC and SACU negotiate collectively and all the other countries (29) negotiate individually, the implementation of the modalities would involve 496 tariff negotiations. If CEMAC as a 6-country grouping would negotiate collectively the number would drop to 351 tariff negotiations, which is still a very high number (see Tables 8.1 and 8.2).

In reality, there would be a lower number of tariff negotiations because of the following: