

BRIEFING NOTE No. 98

Analysis of the implementation of the African Union's 0.2% levy

PROGRESS AND CHALLENGES

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SUMMARY

In July 2016 the African Union decided to introduce a 0.2% levy on eligible non-African imports to finance its operations, programmes and peace and security operations. This decision stemmed from the realisation that, while the AU Member States contribute substantially to the financing of the Union's daily functioning, the implementation of its priorities has been dominated by external funding, especially from the European Union and from individual European Member States.

It is not the first time that African countries discuss and decide on financing regional organisations. In fact, the issue has been on the table since the very creation of the AU back in 2001. However, this was the first time Member States have discussed its concrete implementation and, in 2017, some African countries started taking steps to turn the decision on the 0.2% into reality.

However, a number of implementation issues arose in the course of the year, requiring further clarifications and dialogue. These ranged from technical and legal issues related to the implementation of the levy, to the accountability around the use of funds. As a result, the discussion on the implementation of the 0.2% needs to be viewed in the broader context of reforming the AU's financing and budget processes.

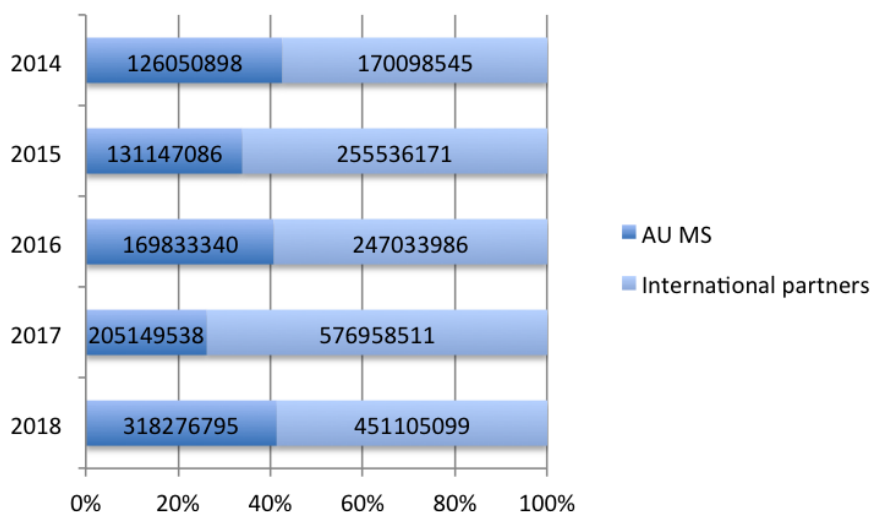
In this Brief, we look back at the year 2017. We look at the progress on the process within which the implementation of the 0.2% levy is being discussed. We then focus on one of the contentious issues raised by African Member States, namely the legality and the universal applicability of the 0.2% levy. We then share some observations on the way forward for a successful implementation.

1. The decision to implement the 0.2% levy¹

Securing reliable, predictable and sustainable funding is one of the key agenda items within the African Union (AU) since its launch in 2001. At different moments, AU actors have expressed concern over the growing reliance on external partners to finance the continental integration and development agenda. The Constitutive Act² of the AU promotes the self-reliance of the Union.³ Similarly, Agenda 2063's Aspiration number 7 wishes for Africa to become a strong, united and influential global player, and to be "fully capable and have the means to finance her development".⁴ The Executive Council and the AU Assembly have taken various decisions on finding alternative sources of financing the Union. The Organisation of African Unity (OAU) Heads of State and Government, during the 2001 Lusaka Summit⁵, authorised the Secretary-General to undertake studies, with the assistance of experts, to identify alternative modalities of funding the activities and programmes of the AU - bearing in mind that the Union cannot operate on the basis of assessed contributions from Member States only - and to make appropriate recommendations. In addition, in June 2006 the Executive Council adopted a Decision⁶ mandating the AU Commission (AUC) in consultation with member states to undertake further analytical work to evaluate the impact of the various funding proposals on various economies, particularly on national budgets, trade, investment (including legal implications of agreements) and business environment, and how they would provide sustainable revenue to the AU. More so, the AU Summit adopted the July 2007 Accra Declaration⁷ which called for the establishment of a Ministerial Committee to identify additional sources of financing the activities of the AU.

Yet, the AU continued to struggle with securing reliable funding from its member states. By the time the Union celebrated its 10th anniversary, its funding structure continued to rely on international partners contributions as illustrated in the visual below:

Visual 1: Contributions to the AU's budget 2014 - 2018 (in US\$)



¹ The authors would like to express their gratitude to those who commented on earlier versions of the paper and accompanied us in our reflection process, particularly Brendan Vickers and Isabelle Ramdoo as well as other WTO experts and African member state representatives.

² Organisation of African Unity, [Constitutive Act of the African Union](#), 2000, Lome, Togo. Came into force on May 26, 2001.

³ Ibid, article 4(k).

⁴ African Union, [Agenda 2063 Popular Version](#), 2013.

⁵ African Union Assembly of Heads of State and Government, [Decision on the Implementation of the Sirte Summit Decision on the African Union AHG/Dec.1 \(XXXVII\)](#), Thirty-seventh Ordinary Session/ Fifth Ordinary Session of the AEC, 9- 11 July 2001, Lusaka, Zambia.

⁶ African Union Executive Council, [Decision on Alternative Sources of Financing the AU EX.CL/Dec.285 \(IX\)](#), Ninth Ordinary Session, 25- 29 June 2006, Banjul, The Gambia.

⁷ African Union Assembly, [Accra Declaration Assembly/AU/Decl.2\(IX\)](#), Ninth Ordinary Council, 1- 3 July 2007, Accra Ghana.

The bulk of the funding was aimed at peace operations; an area the AU argues should be tackled collectively as it relates to international stability. This causes the financing for other areas of intervention in the AU to remain meager. The reliance on the international partners to fund programmes posed risks, for instance, through the imposition of conditions on how the money could be spent, which in turn raised questions on the ownership and sustainability of initiatives.⁸ As a result, some priority programmes on the continent are not funded, as they are not priorities for international partners. This mismatch of priorities reinforces the need for self-financing of both AU operations and programmes.

In an attempt to move towards the identification of concrete sources of income for the AU, the July 2011 AU Summit adopted a Decision⁹ on financing the Union, calling for the setting up of a High Level Panel of Eminent Personalities to engage member states on finding alternative means of financing the AU. The former Nigerian President Olesugun Obasanjo was elected to head this Panel, whose key focus was to identify a *predictable* source of funding that, would allow the AU to address concerns about inconsistent financing from its member states. As member states systematically defaulted on their payments or made late payments, attention was not only given to securing regular funding but also to ensuring its predictability and timeliness through the annual assessed contributions.¹⁰

The Obasanjo Panel presented a report on its progress to the AU Assembly, acknowledging that the system of statutory contributions which were in place in the OAU era are “deemed no longer adequate to meet the growing financing needs of the Union due to greater operational requirements and increased scope of activities.”¹¹ It proposed three options to raise predictable funding; namely: a) US\$2.00 hospitality levy per stay in a hotel instead of tourism levy; b) US\$5 cents levy per text message sent; c) US\$5.00 travel levy on flight tickets originating from or coming to Africa from outside Africa. In May 2013, the AU Assembly approved the Obasanjo report in principle.¹² However, some member states, especially those depending on the tourism industry, expressed their reservations, noting that the proposals would further strain their tourism sector and quell the competitiveness of an already struggling airline industry. There were also concerns about burden sharing whereby countries with a tourism industry – mainly small to medium sized states – would become the largest contributors to the AU budget with unclear obligations to other countries. Member states have therefore argued that it would be useful to explore other routes or to provide flexibility for countries to choose their source of financing. In addition to economic considerations, member states also noted the need to discuss the financing incentives in terms of their impact on the work of the AU.

The lack of consensus around the Obasanjo proposal as well as the increasing financial crisis of the AU following the fall of Muammar Qaddafi in Libya and the subsequent crisis in this major financier of the AU accelerated the momentum to advance the discussion on the AU funding.

In June 2015, the AU Assembly reached consensus¹³ regarding the scale of assessment and financing of the AU based on the principles of solidarity, equitable payment and capacity to pay, and ensuring that no single country bears a disproportionate share of the budget. The decision set the targets for funding the AU at 100% of the operations budget; 75% of the programme budget; and 25% of the peace and security

⁸ Samuel M. Makinda, F. Wafula Okumu & David Mickler, *The African Union: Addressing the Challenges of Peace, Security and Governance*, 2015, Routledge: London and New York.

⁹ African Union Assembly, [Decision on Alternative Sources of Financing the Union Assembly/AU/Dec.364\(XVII\)](#), Seventeenth Ordinary Session, 30 June -1 July 2011.

¹⁰ Makinda et al, note 8.

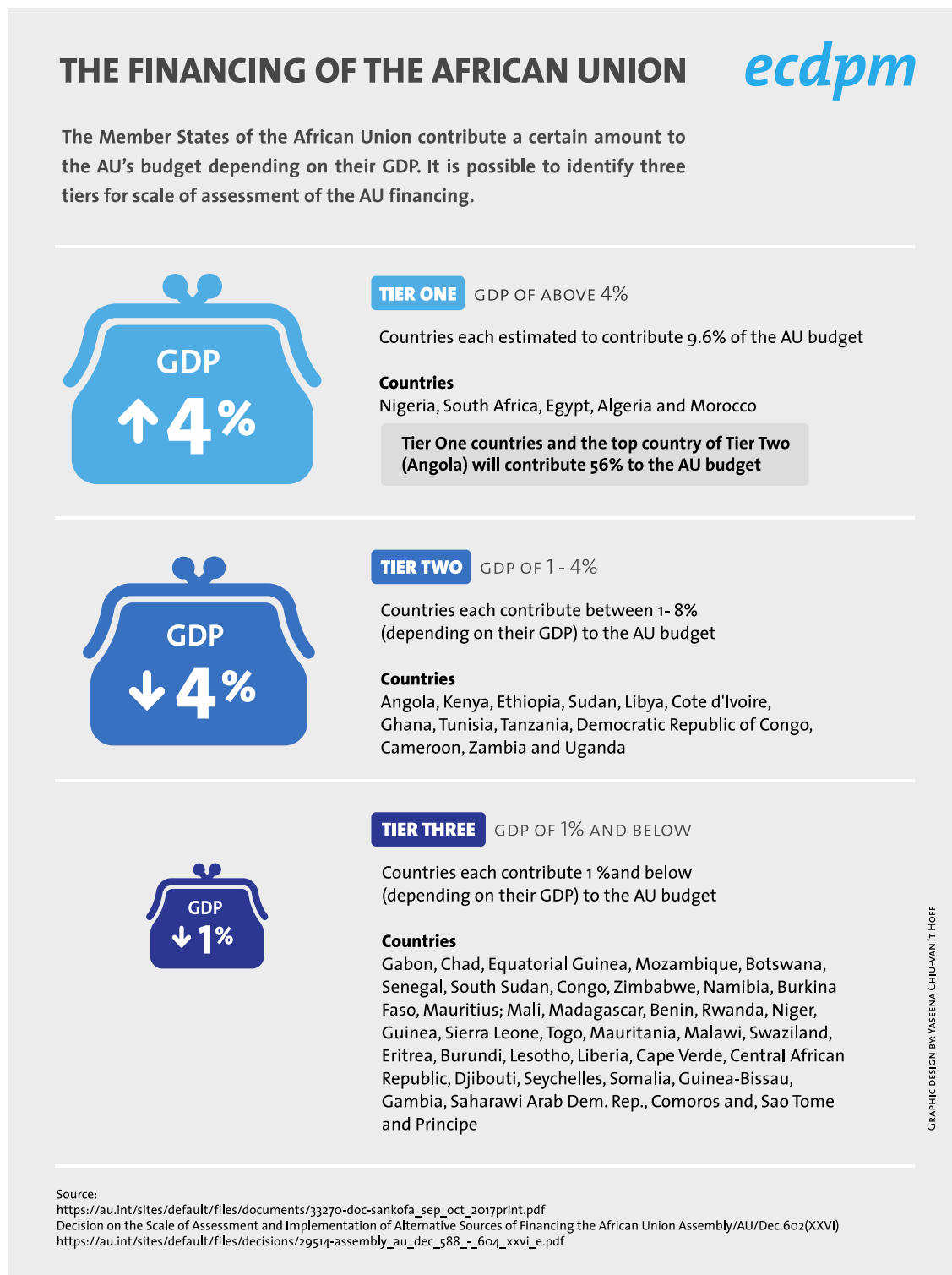
¹¹ African Union Assembly, [Progress Report on the High Level Panel on Alternative Sources of Financing the African Union chaired by H.E Olusegun Obasanjo, Former President of Nigeria consultations with member states](#), Assembly/AU/18(XIX), Nineteenth Ordinary Session, 15-16 July 2012, Addis Ababa, Ethiopia.

¹² African Union Assembly, [Decision on Alternative Sources of Financing the African Union Assembly/AU/Dec.486\(XXI\)](#), Twenty-first Ordinary Session, 26- 27 May 2013, Addis Ababa, Ethiopia.

¹³ African Union Assembly, [Decision on the Scale of Assessments and Financing of the African Union Assembly/AU/Dec.578\(XXV\)](#), Twenty-fifth Ordinary Session, 14-15 June 2015, Johannesburg, South Africa.

operations budget. According to the decision, the scale of assessment is divided into three tiers: all countries with GDP above 4% (tier 1); all countries above 1% but below 4% (tier 2); all countries from 1% and below (tier 3). This scale of assessment is to be implemented for the fiscal years 2016, 2017 and 2018, when it will be reviewed. However, a key question still remained: how to ensure *predictable* sources of funding?

Visual 2:



In September 2015, the Meeting of the Peace and Security Council at the Level of Heads of State and Government requested the Chairperson of the Commission to appoint a High Representative on the Peace Fund. In January 2016, Dr. Donald Kaberuka¹⁴ was appointed as High Representative on the Peace Fund and tasked with finding sustained, predictable and flexible funding mechanisms to support AU-led peace operations. Dr. Kaberuka proposed the use of a 0.2% import levy to finance the AU.

The AU Assembly, at its July 2016 Summit in Kigali, considered the report of the High Representative's new proposal. On this occasion, the Assembly decided to "institute and implement a 0.2% levy on all eligible imported goods into the continent to finance the African Union Operational, Program and Peace Support Operations Budgets starting from the year 2017".¹⁵ This proposal was lauded as an effort by the AU to secure a predictable and sustained self-financing of the Union. But its implementation also raised a number of questions.

This note provides a brief overview of the progress achieved before tackling one of the contentious issue related to the implementation of the 0.2% levy, namely its compatibility with international agreements.

2. Progress achieved with the implementation so far

While the decision of the Heads of States provided the political basis for the introduction of the levy, it was not enough to provide guidance on the implementation of this decision. Indeed, some questions were raised by the member states in relation to the feasibility of the proposal, especially in relation to international trade agreements, member states' oversight over the use of the resources, principles and process of prioritisation of the AU activities, and the calculation of the assessed contributions of African member states to the budget of the AU.

It is critical to position the discussion on the financing of the AU in the broader context of the management of Union's budget – as opposed to a mere focus on the 0.2% levy – to address concerns around the incentives for the member states to provide substantial financial contributions to the AU. This was one of the key missing elements from past discussions on the AU financing.

To support a comprehensive reflection, a group of ten Finance Ministers (F10) was set up and given a broad mandate to:

- a) Propose implementation mechanisms of the current decision on financing the African Union (Import Levy) in particular;
 - b) Review and evaluate the annual budget of African Union before submission to the Assembly of Heads of State and Government of the African Union;
 - c) Define a roadmap for the implementation of the Decision;
 - d) Review the Status of the implementation and compliance and adopt policies for enhancement;
- Propose various resource mobilisation strategies for the Union.¹⁶

¹⁴ African Union, Donald Kaberuka, outgoing President of the African Development Bank appointed as High Representative for the AU Peace Fund, 29 January 2016, <http://www.peaceau.org/en/article/dr-donald-kaberuka-outgoing-president-of-the-african-development-bank-appointed-as-high-representative-for-the-au-peace-fund>

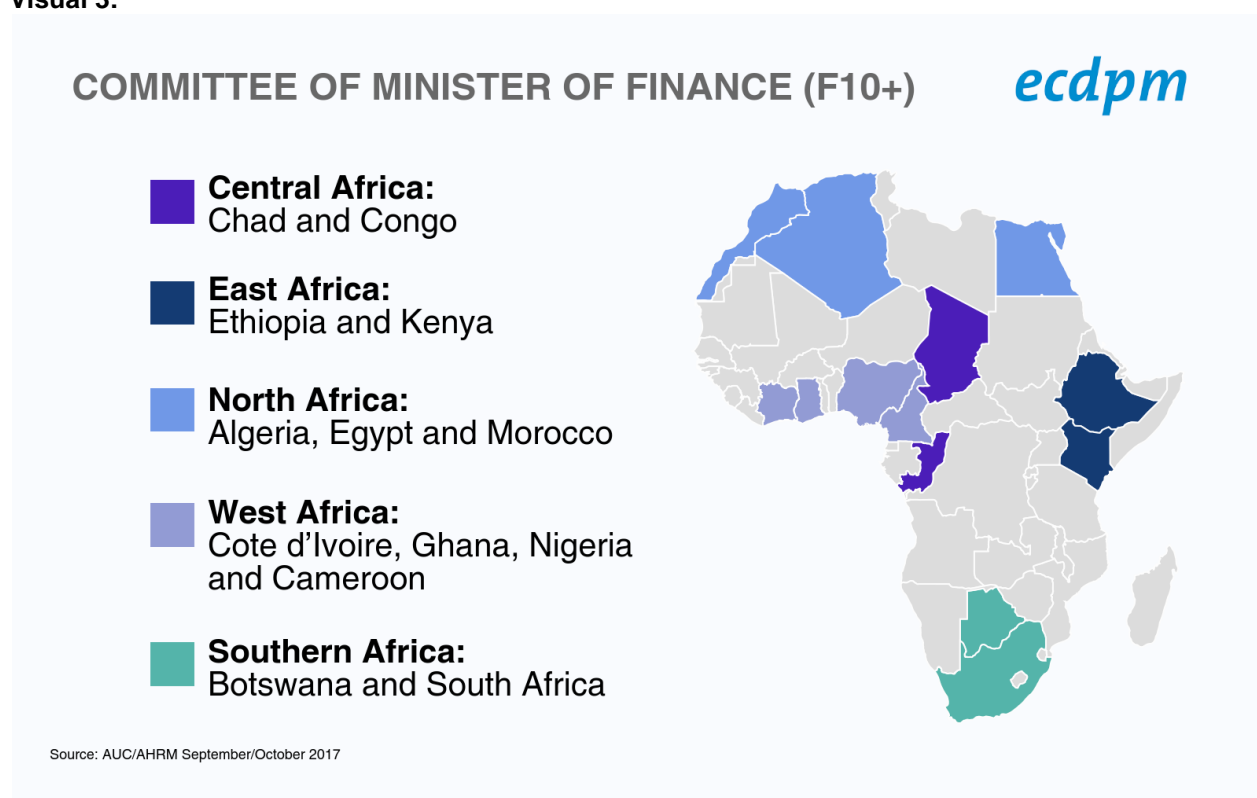
¹⁵ African Union Assembly, [Decision on the Outcome of the Retreat of the Assembly of the African Union Assembly/AU/Dec.605 \(XXVII\)](#), Twenty-seventh Ordinary Session, 17- 18 July 2016, Kigali, Rwanda.

¹⁶ African Union, Economic Affairs Department, [Terms of Reference for the Committee of Ten Ministers to participate in the preparation of the Annual Budget](#), August 2016.

The F10 ministers met on 9 August 2017 with the aim of assessing the status and accelerating the implementation of the financing decisions and to ensure progressive financial autonomy of the Union.¹⁷ Proposals included the revision of the scale of assessments in line with the principles of equitable burden sharing, ability to pay, solidarity, equity, ownership and sustainability, and the adoption of a new and robust sanctions mechanism in order to encourage members to timely pay their contributions.¹⁸

The committee subsequently met on 11-13 January 2018 to examine and adopt the operational measures to be put in place by the AU member countries to ensure that this continental institution has the autonomy of financing. The ministers of finance approved the golden rules and the AU now has a credible budget process in place.¹⁹ The F10 committee was enlarged in August 2017 to include Cameroon, Morocco – the new member of the AU - and Nigeria thus forming the F10+.²⁰ Subsequently, the Assembly at the 30th AU Summit held that the committee of Finance Ministers should be expanded from 10 to 15 members based on the principles of geographical representation and rotation.²¹

Visual 3:



Since its establishment, the F10 has addressed a number of issues in relation to the implementation of the 0.2% levy.

¹⁷ African Union, [Communiqué of the Meeting of African Union Finance Ministers](#), 9 August 2017, Addis Ababa, Ethiopia.

¹⁸ Ibid.

¹⁹ Acceptance [Remarks by President Paul Kagame at Opening of the 30th AU Summit](#), Addis Ababa, 28 January 2018.

²⁰ African Union, [Communiqué of the Meeting of African Union Finance Ministers](#), 9 August 2017, Addis Ababa, Ethiopia.

²¹ African Union, [The 30th Ordinary Session of the African Union concludes with remarkable decisions on \(3\) flagship projects of Agenda 2063](#), 28-29 January 2018.

2.1. Clarifying definitions

The taxable base of the AU import levy will be the value of *eligible goods* originating from outside the territory of the African Union, and imported and consumed in an AU Member State. The levy shall apply to the Cost Insurance and Freight (CIF) value at the port of arrival for those goods that arrive either by sea or road, and to customs value at the airport of disembarkation for goods arriving by air.

One of the immediate questions arising in relation to the decision to impose the levy relates to the definition of eligible goods. Understanding what is eligible in specific countries is particularly relevant since certain goods benefit from exemptions either because they are protected domestically (and this is the case for basic food items and certain pharmaceuticals products) or because they are tax-exempted due to pre-existing international trade agreements. The retreat of the F10 in September 2016 delved deeper into the issue of definitions and concluded that: "all goods that are already exempted by national law or international obligations shall continue to be exempted from the levy"²² thereby providing further guidance to countries.

For example, Rwanda's law establishing the levy on imported goods for financing the African Union²³ stipulates that the 0.2% levy applies to all imports, except those exempted under relevant laws.²⁴ Exempted goods include: goods originating from the East African Community (EAC), goods exempt from customs duty under the *East African Community Customs Management Act*,²⁵ the import of sensitive products such as agricultural fertilisers and seeds, industrial machinery and medical equipment, and goods exempted from the Infrastructure Development Levy (IDL) by the EAC Member States.²⁶ Countries are therefore given the flexibility to operate in accordance with pre-existing regulations and are allowed to exclude goods that are sensitive to their country's interests.

2.2. Approaches to implementation

Responding to concerns about the legality of the levy in May 2017, Donald Kaberuka, the AU's Special Envoy of the African Union on sustainable Financing for the Union and the Peace Fund, noted: "[L]evies are normal instruments. ECOWAS can do it because it's a free trade zone. ECCAS can do it because it is a free trade zone. The Africa as a whole is not a free trade zone. And therefore a levy imposed on outside imports would be seen as discrimination under WTO [...] The Summit has decided the AU should become a [continental] free trade [area]. Once that is in place this is no longer an issue. The issue at hand is what to do in the meantime pending that particular deadline being respected. And there are ways to do so".²⁷

Indeed, despite WTO limitations, some countries have moved forward with the implementation of the 0.2% levy. As per December 2017, Kenya, Rwanda, Ethiopia, Chad, Djibouti, Guinea, Sudan, Morocco, Congo Brazzaville, Gambia, Gabon, Cameroon, Sierra Leone and Cote d'Ivoire had started collecting the levy and depositing the funds within the AU accounts in their respective Central Banks.²⁸ Ghana, Benin, Malawi, and Senegal have initiated legal and administrative processes to allow for the implementation of the 0.2% levy.²⁹ Mauritius and Seychelles have also indicated full commitment to the principles of financing the

²² African Union, Meeting of Finance Ministers on Implementation of the Kigali Assembly Decision on Financing the African Union. 15- 16 September 2016, Addis Ababa, Ethiopia.

²³ Government of Rwanda, [Law Establishing the Levy on Imported Goods for Financing the African Union](#) No.19/2017 of 28 April 2017.

²⁴ Ibid, article 2.

²⁵ East African Community, [East African Community Customs Management Act](#) No. 1 of 2005.

²⁶ Ernst and Young, 'Rwandan Parliament passes draft law establishing levy on imported goods for financing the Africa Union activities', Indirect Tax Alert, 21 April 2017.

²⁷ [Consultative Meeting on African Union Reforms](#), 7 May 2017, Kigali, Rwanda.

²⁸ Rwanda Ministry of Finance and Economic Planning, [Finance Ministers meet to discuss African Union financing progress](#), Kigali, Rwanda, 11 January 2018.

²⁹ Ibid.

union.³⁰ Kenya, for instance, implemented the decision by “lowering an existing levy (import declaration fee) from 2.5% to 2%. The 0.2% of the AU levy is then derived from the import declaration fee, which is paid into an escrow account with the Central bank of Kenya.” Kenya passed a law in September 2016 that allows the transfer of the resources from the Central Bank.³¹ Introducing such arrangements would require careful consideration of the space provided within the existing systems in place. Rwanda instituted a new Act, which applies 0.2% import to all (eligible) goods.³² The levy is then collected at the custom points, and further transferred to the National Bank of Rwanda for financing the AU.³³ Similarly, on 10 June 2017, Ghana’s president announced the imposition of a 0.2% import levy on all imports from outside the AU Member States aimed at financing the activities of the AU.³⁴

The F10 subsequently agreed to the need to introduce a transitional arrangement until the end of 2017. It argued that “since Member States have varying budget cycles and legal regimes, it is envisaged that there will be a transition period not exceeding twelve months to enable them to adjust and adapt so that all Member States are in compliance within the fiscal year 2017”.³⁵ The transition period is likely to be extended as several Member States have notified delays while others – mainly the large funders – indicated that they will continue to meet their obligations in line with the scale of assessed contributions. For example, South Africa and Egypt have requested they be given flexibility to determine the sources of AU funding instead of implementing the 0.2% levy.

2.3. Link with the assessed contributions

The link between the scale of assessed contributions and the resources derived from the levy required further thinking. One of the key concerns among Member States was that the levy would introduce additional financial burden.³⁶ Also, states were raising the question whether an eventual surplus resulting from the difference between the assessed contribution and the collected levy should also be transferred from the country to the AU.

A meeting of the ministers of finance in September 2016 partially clarified the issue by noting that, once fully in force, the levy would allow countries to pay their assessed contributions. They advised that “any surplus collected by Member States after the fulfilment of obligations under the assessed contribution shall be retained by the State”. They further argued that, “any deficit between the assessed contribution and revenues collected under the AU import levy by a Member State shall be covered by the Member State”.³⁷

However, during the Summit of January 2017, the Heads of States instructed the F10 to further explore the possibility of “placing surplus in a Reserve Fund for continental priorities as decided by the Assembly”.³⁸ In August 2017, the F10 concluded that Member States should retain the surplus.³⁹ However, since the scale of assessed contributions is currently under review for adoption in 2018, it is likely that some States’

³⁰ Ibid.

³¹ African Union, Meeting of Finance Ministers on Implementation of the Kigali Assembly Decision on Financing the African Union. 15-16 September 2016, Addis Ababa, Ethiopia.

³² Government of Rwanda, [Law Establishing the Levy on Imported Goods for Financing the African Union](#) No.19/2017 of 28 April 2017.

³³ Ibid.

³⁴ Deloitte, [Africa Tax Alerts- Further Tax Developments in Africa](#), 30 June 2017.

³⁵ African Union Commission, Summary report of the Meeting of African Finance Ministers on Financing the Union. 16 September 2016.

³⁶ For instance <https://www.timeslive.co.za/politics/2016-07-18-african-union-to-cost-south-africa-an-extra-r22bn/>

³⁷ African Union, Meeting of Finance Ministers on Implementation of the Kigali Assembly Decision on Financing the African Union, 15-16 September 2016, Addis Ababa, Ethiopia.

³⁸ African Union, [Decision on the outcome of the Retreat of the Assembly of the African Union, on the Institutional Reform of the Africa Union](#), Assembly/AU/Dec.635(XXVIII) Twenty-eight Ordinary Session, 30- 31 January 2017, Addis Ababa, Ethiopia.

³⁹ African Union, [Communiqué of the Meeting of African Union Finance Ministers, Addis Ababa](#), 9 August 2017, Addis Ababa, Ethiopia.

contribution will increase while that of others might decrease. In his 2018 New Year message, AUC Chairperson Faki Mahamat noted that “in 2018, Member States will be funding almost 40% of the African Union programme budget compared to less than 5% in 2015 when the initiative was launched.” This shows a positive move towards financial autonomy of the AU.⁴⁰

The transitory arrangement provides space for countries to establish mechanisms to respond to short-term need until the full transition to the implementation of the 0.2% levy is finalised. But what will be the implications of implementation of this decision in the short- and medium-term, particularly with respect to compatibility with international agreements?

3. Tackling the issue of compatibility with international agreements

In December 2016, the United States raised concerns with regards to the compatibility of the 0.2% levy with the General Agreement on Tariffs and Trade⁴¹ (GATT) before the WTO's General Council and, subsequently, in a formal letter to the African Union Commission (AUC) and some African countries.⁴² Japan expressed a similar view on the compatibility of the levy with WTO rules. Subsequently, in a letter addressed to the AU Commission, the US Mission to the AU,⁴³ raised the following WTO provisions which may affect the AU Member States' implementation of the 0.2% levy:

- a) Most favoured nation principle (MFN) under GATT Article I
- b) Duties and charges not in the WTO Schedule under GATT Article II
- c) Fees not commensurate with services rendered/ indirect protectionism under GATT Article VIII

Although the AU proposed the 0.2% levy to fund the budget of the AU, each Member State that is also a member of the WTO, will have to individually argue that the measure is justified, if WTO non-compatibility is raised. The AU is not a member of the WTO currently, but has an ad hoc observer status on a meeting-by-meeting basis. The AU could request for full observer status or membership status to strengthen its negotiating position at the WTO.

In case the issue of WTO non-compatibility will be raised, the following options could be considered by AU Member States also party to the WTO.

⁴⁰ African Union, [2018 New Year Message of African Union Chairperson, Moussa Faki Mahamat](#), January 2018.

⁴¹ World Trade Organisation, [General Agreement on Tariffs and Trade](#), 1947.

⁴² World Trade Organisation (2017) General Council Minutes from Meeting held on 7 December 2016. 21 February 2017. WT/GC/M/165.

⁴³ United States Mission to the African Union. Letter to the African Union Commission. 2 May 2017. On file with author.

3.1. A Continental Free Trade Area as a possible option to Most Favoured Nation challenges

In January 2012, the AU Assembly Summit decided to establish a Continental Free Trade Area (CFTA) by the indicative date of 2017.⁴⁴ Subsequently, in June 2015, AU Heads of State and Government agreed to launch negotiations on the creation of the CFTA by 2017 through negotiations on the liberalisation of trade in goods and services.⁴⁵ The CFTA aims to boost Africa's economic growth and development through integration by creating "One African Market", which will boost intra-African trade. The establishment of the CFTA is the first Agenda 2063 flagship project on target for completion within the roadmap established by the Agenda 2063 first ten-year implementation plan. The main objectives of the CFTA are to "create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Customs Union."⁴⁶ The regional trade agreements under regional economic communities (RECs) are building blocks for the CFTA.⁴⁷

Discussions and negotiations on the CFTA were conducted with meetings amongst the CFTA Negotiating Forum (CFTA-NF), Continental Task Force, Technical Working Groups, Committee of Senior Trade Officials and African Ministers of Trade. Since the inaugural meeting of the CFTA-NF on 24 February 2016, progress has been made towards the establishment of the CFTA within the agreed deadline. On 4 December 2017, discussions on the CFTA Agreement were finalised by African Ministers of Trade. At the 30th AU Summit it was announced that the signing ceremony of the CFTA Agreement is scheduled for 21 March 2018. The CFTA Agreement requires 15 signatures to come into force. The Protocol on Trade in Services, the Protocol of Trade in Goods and the Protocol on Dispute Settlement Mechanism will be an integral part of the CFTA Agreement.⁴⁸ Negotiations for the Protocol on Services were concluded and liberalisation of services will be conducted through a request and offer approach based on the identified priority areas.⁴⁹ The Protocol on Services will have two annexes namely: schedules of commitments and regulatory frameworks.⁵⁰ However, negotiations on the Protocol on Goods are still ongoing and may be concluded by the signing ceremony. The Protocol on Goods will cover nine areas namely: tariff liberalisation schedules; rules of origin; customs procedures and cooperation; trade facilitation; transit and transit facilitation; non-tariff barriers; technical barriers to trade; sanitary and phyto-sanitary measures; and trade remedies. The second phase of negotiations after the conclusion on goods and services will be on competition, intellectual property and investment.⁵¹

⁴⁴ African Union Assembly, [Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area. Assembly/AU/Dec.394 \(XVIII\)](#), Eighteenth Ordinary Session, 29- 30 January 2012, Addis Ababa, Ethiopia.

⁴⁵ African Union Assembly (2012). [Decision on the Launch of the Continental Free Trade Area Negotiations. Assembly/AU/Dec. 569 \(XXV\)](#), Twenty-fifth Ordinary Session, 14- 15 June 2015, Johannesburg, South Africa.

⁴⁶ African Union, Continental Free Trade Area, <https://au.int/en/ti/cfta/about>.

⁴⁷ Prudence Sebahizi, [Scope of the CFTA Negotiations, Principles, Objectives and Institutional Framework](#), 9 March 2016.

⁴⁸ African Union, [Note to Editors: Chief Negotiators conclude the 7th round of Continental Free Trade Area \(CFTA\) Negotiations](#), 11 October 2017.

⁴⁹ Bridges Africa, [African Countries make headway towards the creation of the CFTA](#), 8 December 2017.

⁵⁰ James Karuhanga, [Continental Free Trade Area to boost domestic tax collection](#), New Times, 15 January 2018.

⁵¹ Prudence Sebahizi, [Scope of the CFTA Negotiations, Principles, Objectives and Institutional Framework](#), 9 March 2016.

Under the WTO rules, the CFTA can be established under Article XXIV of the GATT or the Enabling Clause for trade in goods and under Article V of the General Agreement on Trade in Services (GATS) for trade in services. The most logical option for the AU would be to establish the CFTA under the Enabling Clause of 1971 relating to South-South free trade agreements. One of the advantages of this clause is that it allows AU Member States to be more flexible in terms of the sectors covered and tariff elimination or reduction than would be possible for agreements under Article XXIV of the GATT.⁵² Contrarily to this article, the Enabling Clause does not provide for the requirement of liberalising substantially on the trade among parties.

In light of the establishment of the CFTA, whose final aim is to create a customs union, this avenue may be a possible option to circumvent the application of MFN before the WTO.⁵³ The MFN principle in GATT Article I:1 provides that countries cannot normally discriminate between their trading partners. For example, if a country lowers customs duties for the products of one trading partner it must extend the MFN to the like products of other trading partners and similarly lower customs duties.⁵⁴ However, there are derogations from the MFN principle. Article XXIV of GATT provides for a derogation from MFN by allowing countries to form free trade areas or customs unions to govern trade in goods. Similarly, Article 2(c) of the Enabling Clause allows for an exception to the MFN for regional trade agreements (RTAs) between developing countries. Article V of the GATS provides for derogation from MFN in trade in services through the formation of RTAs.

The *Turkey Textiles*⁵⁵ case held that Article XXIV may justify a measure inconsistent with "certain other GATT provisions", including Article 1:1 covering MFN. The case also set out a test for "defence" when using Article XXIV as follows:

However, in a case involving the formation of a customs union, this "defence" is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV.⁵⁶

Although this test was used in reference to customs unions, some authors argue it presumably may also be applied to FTAs.⁵⁷ This test may be crucial in analysing whether the 0.2% levy is a necessary measure for the CFTA to be put into force. Coincidentally, revenue collected from the 0.2% levy will be used to finance the implementation costs of the CFTA as one of the flagship projects of the AU's Agenda 2063, and arguably it is necessary for the CFTA's establishment.

The notion of the 0.2% levy on imports is not new and similar levies has been used by RECs in Africa such as the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS) and Central African Economic and Monetary Community (CEMAC). Such levies have proven effective in financing these regional organisations.

⁵² United Nations Conference on Trade and Development (2016). African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods. Available at http://unctad.org/en/PublicationsLibrary/webdita2016d7_en.pdf

⁵³ African Union, Financing the Union: Does the 0.2% levy contradict international norms, <https://au.int/en/does-02-levy-contradict-international-norms>.

⁵⁴ See World Trade Organization, [Principles of the trading system](#)

⁵⁵ World Trade Organisation, Appellate Body, *Turkey- Restrictions on Imports of Textiles and Clothing Products* WT/DS34/AB/R, 22 October 1999.

⁵⁶ Ibid, para 58.

⁵⁷ Nicolas JS Lockhart and Andrew D Mitchell, *Regional Trade Agreements Under GATT 1994: An Exception and Its Limits* in Andrew D Mitchell (ed), *Challenges and Prospects for the WTO* (London: Cameron May, 2005) 217.

Since, the AU 0.2% levy will apparently be implemented as a new tariff, this will affect some countries' tariff bindings under WTO schedules.⁵⁸ The issue remains with countries like Mauritius, which already have duty-free rates on some products. Any increase in the tariffs of such duty-free products will violate WTO rules. Nevertheless, Mauritius' simple average bound tariff rate is 84.1% and there are some products groups where there are significant differences between the applied tariff and bound tariff (tariff water).⁵⁹ Mauritius can choose eligible goods amongst these products groups, in which it can implement the 0.2% levy without exceeding its bound tariffs.

The issue of the Euro-Mediterranean partnership and Economic Partnership Agreements (EPAs) was also raised. Signatories have committed to eliminate all duties on "substantially all trade" (this varies between 75% and 98% in case of EPAs). Most EPAs have been notified. Hence, raising a 0.2% levy on some duty-free items could be seen as breach with this principle. However, the European Union (EU) has openly expressed its support to the implementation of the 0.2% following consultations of the different relevant departments of the commission. At the 7816th meeting of the United Nations Security Council,⁶⁰ João Vale de Almeida, Head of the EU delegation, welcomed the introduction of a 0.2% levy on eligible imports to finance the African Union Peace Fund. The European Commission (EC) has reportedly offered support to the AUC, providing the necessary technical support to African Member States to implement the decision.⁶¹ At the 5th AU-EU Summit, the EU encouraged efforts by AU Member States to follow up on the AU Summit Decision of introducing a levy of 0.2% on eligible imports for the financing of the Union.⁶²

Once the CFTA is established it will have to be formally notified to the WTO. Trade in goods must be notified under either Article XXIV of the GATT or Article 2(c) of the Enabling Clause. Trade in services must be notified under Article V of the GATS. Since the CFTA encompasses both trade in goods and services the requisite notifications will have to be made.

A question then arises as to how the CFTA will be notified before the WTO- two options are as a free trade area or as a customs union. Article XXIV(5)(a) read with Article 8(a) deals with customs union while Article XXIV(5)(b) read with Article 8(b) addresses free trade areas. The way in which the CFTA is notified will be crucial for future legal implications. Notifying the CFTA as a free trade area means that countries retain their own external tariff and AU countries also party to the WTO will have to individually justify the 0.2% levy. This may have challenges for countries such as Mauritius, which constitute clear exceptions for bound tariff rates amounting to zero for some eligible goods. Authorities might adopt *ad hoc* measures to address the violation of bound schedules,⁶³ as any increase in bound tariffs above zero would require the overall renegotiation of tariffs. Since the CFTA is envisioned to finally result in the establishment of a customs union, by notifying it as a customs union, CFTA members will be able to have a common external tariff. This could then justify the imposition of 0.2% as a common community tariff.

⁵⁸ Gerhard Erasmus, [The new self-financing mechanism of the African Union: Can the proposed AU levy be a step towards financial independence?](#) TRALAC 25 May 2017.

⁵⁹ World Trade Organisation, Mauritius, http://stat.wto.org/TariffProfiles/MU_e.htm.

⁶⁰ United Nations Security Council, [7816th Meeting](#), SC/12595, 18 November 2016.

⁶¹ Donald Kaberuka during the [Consultative Meeting on African Union Reforms](#), Kigali, Rwanda May 7th, 2017

⁶² African Union- European Union Summit 2017 [Declaration](#), Abidjan, Cote D'Ivoire, 29-30 November 2017.

⁶³ David Luke and Jamie Macleod, [Bringing the CFTA About: Key Factors for Success](#), *Bridges Africa*, Vol 6 Issue 6, September 2017.

The next step is whether the CFTA will be established within the set deadline of 21 March 2018 to coincide with the implementation of the 0.2% levy. Member states should take care of the sequencing the introduction of the levy, to avoid WTO challenges that may arise before the CFTA is implemented.⁶⁴ This is because before the implementation of the CFTA, there will be a period in which AU WTO members will be violating the MFN rule.⁶⁵ This is more pertinent, given the WTO Transparency Mechanism on Regional Trade Agreements, which requires members involved in negotiations towards the conclusion of a RTA to inform the WTO Secretariat of such negotiations. However, once the CFTA is established, notified and implemented as an RTA, it will become an exemption to the WTO's non-discrimination (MFN) principle.⁶⁶

3.2. Waiver from WTO obligations

Another route AU Members States also party to the WTO can consider is the use of waivers under Article IX of the Marrakesh Agreement⁶⁷ establishing the WTO. Article IX:3 specifically provides that:

In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.⁶⁸

This Article allows for the use of a waiver to an obligation under the WTO. AU Member States can utilise this provision in support of the 0.2% levy by excluding them from obligations under the GATT like the MFN principle under Article I. More so, countries like Mauritius can also request for a waiver to suspend a tariff concession on a temporary basis under Article IX:3 for instances where the 0.2% levy would be above their bound zero tariff rate.

The decision-making procedures under articles IX and XII of the WTO Agreement stipulate that a waiver decision under Article IX will first be taken by consensus.⁶⁹ Consensus is deemed "if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision."⁷⁰ Failing which, the decision making process in Article IX:3 will be taken by three-fourths of the members. Past negotiations at the WTO, reveal that consensus is hard to achieve, so most likely if a waiver is to be invoked, it will pass by three-fourths majority.

Decision-making under Article IX:3 requires diplomacy in order to get the necessary votes for a waiver to be passed. Voting is done on the basis of "one country, one vote". Participation of all WTO African member states will be necessary to secure the required vote threshold. Past practice shows that African countries do not participate effectively in the WTO meetings due to capacity constraints and lack of technical expertise.⁷¹ The WTO African group should therefore strengthen the capacity of its members especially around voting on key issues (such as the use of the waiver if it is invoked). Some non-African WTO members like the EU have indicated their willingness to support for the AU's 0.2% levy.

⁶⁴ Ibid.

⁶⁵ United Nations Economic Commission for Africa, African Union and African Development Bank Group, [Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About](#), 2017, ECA Printing and Publishing Unit, Addis Ababa, Ethiopia.

⁶⁶ United Nations Economic Commission for Africa, African Union and African Development Bank Group, [Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About](#), 2017, ECA Printing and Publishing Unit, Addis Ababa, Ethiopia.

⁶⁷ World Trade Organisation, [Marrakesh Agreement Establishing the World Trade Organisation](#) 1994.

⁶⁸ Ibid, article IX:3.

⁶⁹ World Trade Organisation. Decision-making Procedures Under Articles IX and XII of the WTO Agreement. WTO Document WT/L/93. As agreed by the General council on 15 November 1995.

⁷⁰ World Trade Organisation, [Marrakesh Agreement Establishing the World Trade Organisation](#) 1994, footnote 1.

⁷¹ Joan Apecu, [The Level of African Engagement at the World Trade Organisation from 1995 to 2010](#), *International Development Policy*, 4.2, 2013.

The WTO rules provide that a waiver is an ad hoc and temporary measure, that can be only be granted in “exceptional circumstances” related to a specified policy objective. As expressed by the Appellate Body in *EC-Bananas* waivers are “not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement or Schedule. Therefore, waivers are exceptional in nature, subject to strict disciplines and should be interpreted with great care.”⁷² This questions whether the 0.2% levy to finance the AU can qualify as an exceptional circumstance to allow the imposition of a levy to eligible non-African goods, which is in violation of MFN. There is precedence for waivers to exclude the application of Article I:1 dealing with MFN and AU member states that are also WTO members can rely on these previous cases.⁷³

Although waivers are temporary, there have been instances where the use of waivers have been in place for a number of years and have been renewed. An example is the waiver requested by the United States of America (USA) under the Caribbean Basin Economic Recovery Act for the benefit of listed Caribbean Basin countries.⁷⁴ This measure was applied as a non-generalised scheme of preference and a waiver was sought by USA for *inter alia* Article I:1 of the GATT. The objective was the promotion of trade and economic stability in Caribbean Basin countries through provision of duty free access by the USA for imports from beneficiary countries. This waiver was originally adopted on 1 January 1984 and has been extended and expanded three times. The current extension is in force until 31 December 2019.⁷⁵ This example illustrates that waivers can be extended for long periods of time. The waiver would be an option to prevent countries from being in breach of their WTO obligations during the transition phase pending the implementing the CFTA. Ultimately the success of such waivers will depend on the consultations between AU WTO member states and other WTO members in a bid to gain support for the waiver at the WTO.

3.3. Transitional measures: Kenya's Model as a guide to circumvent additional charges or duties

Another key issue arising is the additional charges or duties not present in the WTO schedule of concessions that may arise with the imposition of the 0.2% levy on eligible goods. Countries may have bound tariffs on goods but not included additional charges or duties in their schedules. The 0.2% levy may therefore be challenged as infringing Article II of the GATT. For example, importers from Ghana, which has taken steps towards implementing the 0.2% levy, have expressed concern that the levy to be administered as a new tax will increase the cost of importation, which will then have to be moved into the consumer through increased prices of imports.⁷⁶

Kenya has adopted a model, which seeks to implement the 0.2% levy while not increasing the overall costs of importation. Article 7(2) of the 2016 Miscellaneous Fees and Levies Act⁷⁷ imposes an import declaration fee of 2%. Out of the fee collected 10% is to be paid into a fund established under the Public Finance Management Act. The money in the fund shall then be used for the payment of Kenya's contributions to the AU (and other international organisations). Previously the import declaration fee under the now repealed Customs and Excise Act was charged at 2.25%. According to Treasury Secretary Henry Rotich, “there will be no increase on the cost of imports. The effect of the new levy will be zero. There will be no overall

⁷² World Trade Organization, Appellate Body Report, *European Communities Regime for the Importation, Sale and Distribution of -Bananas Second Recourse to Article 21.5 of the DSU by Ecuador III/ European Communities Regime for the Importation, Sale and Distribution of -Bananas Recourse to Article 21.5 of the DSU by United States*, WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA, para. 382.

⁷³ Ibid, see case for discussion on waiver of Article 1 of GATT.

⁷⁴ World Trade Organization, Council of Goods, Request for a Waiver: Caribbean Basin Economic Recovery Act (CBERA as amended), 7 November 2014, G/C/W/708 18 November 2014.

⁷⁵ Ibid.

⁷⁶ Business Ghana, [Importers resist AU 0.2% Levy](#), 20 June 2017.

⁷⁷ Government of Kenya, [Miscellaneous Fees and Levies Act](#) No. 29 of 2016.

impact on taxation of imports.”⁷⁸ The implementation of 0.2% levy in Kenya relies on existing frameworks so as to avoid the introduction of a new levy. This model will circumvent the violation of WTO rules, as there will be no overall increase in the cost of importation, which is in line with the objectives of the WTO.

The Kenyan model will be useful for the majority of the AU countries, which are classified under Tier 3, with GDPs of 1% and below. This group includes lower developing countries (LDCs), which may require assistance in setting up the necessary mechanisms for the implementation of the 0.2% levy. Some LDC member states have been failing to meet their obligations to pay their assessed contributions from their national budget. For such countries the 0.2% levy is useful as it provides an alternative source of financing outside the national budget. Given the small size of LDC economies, it is unlikely that they will be challenged before the WTO. Nevertheless, the delay in the implementation the 0.2% levy will delay the establishment of a predictable source of funding for the AU. The Kenyan model therefore provides a best practice countries can adopt.

The Kenya model can be also useful for countries that are currently implementing mechanisms similar to the AU 0.2% levy. Some countries in ECOWAS, ECCAS and CEMAC have expressed concern over the challenges in financing an additional levy above their already existing commitments at the regional level. Given the link between the AU and RECs a portion of the existing levy under the RECs can be used to finance the 0.2% levy. The first AU-REC coordination meeting is to be held in July 2018 as part of the recommendations on the reform of the AU. There is a need for clear division of labor and clarification of the principle of subsidiarity especially in peace and security issues. The revenue collected under the 0.2 % levy covers each Member State's approved assessed contribution including the Peace Fund. The meeting of the F10 ministers revealed that the AU Peace Fund would also support regional responses to conflict and insecurity. This will give countries incentive to collect revenue through the 0.2% levy as it will contribute towards burden sharing for financing peace and security operations. Adopting the Kenya model, countries implementing a similar levy at the regional level for example ECOWAS's 0.5% community level could be divided into 0.3% for the REC's administration while 0.2% is used to finance the AU. This model is feasible bearing in mind that any excess money collected beyond a country's AU assessed contribution will be returned to the country.

⁷⁸ Business Day, [Kenya will introduce 0.2% tax on imported goods to finance AU military operations](#), 27 July 2016.

4. Conclusion

The full and effective establishment and implementation of the CFTA would seem to provide a stronger legal foundation for the use of the 0.2% levy. Once the CFTA is formally established and notified to the WTO, it will allow a large number of countries within the CFTA to be able to discriminate against third parties, contrary to the MFN principle. However, the CFTA is yet to be established. Furthermore, as noted above, notification of the CFTA as a free trade area means that countries retain their own external tariffs and issues may remain for countries, which have bound at zero tariffs or are in EPAs. A customs union encompassing all AU member states would be the ideal solution as this would allow all member countries to have a common external tariff and the 0.2% levy can then be imposed on all imports from non-members. The CFTA is envisioned to finally result in the establishment of an African customs union.

Therefore, some flexibility will need to be provided to countries that cannot implement the 0.2% levy due to pre-existing conditions. For instance, countries like Mauritius, which have zero tariffs on products, may opt to meet its assessed contribution through other resources. However, the AU will need to strike a balance between *flexibility* and *predictability*. The levy was introduced in a context where flexibility meant that countries have repeatedly failed to pay their dues on time. Several reasons, especially relating to budgetary space at the country level, have often been advanced as a reason behind unpredictable funding. There is therefore a merit in identifying a *specific stable source of income* that is adapted to the country context from which resources to fund the AU will be regularly collected.

The Kenyan model provides a best practice that may be adopted by countries to avoid the imposition of a new tax on imports at least as a transitional arrangement.

Overall, however, what is key is that countries have a clear understanding on the accountability, legitimacy and scrutiny in the administration of the funds collected from the 0.2% levy. The process currently underway to strengthen these accountability mechanisms through a greater involvement of the Ministers of Finance is certainly a positive move. Regularly communicating on the *package* around the financial reforms as opposed to a focus on the need to implement the 0.2% levy is indeed more likely to put member states more at ease with the on-going reforms.

As expressed by President Paul Kagame on the financing of the AU, “[W]e should look at this process as the last best chance, for the AU to fix its finances and secure the esteem of people we serve. We cannot lose the momentum that has been built or allow the sense of urgency that has been driving us forward to fade away”.⁷⁹ More so, “[T]he key principle we must insist on is not to allow political or technical dilemmas to override our strategic imperatives. The reform process contains the flexibility to improve and we will continue listening to each other and incorporate feedback.”⁸⁰ These sentiments show the determination of AU leaders to ensure the independence and self-reliance of the Union. The election of Kagame as the AU chairperson for 2018 as well as his role as lead of the AU Reforms, provides the leadership impetus necessary to see the implementation of the 0.2% levy which is one of the key reforms of the AU.

⁷⁹ [Address by H.E Paul Kagame during the 29th Ordinary Session of the Assembly of the Union](#), 3 July 2017, Addis Ababa, Ethiopia. KT Press.

⁸⁰ Ibid.

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