

The risks and opportunities for efforts to combat IFFs in multilateral trade agreements



Ruth Maina-Ndung'u, LL.M.

Global Tax Policy Center

Institute for Austrian and International Tax Law,
Vienna University of Economics and Business (WU)



Institute for Austrian and International Tax Law • www.wu.ac.at/taxlaw



Trends in trade agreements

IFF vulnerabilities of free trade areas

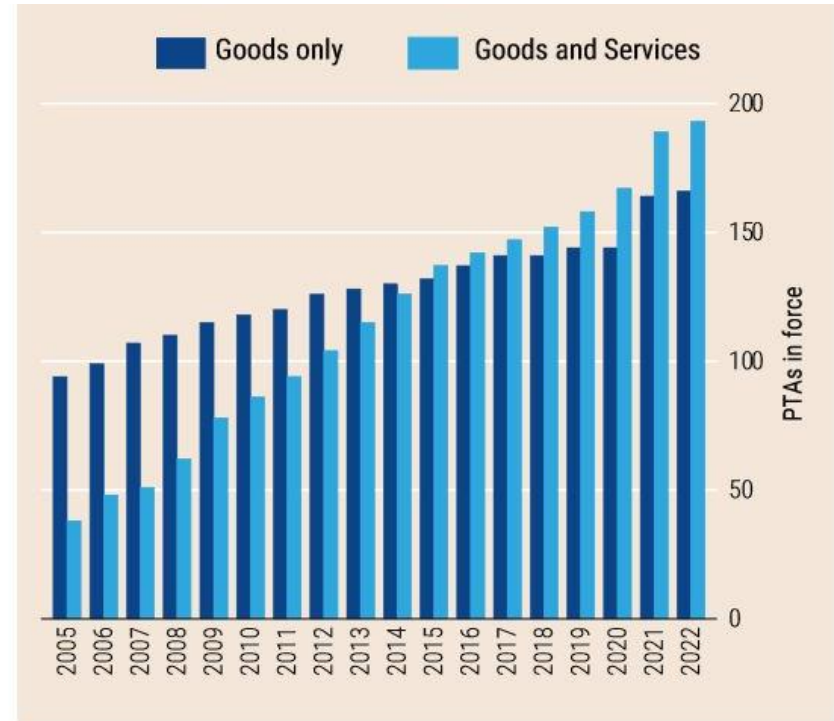
Trade obligations as potential constrain on measures to curb IFFs

AfCFTA and IFFs

Recommendations

Trends in trade agreements

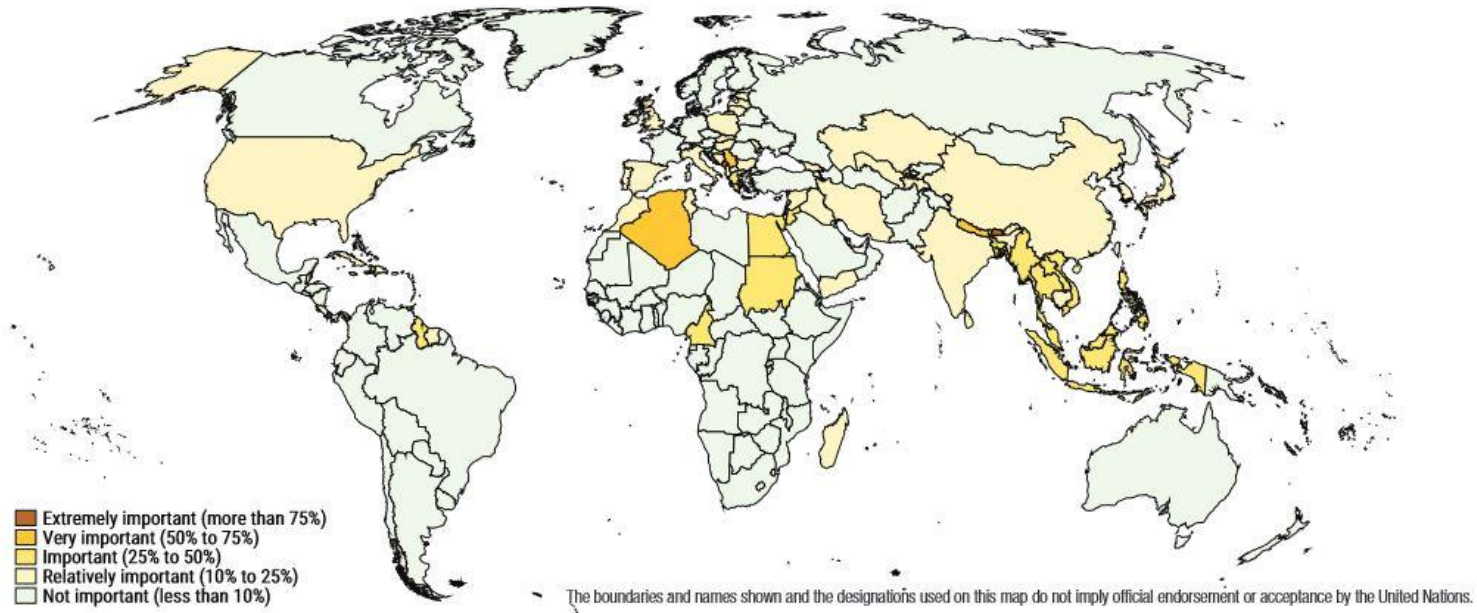
- More than double the number of agreements from 2005 – 2022.
- From 2015, upward trend has been driven by new agreements that cover both goods and services.
- Large number of agreements in force go beyond tariff concessions, covering services and behind-the-border measures.
- Percentage of trade within these regions has also increased though this may be minimal in some regions.



SOURCE: UNCTAD, KEY STATISTICS AND TRENDS IN TRADE POLICY 2023

Trends in trade agreements

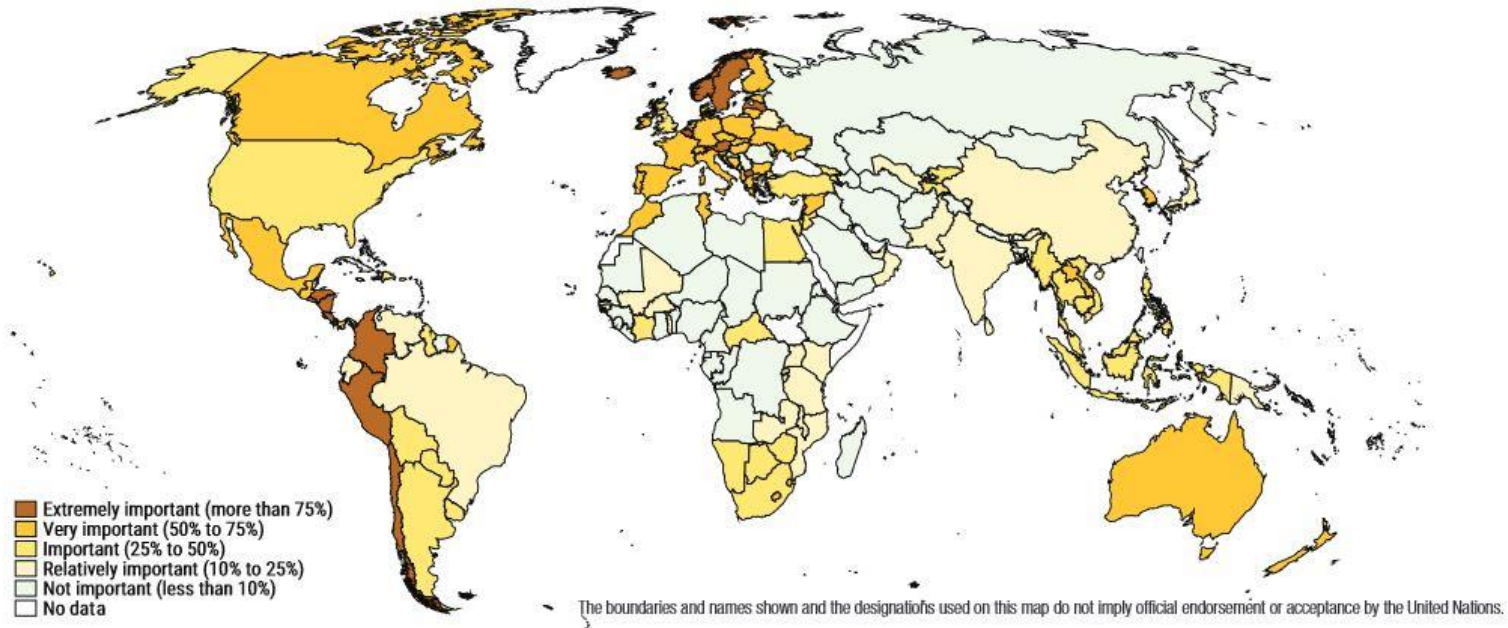
Importance of PTAs, as measured by percentage of trade (2022)



SOURCE: UNCTAD, KEY STATISTICS AND TRENDS IN TRADE POLICY 2023

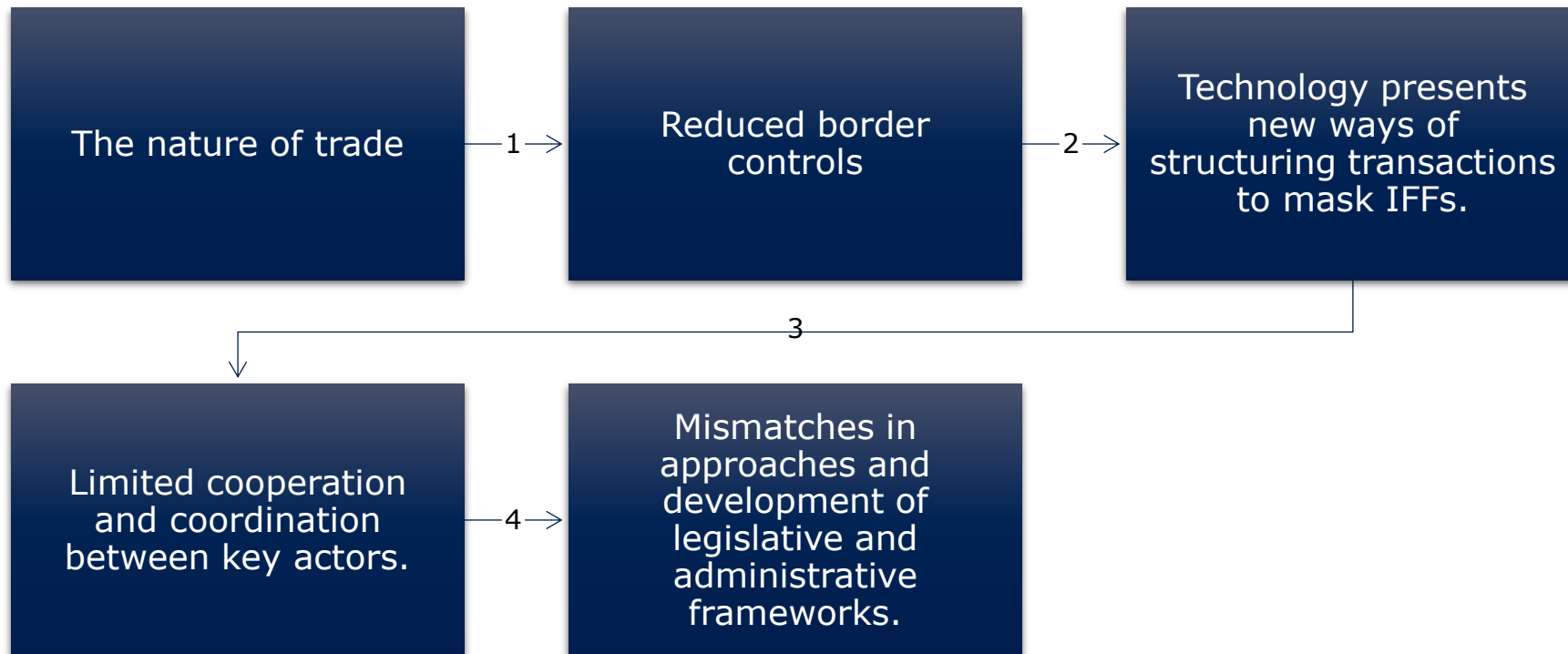
Trends in trade agreements

Importance of deep PTAs, as measured by percentage of trade (2022)



SOURCE: UNCTAD, KEY STATISTICS AND TRENDS IN TRADE POLICY 2023

IFF vulnerabilities of free trade areas



Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear (2017)

- Panama brought complaint against compound tariffs introduced by Colombia arguing that they exceeded Colombia's schedule of concessions in breach of Article II of the GATT.
- *Colombia's arguments:* The compound **tariff was designed to combat illicit trade**. Even if it was, the compound tariffs would be covered under the exceptions under Article XX.

Trade obligations as potential constrain on measures to curb IFFs

Panel Decision:

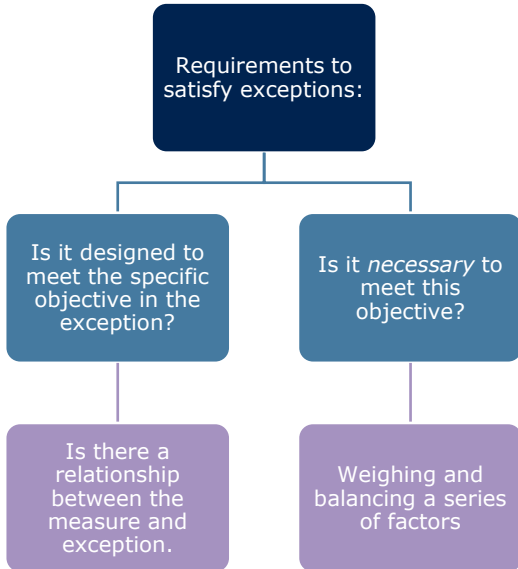
- Did not decide on whether Article II applies to illicit trade. However, decided that the compound tariff exceeded the schedule of commitments and therefore breached Article II.
- On whether the exceptions applied – Panel decided that Colombia did not provide sufficient evidence demonstrating link between measures and efforts to combat ML.

AB Decision:

- Scope of Article II **did not** exclude illicit trade. The measures exceeded the schedule of commitments and therefore in breach of Article II.
- Members still free to implement measures that achieve legitimate policy objectives under Article XX.
- Applicability of Article XX – found that the measures were designed to protect public morals (Article XX (a)) and secure compliance with legislation in line with GATT (Article XX (d)). However, Colombia failed to sufficiently show that the measures were necessary to achieve these objectives.

Trade obligations as potential constrain on measures to curb IFFs

Does it constitute arbitrary or unjustifiable discrimination?



Takeaways:

- Trade obligations may be extended to illicit trade.
- However, Article XX exceptions can be utilized to meet legitimate policy objectives (for instance combatting ML); countries would need to sufficiently satisfy the requirements which may not be easy.
- Must also ensure that measures do not constitute a means of arbitrary or unjustifiable discrimination (chapeau to Article XX)

Trade obligations as potential constrain on measures to curb IFFs

Argentina – Measures Relating to Trade in Goods and Services (2016)

- Panama challenged certain financial, taxation, foreign exchange and registration measures introduced by Argentina which distinguished between “countries cooperating for tax transparency purposes” (cooperative countries) and “countries not cooperating for tax transparency purposes” (non-cooperative countries). It argued that these measures were inconsistent with MFN and NT obligations in GATS.

Key points from the panel decision:

- Found measures inconsistent with Article II:1 of the GATS (MFN Obligation).
- The measures were not covered under the exception under Article XIV(c) of the GATS as they failed to meet requirements under the Chapeau due to distortions created by the classification used by Argentina – no arbitrary discrimination.

AB decision

- Panel erred in its analysis of likeness.
- Refrained from explicitly taking a position on whether cooperative and non-cooperative jurisdictions services and service providers are 'like.'
- Panel erred in its interpretation of Articles II:1 and XVII of the GATS in finding that an analysis of "treatment no less favorable" had to consider "regulatory aspects" relating to services and service suppliers

Trade obligations as potential constrain on measures to curb IFFs

Takeaways:

- Differentiation between services and service providers (horizontally under MFN or Vertically under NT) must eventually be justifiable and not constitute disproportionate interference in economic freedoms.
- Need to test any new (and existing) tax related policies to curb IFFs and evaluate them considering the conditions and obligations in trade agreements.

AfCFTA and IFFs

The AfCFTA is a game changer for African countries.

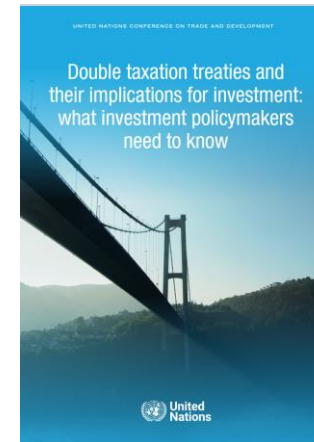
Agreement does not have specific comments on IFFs. However, recognizes several higher goals that can be invoked to set aside economic freedom it guarantees.

In addition, there are provisions available to facilitate enhanced cooperation; technical assistance; capacity building.

Several continental efforts but there remains mismatches in legal and administrative frameworks. AU in partnership with ATAF and other stakeholders working to coordinate these efforts.

Recommendations

- Achieve a shared understanding on policy objectives
 - coherence between trade policy implementation and design of IFF policies.
- Harmonized approaches between countries to combat IFFs including the introduction of IFFs related exceptions in the AfCFTA agreement and annexes (borrowing from investment agreements clauses).
- States must ensure that the measures implemented can be justified to meet the “necessity” requirement.
- Measures cannot be a means of arbitrary or unjustifiable discrimination.
- Need to test any new (and existing) measures to curb IFFs and evaluating them considering the conditions and obligations in trade agreements.





VIENNA UNIVERSITY OF
ECONOMICS AND BUSINESS

**INSTITUTE FOR AUSTRIAN AND
INTERNATIONAL TAX LAW**

Welthandelsplatz 1, Building D3, 1020
Vienna, Austria

Ruth Maina-Ndung'u, LL.M.

ruth.wamuyu.maina@wu.ac.at
www.wu.ac.at/taxlaw