



BUSA Position to the paper AU Paper Below:

1. This should be a wholly obtained product (like ECOWAS applies it), if it must be included at all.

ECOWAS Article 3: Goods wholly produced in Member States

Art. 3.1(k) "electric energy produced in the Member States"

2. Electric Energy does not form part of the imported content when used in the manufacture of an imported product (just as the machinery used in the production of the product does not become part of the imported product).
3. Most countries would probably not have tariffs on imported energy/electricity. South African tariff heading for 'electrical energy', 27.16, has a rate of duty of zero.
4. However, the trade of electricity energy is generally highly regulated. Developing rules on this might not be worth it. If the Members insist, a wholly obtained rule should be sufficient.

**TECHNICAL NOTE ON TREATMENT OF ELECTRIC ENERGY
IN RULES OF ORIGIN**

**AFRICAN UNION COMMISSION
DEPARTMENT OF TRADE AND INDUSTRY
CFTA SUPPORT UNIT
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TECHNICAL NOTE ON TREATMENT OF ELECTRIC ENERGY IN RULES OF ORIGIN

I. BACKGROUND

1. The Assembly of the African Union launched the negotiations for the establishment of a Continental Free Trade Area (CFTA) in June 2015 under its Decision Assembly/AU/Dec. 569 (XXV). Under the same Decision, the Assembly adopted, among others, the following:
 - (a) The Objectives and Principles of Negotiating the CFTA;
 - (b) The Indicative Roadmap for the Negotiation and Establishment of the CFTA;
 - (c) The Terms of Reference for the CFTA Negotiating Forum (CFTA-NF);
 - (d) The institutional arrangements for the CFTA negotiations;
 - (e) The Declaration on the Launch of the Negotiations for the Establishment of the CFTA.

2. Pursuant to its Terms of Reference the CFTA-NF established Technical Working Groups (TWGs) to focus on some areas being negotiated towards the establishment of the CFTA. One such TWG was established to propose the legal text of Appendix 2 on Rules of Origin for consideration by the CFTA-NF.
3. At its third meeting held in Durban, South Africa, on 21st to 25th August, 2017 the TWG on Rules of Origin could not reach consensus on whether electric energy can be included in the list of Wholly Produced Products.
4. This Technical Note therefore examines how electric energy has been treated in the existing Free Trade Areas (FTAs) in Africa and elsewhere in response to the TWG's request for the AUC to provide such an analysis. Rules of Origin from four FTAs in Africa, the EPA between some African Member States and the EU as well as NAFTA and ASEAN-CHINA FTA have been analyzed to establish how electric energy has been treated.
5. From the conclusions drawn in this analysis and the recommendations that follow, the TWG will have to decide on how electric energy ought to be treated in the CFTA Rules of Origin.

II. IS ELECTRIC ENERGY A GOOD OR A SERVICE?

6. Arguments have been submitted at different forums on whether electric energy is a good or a service. Literature review has shown that there is no universal agreement on this question.
7. In 2010 Thomas Cottier et al¹ analyzed the aspects of energy in the WTO laws and policies. They concluded that the WTO rules did not deal properly with trade in energy. Further they noted that the WTO law did not contain any specific provisions on electricity.
8. Earlier in 2005 Morrison & Foerster² wrote in the Energy Law Bulletin with reference to whether electric energy is a good or not under the Uniform Commercial Code of

¹ Energy in WTO Law and Policy https://www.wto.org/english/res_e/publications_e/wtr10_7may10_e.pdf (Accessed 20 September 2017)

² Electricity: A "Good" under the UCC. Should be a Simple Question - Right? http://faculty.law.miami.edu/rrosen/courses/documents/05kelectricityagood_000.pdf (Accessed 20 September 2017)

the USA. Their findings were that the USA courts were split on this definition. Some courts ruled that it is a good³ while others ruled that it is a service. Yet other courts ruled that whether electric energy is a good or a service depends on its location in the distribution chain of *generation; transmission; distribution; or supply*. As all determinations prevail in different states, it was recommended that parties to a contract have to align to the ruling applicable in each state or better still consider specifying the law they agree to apply in case of a dispute.

9. In the European Union it was only in 1994 that the European Court of Justice “explicitly recognized that the rules on the free circulation of goods of the EC Treaty applied to electricity”.⁴

Electric Energy in the Harmonized System (HS)

10. Meanwhile in the HS, the World Customs Organization (WCO) has specified electric energy in HS Heading 27.16 but this remains an optional inclusion in the nomenclature of the Member States. The HS is the WCO’s Harmonized Commodity Description and Coding System that applies to all commodities (goods) that are traded across the world. Thomas Cottier et al noted that electric energy has been defined as a good in the HS despite its peculiar physical properties.

III. ANALYSIS OF FREE TRADE AREA AGREEMENTS

11. The trend in the Free Trade Area (FTA) agreements examined so far reveals that electric energy is, in all cases, considered as a good in two ways:
 - (a) In some instances it is deemed to be a wholly produced product like minerals and agricultural goods notwithstanding its actual origin. This means even where electric energy is imported from the outside the FTA, its value would be taken as part of originating goods, labour or other local overhead expenses. ECOWAS explicitly included electric energy in the list of Wholly Produced Products.
 - (b) In other instances electric energy is classified as a neutral element together with fuels, plant equipment and tools. This entails that the value of electric energy will be part of the cost of the manufactured goods without recognizing its origin, even where the energy originated from outside the FTA.

Table 1: Electric Energy in the texts of the FTAs

³ Cases where there was debate whether electricity is a good or a service were heard in Utah, California, New York, Kentucky, Maryland, Massachusetts and Michigan.

⁴ Almelo case of 1994 at the European Court of Justice

	FTA Agreement	Wording	Wholly Produced	Neutral Element
(a)	ASEAN-CHINA (Annex 3)	Rule 11: Neutral Elements <i>Unless otherwise provided, for the purpose of determining the origin of goods, the origin of power and fuel, plant and equipment, or machines and tools used to obtain the goods, or the materials used in its manufacture which do not remain in the goods or form part of the goods, shall not be taken into account.</i>		✓
(b)	COMESA	RULE 3 - Goods Wholly Produced in the Member States <i>2. Electrical power, fuel, plant, machinery and tools used in the production of goods shall always be regarded as wholly produced within the Common Market when determining the origin of the goods.</i>	✓	
(c)	EAC	Rule 14 – Neutral Elements <i>In order to determine whether a product originates in a Partner State, it shall not be necessary to determine the origin of the following where these are used in its manufacture:</i> <i>(a) energy and fuel;</i> <i>(b) plant and equipment;</i> <i>(c) machines and tools; and</i> <i>(d) goods which do not enter and are not intended to enter into the final composition of the product.</i>		✓
(d)	ECOWAS ⁵	Article 3: Goods wholly produced in Member States <i>Art. 3.1(k) “electric energy produced in the Member States”</i>	✓	
(e)	SADC	Rule 4 - Goods Wholly Produced in the Member States <i>Rule 4.4 Electrical power, fuel, plant machinery and tools used in the production of goods shall always be regarded as wholly produced within the Region when determining the origin of the goods.</i>	✓	
(f)	NAFTA	Part I – Definitions and Interpretations <i>2 (1) For purposes of these Regulations “indirect material” means a good used in the production, testing or inspection of a good but not physically incorporated into the good, or a good used in the maintenance of buildings or the operation of equipment associated with the production of a good, and includes:</i>		✓

⁵ Protocol A/P1/1/03 Relating to the Definition of the Concept of Product Originating from Member States of the Economic Community of West African States.

	FTA Agreement	Wording	Wholly Produced	Neutral Element
		<p>(a) fuel and energy, (b) tools, dies and moulds, (c) spare parts and materials used in the maintenance of equipment and buildings, (d) lubricants, greases, compounding materials and other materials used in production or used to operate equipment and buildings, (e) gloves, glasses, footwear, clothing, safety equipment and supplies, (f) equipment, devices and supplies used for testing or inspecting the other goods, (g) catalysts and solvents, and (h) any other goods that are not incorporated into the good but the use of which in the production of the good can reasonably be demonstrated to be part of that production; (matière indirecte)</p>		
(g)	SADC EPA	<p>Article 13 - Neutral elements</p> <p><i>In order to determine whether a product originating, it shall not be necessary to determine the origin of the following which might be used in its manufacture:</i></p> <p style="padding-left: 40px;">(a) energy and fuel; (b) plant and equipment; (c) machines and tools; and</p> <p>(d) goods which do not enter and are not intended to enter into the final composition of the product.</p>		✓

IV. CONCLUSIONS

12. In trade protocols electric energy is a good. It has been treated as a wholly produced product or a neutral element for purposes of determining the origin of manufactured goods where it (electric energy) would be used. This calls for consideration in two separate ways:

(a) **Electric energy as a tradable commodity**

Would Member States in an FTA desire to trade in electric energy as described in HS Heading 27.16 of the HS?

(b) **Electric energy as a neutral element**

Would Member States in an FTA desire to consider the value or content of electric energy in other goods that are manufactured using electric energy?

13. Taking both (a) and (b) above into the CFTA Rules of Origin does not appear to disadvantage any Member State.

V. RECOMMENDATIONS

14. In view of the conclusions reached it is recommended that:

- (a) The CFTA TWG on Rules of Origin should tackle the need for one or both (a) and (b) in paragraph 12 above in the CFTA Appendix 2 on Rules of Origin.
- (b) Having electric energy specifically included in the list of wholly produced products may help those Member States that see an opportunity to export this commodity to others in the CFTA expand their generation of the commodity for guaranteed export markets in Africa.
- (c) Treating electric energy as a neutral element becomes an advantage where the value of the manufactured goods, such as ex-works cost or price, is concerned. Its value becomes part of the local content in a Member State.
- (d) It appears in order to allow electric energy that is produced in Member States of the CFTA to be granted preferential tariffs where it is exported as a wholly produced commodity.
- (e) The CFTA TWG on Customs Cooperation and Procedures may help in developing appropriate procedures for the Customs clearance of this commodity given its peculiarity as opposed to other goods that are exported and imported through designated ports of entry.