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What is the DNA of the AfCFTA?

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It has been said that "… the significance of the AfCFTA cannot be overstated. It is the world's largest free trade area since the establishment of the World Trade Organisation (WTO) in 1994."[1] Trade under the African Continental Free Trade Area (AfCFTA) has not yet started but what can be expected when that moment arrives? How does it compare, in terms of principles, design and institutions, to the WTO? Is it realistic to compare it to the WTO?

The AfCFTA is a unique preferential trade arrangement designed for the needs of the African continent. Its legal instruments include principles developed after World War II when the General Agreement on Tariffs and Trade (GATT) was adopted. It is useful to recall these principles and to contemplate what will happen once the AfCFTA Agreement is implemented. Will the most favoured-nation-treatment principle, for example, work in the same manner? Can rules-based trade governance be expected? How will exceptions be implemented? Will disputes be referred to the Panels and Appellate Body of the AfCFTA? This Blog speculates about these issues by looking at some of the provisions in the texts of the AfCFTA legal instruments.

The GATT aimed at eliminating different kinds of trade protectionism imposed by states during the pre-World War II period. It also provided a system to resolve trade disputes. The most crucial principle of GATT is trade without discrimination. Member countries may not discriminate between their trading partners (member countries must give them equal "most-favoured-nation" or MFN status). Neither may they discriminate between their own and foreign products or nationals (give others "national treatment"). Tariffs protect domestic industries. GATT prefers customs tariffs over any other form of trade restrictions; the prohibition of quantitative trade restrictions was and remains central to the GATT. Emergency actions are permissible in the form of safeguards or when a member state applies for a waiver or tariff modifications.

[1] See Understanding the African Continental Free Trade Area and how the US can promote its success

The GATT is rules-based and predictable; trade barriers should not be raised arbitrarily, and tariff rates and market-opening commitments are "bound". It discourages unfair practices such as export subsidies and dumping products at below cost in foreign markets. However, it provides for certain exceptions, such as trade remedies, regional trade arrangements, balance of payments and general exceptions.[2]

The GATT was implemented and refined through subsequent rounds of negotiations to make trade freer and develop additional technical standards and procedures. It employed a system of notifications and rules on transparency. It was (and still is) an evolving system.[3]

Measured against the extent to which tariffs on industrial goods were eliminated and many domestic reforms were implemented, the GATT has been a successful trade arrangement. From 1948 to 1994, the GATT provided the rules for much of world trade and presided over periods that saw some of the highest growth rates in international commerce.[4] The average tariff levels for the major GATT participants were about 22 per cent in 1947. After the Uruguay Round, tariffs were under 5%.[5]

The WTO was established in 1995. It is an International Organisation with legal personality[6] and has many institutions.[7] Its top decision-making body is the Ministerial Conference, which is composed of all member states and usually convenes biennially. Consensus is emphasised in all decisions. Day-to-day functions are handled by the General Council, made up of representatives from all members. A Secretariat of over 600 personnel, led by the Director-General and four deputies, provides administrative, professional, and technical services. The WTO also administers an independent and active dispute settlement system and the Trade Policy Review Mechanism.

The AfCFTA founding Agreement does not establish an international organisation; the AfCFTA is institutionally much more decentralised, and its institutions are in essence platforms for meetings, when needed, by representatives of the State Parties. It is indeed a member-driven arrangement.[8]

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[2] Art XX is the "General Exceptions" clause of the GATT. Members may take measures that would otherwise be inconsistent with the Agreement, such as protecting public health, morals, and the environment. When doing so, certain conditions must be met. Compliance with the rules is justiciable.

[3] The GATT 1994 is contained in Annex 1A of the WTO Agreement and incorporates by reference the provisions of the GATT 1947. See General Agreement on Tariffs and Trade (GATT) 1994

[4] See The GATT years: from Havana to Marrakesh

[5] Bown, C.P. and Irwin, D.A. 2017. 'The GATT's Starting Point: Tariff Levels circa 1947', in Elsig, M., Hoekman, B., and Pauwelyn, J. (eds.), *Assessing the World Trade Organization: Fit for Purpose?* New York: Cambridge University Press, 45–74.

[6] Arts I and VIII Marrakesh Agreement Establishing the World Trade Organization.

[7] One source mentions 35 standing bodies and 30 ad hoc bodies. Van den Bossche. P, and Zdouc. W. 2013. *The Law and Policy of the World Trade Organization*, 3rd ed, Cambridge University Press, at 120. See further Art IV Marrakech Agreement.

[8] As provided in Art 5(a) AfCFTA founding Agreement.

The AfCFTA Council of Ministers consists of the Ministers of the State Parties responsible for trade (or other ministers) and shall ensure effective implementation and enforcement of the AfCFTA Agreement; it meets twice a year in ordinary session and may meet as and, when necessary, in extraordinary sessions.[9] There is only one permanent AfCFTA institution, the AfCFTA Secretariat, which is autonomous of the African Union (AU) Commission. It is an institution within the AU system with an independent legal personality. The Council of Ministers determines the roles and responsibilities of the Secretariat.[10]

Article 5 of the AfCFTA founding Agreement is central to its design and intentions. This provision contains the AfCFTA's founding principles and says, among other things, that the AfCFTA is member-driven, that the RECs' Free Trade Areas (which shall continue to function[11]) are building blocs for the AfCFTA, and that that the *acquis* (existing integration achievements) shall be preserved. It mentions MFN and national treatment, but MFN treatment shall be granted on *a reciprocal basis*.[12]

In some instances, the AfCFTA legal instruments incorporate WTO principles quite directly. Art 5 of the Protocol on Trade in Goods says a State Party shall accord to products imported from other State Parties treatment no less favourable than that accorded to like domestic products of national origin. This treatment covers "all measures affecting the sale and conditions for sale of such products in accordance with Article III of GATT 1994". The same applies to Trade Remedies,[13] although only three African nations (Egypt, Morocco, and South Africa) are active users of multilateral trade remedies.

The AfCFTA should rather be viewed as a unique arrangement established as a preferential/regional trade arrangement in the form of a Free Trade Area for the Member States of the African Union. They count 55 countries at very different levels of economic development and industrialisation. These states treasure their sovereignty and policy space. They have now established a continent-wide FTA which will allow them to continue with their established approach to economic integration.

African States never litigate against each other over disputes involving trade agreements. It is very unlikely that they will change their behaviour under the AfCFTA. If they would do so, it will have far-reaching implications for the REC FTAs and will upset the bigger scheme of things underpinning the AfCFTA. It has to be noted that in SADC, the regional Tribunal was abolished by unanimous decision in

[9] Art 11 AfCFTA founding Agreement.
[10] Art 13 AfCFTA founding Agreement.
[11] Art 8(2) AfCFTA Protocol on Trade in Goods.
[12] Art 18 AfCFTA founding Agreement and Art 4 AfCFTA Protocol on Trade in Goods.
[13] Arts 17 and 18 AfCFTA Protocol on Trade in Goods.

2011 when it ruled against Zimbabwe for expropriating private land without compensation. There has not been a new SADC tribunal since. The AfCFTA Dispute Settlement Mechanism will not become its replacement.

Most AfCFTA State Parties are WTO members. The AfCFTA is, in terms of its relationship with the WTO, and its design, an FTA along the lines of the exception provided for in Article XXIV GATT. It should be assessed and discussed as such.

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