

## The role of Negotiating Principles in the design of the AfCFTA

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Since the launch of the '[Tripartite Free Trade Area \(TFTA\)](#)',<sup>1</sup> negotiations on trade liberalisation among African States have been based on a specific set of principles. When the African Union launched the Continental Free Trade Area (CFTA), as it was then called, the TFTA was considered a “milestone” event. What was expected to happen was “*the consolidation of the Tripartite and other regional FTAs into a Continental Free Trade Area (CFTA)*”.<sup>2</sup> Things turned out differently but when the AfCFTA negotiations began, basically the same Principles were adopted to guide that process.

Article 6 of the TFTA Agreement reads:

*The principles governing this Agreement shall be the following:*

- (a) REC and/or Tripartite Member/Partner States driven;*
- (b) variable geometry;*
- (c) flexibility and special and differential treatment;*
- (d) transparency;*
- (e) building on the acquis;*
- (f) single undertaking with regard to the various phases of the Agreement;*
- (g) MFN treatment*
- (h) national treatment;*
- (i) reciprocity;*
- (j) substantial liberalisation;*
- (k) consensus decision making; and*

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<sup>1</sup> The TFTA has its roots in a decision by the Heads of State and Government of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC), adopted in October 2008 in Kampala, Uganda. The TFTA Agreement was adopted at Sharm El Sheikh, in Egypt, on 10 June 2015.

<sup>2</sup> Assembly/AU/Dec.394(XVIII)

- (l) *best practices in the regional economic communities, the Tripartite Member/Partner States and international conventions binding Tripartite Member/Partner States.*

Article 5 of the AfCFTA Agreement provides as follows:

*The AfCFTA shall be governed by the following principles:*

- (a) *driven by Member States of the African Union;*
- (b) *RECs' Free Trade Areas (FTAs) as building blocs for the AfCFTA;*
- (c) *variable geometry;*
- (d) *flexibility and special and differential treatment;*
- (e) *transparency and disclosure of information;*
- (f) *preservation of the *acquis*;*
- (g) *Most-Favoured-Nation (MFN) Treatment;*
- (h) *National Treatment;*
- (i) *reciprocity;*
- (j) *substantial liberalisation;*
- (k) *consensus in decision-making; and*
- (l) *best practices in the RECs, in the State Parties and International Conventions binding the African Union.*

These AfCFTA Principles should be read together to appreciate their effect, but it seems fair to say that three of them are particularly important for understanding the design of the AfCFTA. They are the fact that the AfCFTA is **member-driven**, that the **REC Free Trade Areas (FTAs) are the building blocks for the AfCFTA**, and the **preservation of the *acquis***.

During the TFTA deliberations, the following explanation of the implications for the negotiations was provided:

*Building on the *acquis* of the existing REC FTAs in terms of consolidating tariff liberalisation in each REC FTA: *Acquis* is a French term meaning "that which has been agreed". In the context of the Tripartite Free Trade Agreement, it means that the negotiations should start from the point at which of the COMESA, EAC and SADC trade negotiations have reached. Tariff negotiations and the exchange of tariff concessions would be among Member/Partner States of the Tripartite FTA*

*that have no preferential arrangements in place between them. This will both preserve the acquis and build on it.*

The implication was that intra-REC FTA trade in goods would not see any liberalisation via the TFTA (and AfCFTA) negotiations. At the same time the REC FTAs would remain in place and would continue to function in terms of their own legal instruments.<sup>3</sup> Tariff concessions would only be extended among those African States trading with each other under WTO (MFN) rates, or *General Rates* in case of African countries that are not WTO Members.

The fact that neither the TFTA nor the AfCFTA Agreement defines the term *acquis*, raises interesting questions. Does it mean that it is only limited to tariff and related trade in goods principles and practices? Or does this Principle refer to all AfCFTA disciplines? Under standard treaty interpretation rules, terms in treaty texts that are not given a special meaning must be given their ordinary meaning in the context used. What is the context in this instance? If the REC FTAs are the building blocks for the AfCFTA (which is a comprehensive trade arrangement and includes a Protocol on trade in services, as well as other Protocols<sup>4</sup>) then all other trade-related disciplines should be included as part of the *acquis*. And Article 5 of the AfCFTA Agreement (which mentions the preservation of the *acquis* as a basic Principle) is not limited to trade in goods.

A case could be made that the *acquis* should be understood to mean the total body of law adopted as part of existing regional integration arrangements. The EU's '*acquis*' is the body of common rights and obligations that are binding on all EU member states. However, this aspect has not been clarified during the AfCFTA negotiations. We will have to wait and see what approach the AfCFTA State Parties will follow.

How will these Negotiating Principles guide deeper continental integration? Article 3 of the AfCFTA Agreement lists the AfCFTA's General Objectives. The ultimate aim is to "*create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent.*" This will happen when the State Parties are ready. A "*liberalised market for goods and services*" will be established "*through successive rounds of negotiations*", which will require consensus, another basic Principle. The AfCFTA also wants to "*lay the foundation for the establishment*

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<sup>3</sup> As is expressly stated in Art 19(2), AfCFTA Agreement and in Art 8(2), AfCFTA Protocol on Trade in Goods.

<sup>4</sup> Negotiations to add Protocols on investment, competition, intellectual property rights, digital trade and women in trade have already started.

*of a Continental Customs Union at a later stage*". Such a far-reaching step can only come about if the State Parties formally so agree and if they are prepared to abandon the trade related benefits inherent in the more flexible REC FTAs.

What happens if there is disagreement in the ranks of the AfCFTA membership and only some want to deepen continental integration? The AfCFTA Protocol on Trade in Goods has a clever answer:

*Nothing in this Protocol shall prevent two or more State Parties from extending to one another preferences which aim at achieving the objectives of this Protocol among themselves, provided that such preferences are extended to the other State Parties on a reciprocal basis.*<sup>5</sup>

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<sup>5</sup> Art 4(3) AfCFTA Protocol on Trade in Goods. See also Art 4(3) AfCFTA Protocol on Trade in Services.