



## The post AfCFTA Trade Architecture introduces Parallelism

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As a legal construct the AfCFTA presently consists of a founding Agreement and three Protocols. The Protocol on Trade in Goods establishes a Free Trade Area (FTA) among the relevant State Parties. The second Protocol provides for the liberalization, among the State Parties, of trade in services sectors.<sup>1</sup> The third Protocol deals with the settlement of disputes among the State Parties. It applies to inter-state disputes about the interpretation or application of the relevant legal instruments. During Phase II Protocols on intellectual property rights, investment, and competition policy will be negotiated.

The technical design of the FTA to be established by the AfCFTA is rather straight forward. It aims to liberalize trade in goods through tariff reductions (still being negotiated) applicable to goods originating from the State Parties. It is cast in the mould of the MFN exception allowed under Article XXIV(8)(b) GATT: *A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade between the constituent territories in products originating in such territories.*

An FTA does not have a common external tariff (CET). The members of an FTA remain free to develop their own tariff policies and to negotiate trade in goods agreements with third parties. A customs union (CU), on the other hand, has a single customs territory and a common external tariff (CET).<sup>2</sup>

There are several well-established FTAs on the African continent. They contain all the relevant rules and structures for liberalizing trade in goods among the Parties thereto. Examples are the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA). They will continue to exist and operate as before when and while the AfCFTA finally gets implemented. They will also advance their separate agendas for deeper *inter partes* integration. Some have plans to become proper CUs. The Economic Community of West African States (ECOWAS) and the East African Community (EAC), for examples are working towards the full implementation of the two requirements for a customs union – the CET

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<sup>1</sup> Five priority sectors have been identified as a starting point for the negotiations – transport, communication, financial, tourism and business services.

<sup>2</sup> The Southern African Customs Union (SACU) exists since 1910 and was, from the outset, founded as a customs union. It is not one of the 8 RECs recognized by the African Union.

and a common customs territory. It should be noted that some of the RECS, such as SADC, are more than trade arrangements. The SADC Member States have also, in addition to the SADC Protocol on Trade, adopted Protocols on matters such as the sharing of regional water courses, industrialization, energy, combatting corruption, education and training, mining, science, technology and innovation, tourism etc. There are more than twenty additional SADC Protocols.<sup>3</sup>

The FTA brought about by the AfCFTA will not constitute (once operational) one *continental* FTA and will not replace existing intra-African FTAs. This is clearly stated in Article 19(2) of the AfCFTA Agreement: “... *State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves*”. (Emphasis added.)

Article 8 of the AfCFTA Protocol on Trade in Goods further explains the future *de facto* and *de jure* position: “... *State Parties that are members of other RECs, which have attained among themselves higher levels of elimination of customs duties and trade barriers than those provided for in this Protocol, shall maintain, and where possible improve upon, those higher levels of trade liberalisation among themselves*. (Emphasis added.)

Only those African States presently trading with each other under MFN rates<sup>4</sup>, will, once they have become AfCFTA State Parties,<sup>5</sup> be able to benefit from the preferential tariffs of the new FTA of the AfCFTA. They will do so within the AfCFTA configuration. Those AfCFTA State Parties presently belonging to the REC FTAs, CUs and other regional trading arrangements mentioned in Article 19(2) of the AfCFTA Agreement and in Article Article 8 of the AfCFTA Protocol on Trade in Goods, will continue to trade with each other under the higher levels of liberalization provided for by such RECs, trading arrangements and CUs. These other *regional trading arrangements* are not identified by name but will presumably include bilateral trade agreements and the Tripartite Free Trade Area (TFA). The latter consists of COMESA, EAC and SADC Member and Partner States; once operational.<sup>6</sup>

Under its scheme of things, the Africa’s trade regimes will run on several tracks simultaneously. We refer to this as Parallelism. The AfCFTA regime and the existing FTAs, CUs and other trade arrangements co-existing with each other. They predate the AfCFTA and most of them are legal persons in their own right. They have different (sometimes overlapping) memberships.

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<sup>3</sup> <https://www.sadc.int/about-sadc/overview/sa-protocols/>

<sup>4</sup> AU member states that are not yet members of the World Trade Organisation, such as Ethiopia, are also negotiating tariff concessions.

<sup>5</sup> They must first ratify the AfCFTA Agreement or accede to it. See Art 23 AfCFTA Agreement.

<sup>6</sup> The TFTA 14 ratifications for entry into force. There have been 8 ratifications.

The expectation is that the different African preferential regimes for trade in goods will, at some point, gravitate towards one single continental arrangement. When and how that might happen is unclear. Separate negotiations in different configurations will be required, and new preferences shall only be extended on the basis of reciprocity. Article 18(1) AfCFTA Agreement contains the following indication: *“Following the entry into force of this Agreement, State Parties shall, when implementing this Agreement, accord each other, on a reciprocal basis, preferences that are no less favourable than those given to Third Parties.”*<sup>7</sup>

The AfCFTA also embodies long-standing continental political ambitions. It is an AU project connected to the formation of the African Economic Community promised in the Abuja Treaty adopted in June 1991. One of the AfCFTA’s general objectives is to eventually *“create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of “An integrated, prosperous and peaceful Africa” enshrined in Agenda 2063”*.<sup>8</sup>

The AfCFTA is not designed to be a rushed job. *“State Parties shall progressively eliminate tariffs and non-tariff barriers to trade in goods; progressively liberalise trade in services; cooperate on investment, intellectual property rights and competition policy; cooperate on all trade-related areas; cooperate on customs matters and the implementation of trade facilitation measures; establish a mechanism for the settlement of disputes concerning their rights and obligations; and establish and maintain an institutional framework for the implementation and administration of the AfCFTA.”*

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<sup>7</sup> Art 18(1) AfCFTA Agreement.

<sup>8</sup> Art 5(a) AfCFTA Agreement.