



2020 tralac Annual Conference

Questions and Answers

Session 1

1. *What about dispute settlement? (in the context of the WTO)*

The Appellate Body (AB) of the WTO is not operational at present; the US refuses to participate in the appointment of new AB members. It wants bigger systemic reforms in the WTO first. It means an important WTO contribution to multilateral trade governance (certainty about the meaning of legal obligations) cannot fully happen, which is very unfortunate. This is one of the urgent items on the WTO's to-do list. In the meantime, the EU and Canada have launched an *ad hoc* arbitration initiative, but this will only apply to the participating countries. It does not really solve all the problems. Multilateral legal uncertainty should be avoided, and this requires an active AB.

The recent Panel Report in the dispute declared by China against the US tariffs on Chinese imports found in favour of China (on a technical point) but cannot be implemented if the AB cannot also hear this matter.

Session 2

1. *What do you think is the biggest challenge in implementing the AfCFTA? Is it where to draw the line on infant industry argument? Is it the continuation of political will? or weak institutional capacity of African government? or is it something else completely?*

The biggest challenge to the effective implementation of the AfCFTA legal instruments is to ensure domestic compliance by the State Parties. Beware of vague statements about "political will". Compliance with legal obligations, in particular about customs administration, trade facilitation and domestic transparency is vital. It is also time that we also allow more space for private firms and parties to enjoy domestic remedies against the failure of national officials to play by the rules. Administrative law remedies exist in practically all countries but are not actively pursued. It all boils down to better and rules-based domestic trade governance; in respect of all our trade agreements and arrangements.

2. *Investment is a key challenge to the free flow of goods, exacerbated by Covid-19 driven traditional banking constraints. What dialogue, if any, is taking place with African financial institutions such as asset owners and pension funds and sovereign wealth funds to help facilitate focus of longer-term funding?*

The AfCFTA Investment Protocol will only apply to the African State Parties. It means we need improved domestic trade promotion and trade facilitation measures too. Mode 3 re trade in services must be linked to these plans. We need external investors.

3. *Does the AU have an existing instrument of follow-up of the incorporation of the AfCFTA Agreement in the National Plans of member states after ratification?*

The AfCFTA Agreement provides (in Article 28) for a Review exercise after 5 years, but that will not be enough. Note that Article 11 of the AfCFTA Agreement (on the Council of Ministers) says that this body must “*ensure effective implementation and enforcement*” of the AfCFTA Agreement. However, this is a political platform and will only meet twice a year. Decisions are taken by consensus. We need much more. Hopefully this will become one of the Secretariat’s tasks. These must still be finalized.

Session 3

1. *What are the implications of the ongoing Kenya-US trade negotiations for the EAC and the negotiations and implementation of the AfCFTA?*

The EAC purports to be a Customs Union but there are still difficulties in the EAC in respect of internal tariffs and border controls. A true Customs Union has a single customs territory - where such measures will be illegal. Another difficulty is overlapping membership; most EAC members belong to COMESA (which also claims to be a Customs Union). Tanzania belongs to SADC. When Tanzania imports goods at the SADC preferential rates, such goods cannot be exported to other EAC members without ensuring that the different rates are paid, and trade deflection does not happen. Goods imported from SADC sources will not comply with the common external tariff of the EAC (or perhaps there are still rules of origin in place in the EAC too?) In principle the same could be done regarding future imports from the US into Kenya. For the rest it remains a political challenge; to inform the other EAC members and to take timely precautions. It would be unfortunate if the strict rules of a customs union are only used occasionally; to prevent one Member to do what is required in order to pursue its essential domestic trade policies and economic development plans. Kenya is highly dependent on trade with e.g. the US, EU and the UK. Intra-African trade levels are too low to accommodate urgent trade needs. This applies to most AfCFTA State Parties. Note that the 5 SACU states and Mozambique have the SADC-EU EPA; they trade DFQF and in South Africa’s case, at highly attractive preferential rates, with all 27 EU member states. A US-Kenya FTA will fall in the same category.

2. *What are the Implications for AfCFTA in view of the current Trade negotiations between Kenya and the USA? Wouldn’t the effort to implement AfCFTA drag Africa backwards?*

See the answer above. Further: It is not clear how the AfCFTA will be “dragged Africa backwards” when the State Parties improve their global trade. The AfCFTA Agreement explicitly recognizes the importance of trade with third parties (see the Preamble). In addition, Article 4 of the Protocol on Trade in Goods says: *Nothing in this Protocol shall prevent a State Party from concluding or maintaining preferential trade arrangements with Third Parties, provided that such trade arrangements do not impede or frustrate the objectives of this Protocol, and that any advantage,*

concession or privilege granted to a Third Party under such arrangements is extended to other State Parties on a reciprocal basis.

It is important to recall what a free trade area is. It is a trade arrangement in which trade in goods among the Parties happens at agreed preferential rates and preferential rules of origin. This is also what the AfCFTA envisages for now; nothing more. In an FTA the Parties retain their policy space over tariff policy; they may conclude trade agreements with third parties. An FTA does not have a Common External Tariff.

3. *The inclusion of the acquis principle implies that the existing regional agreements will still prevail despite the implementation of the AfCFTA. In such instance, how then do we achieve the goal of eliminating the “spaghetti” membership across the continent?*

The principle of ‘acquis’ entered Africa’s trade and integration vocabulary and discourse when the member states of three regional economic communities in east and southern Africa – SADC, EAC and COMESA – began negotiations to establish the [Tripartite Free Trade Area](#) (TFTA). Several important decisions had been taken at the October 2008 Summit of the Heads of State of the Tripartite Member States (SADC, EAC and COMESA), and one of the stated objectives was to address the problem of overlapping membership, among these three regional economic communities. In 2012, soon after the negotiations began, the clarifications of the negotiations principles, including the ‘*acquis*’ were adopted. In the context of the TFTA, the term ‘acquis’ means that tariff negotiations and exchange of tariff offers would be among Partner States of the Tripartite FTA that have no preferential arrangement between them. This means for example, that the Member States of the Southern African Customs Union (SACU – South Africa, Botswana, Lesotho, Namibia and Eswatini) would negotiate with the Member States of the EAC; excluding Tanzania – because Tanzania is a member of SADC, as are all the SACU Member States. SADC Member States would continue to trade under the regime of the SADC FTA. This meant that the aim of addressing the problem of overlapping membership could not be achieved.

In the AfCFTA, ‘acquis’ is a negotiating principle, but it is not defined ([see Article 1\(Definitions\) and Article 5 \(Principles\) of the AfCFTA Agreement](#)). Article 19(2) of the AfCFTA Agreement and Article 8(2) of the Protocol on Trade in Goods indicate that regional economic communities, other trading arrangements and customs unions will continue to exist. Overlapping membership will not, for now, be addressed. Note, since there is no definition of ‘acquis’ – it is important to consider broader application of this principle to other areas of the REC agendas.

4. *Question for John Stuart – there is a move by a number of countries lead by China and India, and supported by RSA, to impose a “localisation of data” rule – that is basically that data generated in a country should remain in that country. In your view is this in line with the AfCFTA principles?*

Localising data is very difficult technically because server farms are distributed globally and databases are backed up and shared across national borders. It is more feasible to require compliance before national data is used by a foreign commercial or public entity, but policing this is difficult. You need to build serious firewalls like Russia had done if you really want to close off your national Internet, but then it is either 'in our out', you can't sit on the fence.

For further discussion of e-commerce matters in the AfCFTA, please see Ify Ogo's Blog – [An Agenda for the AfCFTA Protocol on e-Commerce](#).

Session 4

1. *Can AfCFTA State Parties ensure that the National Enquiry Points established under the WTO SPS and TBT agreements work effectively to provide information on safety standards, and labelling and marking requirements?*

The Protocol on Trade in Goods contains detailed Annexes dealing with these matters.

2. *In the absence of supra-nationality status among the RECs and the AfCFTA, how do we ensure free and uninterrupted flow of goods and services in the face of member-states national sovereignty across borders? The presenters here are calling for a higher level of coordination in the sphere of trade in goods at our borders, including the role of Economic Zones / SEZs) or Free Ports in delivering economic opportunities. What is the way forward?*

When sovereign states conclude binding trade agreements, they agree to respect the obligations they have accepted. This is an act of sovereignty. If they do not want to do so, they must not ratify the agreement in question and should not become a state party simply for the political accolades. This make no sense. Once a trade agreement has entered into force and must be implemented, the state parties cannot invoke their "sovereignty" or national law (constitution) and refuse to comply. If all state parties react in this manner, no trade benefits will ever accrue.

See further the answer above about domestic implementation and allowing private firms Administrative Law remedies. Better rules-based trade governance and transparency at home are vital. We must also accept that states don't trade; they make and enforce the rules, but it is private firms, importers, exporters and investors that ultimately engage in commerce across borders. They risk their own money. And they rely on States honouring their commitments.