December 2021 tralac Newsletter

In this final 2021 tralac Newsletter, we take a look at an extraordinary year. The global picture has been described as unsettled and unpredictable, and a condition which will last for some time to come. The Economist recently wrote that "*…as 2022 draws near, it is time to face the world's predictable unpredictability. The pattern for the rest of the 2020s is not the familiar routine of the pre-covid years, but the turmoil and bewilderment of the pandemic era. The new normal is already here*".[1]

Africa's challenges are particularly daunting. We begin by going back to what we wrote a year ago, recalling what we then expected to happen in the African Continental Free Trade Area (AfCFTA) negotiations. In December last year, the final tralac Newsletter said that 2020 had been an important year for Africa. The main reason, so we believed, was that the negotiations for concluding the AfCFTA, although disrupted by the pandemic, had reached the final stage. The AfCFTA Agreement entered into force on 30 May 2019, but negotiations to finalise certain Phase I matters continued. At the *13th Extraordinary Summit of the Assembly of the African Union (AU) Heads of State and Government*, convened virtually on 5 and 6 December 2020, it was decided that they had to be concluded by the end of June 2021. Tariff schedules, rules of origin and specific commitments for priority services sectors had to be agreed before a regular AfCFTA regime would be in place. Phase II negotiations on Investment, Competition Policy,

[1] December 16, 2021.

Intellectual Property Rights and E-Commerce also required urgent attention. However, the June 2021 deadline came and went.

The December 2020 Extraordinary AU Assembly meeting also announced that an interim AfCFTA arrangement for trade in some goods would begin on 1 January 2021. It was intended to be based on the unilateral tariff offers and rules of origin that had been agreed thus far by Governments of the State Parties as part of the ongoing Phase I negotiations. This interim phase had to reflect reciprocity; meaning that mutual concessions had to be exchanged between Governments and be adopted to establish a legal foundation for interim trade in particular configurations of State Parties. The relevant States also had to ensure that their national systems had to be *customs-ready* (tariff books had to be updated and rules of origin certificates had to be issued). We observed that trade under AfCFTA preferences and rules was symbolically important, but that this interim system (which had to last for six months only) would be complex and *ad hoc*.

The complexities were underestimated. The interim AfCFTA trade in goods did not materialise. There is an important lesson to be learned about why this did not happen. The establishment of an ambitious continent-wide Free Trade Area (FTA) is well-intended and necessary. Economic integration makes sense for Africa. However, the process for reaching the required agreements cannot be divorced from the realities on the ground and the fact that trade negotiations are about the accommodation of the offensive and defensive interests of all the participating States. Some of them (including major economies such as Nigeria, South Africa, and Kenya) belong to Customs Unions (CUs) and must submit joint tariff concessions. The members of these CUs must, in addition, enter into their own *inter partes* negotiations and agree among themselves on what tariff offers they will make. This is necessary to protect the integrity of the Common External Tariff of their CU. They will then respond to the offers from the other State Parties and adjust their offers as the negotiations proceed.

This is the essence of reciprocity and engaging in trade arrangements to establish a comprehensive continental trade arrangement with institutions to guide its implementation. The AfCFTA might indeed be a member-driven Free Trade Area (FTA), not a CU, but it still needs institutions to ensure trade governance is improved, takes place in a well-coordinated manner, and brings about harmonisation in respect of domestic regulations about trade in goods and services. If this does not happen, the AfCFTA will only add to the complications that overlapping REC membership has caused for intra-African integration.

Continental integration is a complex process. It starts from certain realities and the fact that existing trade arrangements (Regional Economic Communities, CUs, and other trade arrangements[2]) will continue to exist alongside the AfCFTA. Only those State Parties presently trading with each other under MFN (most-favoured-nation) rates will use the AfCFTA preferences. This will, for example, allow preferential trade in goods between South Africa and Nigeria.

Trade in goods in Africa is highly concentrated in regions such as in SADC, the EAC and in ECOWAS. These arrangements are well-functioning and bring benefits in relation to commerce across borders, services, some degree of movement of professionals, and in the recognition of certificates and domestic standards. In the EAC steps have been taken steps to form a Common Market; made possible by a much smaller membership and a history of trial and error. These existing structures put the REC FTAs and CUs way ahead of the AfCFTA, which recognises the REC FTAs as its building blocks. It will take a long time and difficult negotiations to deepen integration in the AfCFTA. Successive rounds of negotiations are required to establish a continental market for goods and services.[3] The AfCFTA now being negotiated is only the starting point.

The REC achievements amount to the *acquis*, which Article 5 of the AfCFTA Agreement says *shall be preserved*. That brings one to a matter that emerged in the course of 2021 and which merits mentioning. A discourse has surfaced which maintains that the RECs are stumbling blocks in the way of realising the AfCFTA. They should be dissolved. This is misguided and disingenuous. These arrangements serve an important purpose as legal arrangements for preferential trade that works. The RECs are founded on their own legal instruments and cannot simply be wished away. The very same States participating in the AfCFTA are the Member/ Partner States of the RECs. For the RECs to disappear these States will have to agree to dismantle their own creations.

[2] Art 19(2) of the AfCFTA Agreement says that "*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*".
[3] Art 3 AfCFTA Agreement.

Another lesson in respect of what happened and did not happen in the AfCFTA negotiations is that specific inter-state and domestic legal arrangements must be in place for preferential trade to start. This involves certainty regarding the goods qualifying for preferential treatment and complying with the modalities that were adopted for adopting tariff schedules and rules of origin on 90% of the tariff lines. It is very difficult to reach consensus on these matters when the needs of 54 countries at very different levels of economic development must be accommodated. And it must be pointed out that 33 of the world's 46 Least Developed Countries (LDCs) are in Africa.

There have been some encouraging developments around the AfCFTA. It has been decided to add a Protocol on Women and the Youth to the AfCFTA collection of legal instruments, while the outstanding formalities in the Protocol on Rules and Procedures on the Settlement of Disputes have been attended to. The Secretariat has prepared initial drafts so that the negotiations for concluding the Phase II Protocols (on Investment, Competition, and Intellectual Property Rights) can start in 2022. This time around it would be prudent not to speculate on when these negotiations may be finalised. One cannot escape the impression that the AfCFTA process needs leadership, direction, and momentum.

We need to glance at multilateral developments too. In February 2021, the Members of the World Trade Organisation (WTO) confirmed Dr. Ngozi Okonjo-Iweala of Nigeria as Director General following a protracted selection process. She is the first woman and first African to lead the organisation. She has brought energy and focus to the WTO, but the long-awaited 12^{th} Ministerial Conference (MC12) did not materialise. Trade ministers from the 164 WTO member states, representing 98% of global trade, were expected to meet for the WTO's Ministerial Conference in Geneva for the first time in four years. However, the meeting has been indefinitely postponed due to new travel restrictions in response to the detection of the Omicron virus.

MC 12 was an opportunity to show progress in long-standing issues such as fisheries subsidies and to adopt a joint declaration on a new vison for global trade. That would have reaffirmed that the multilateral trading system is about progressive trade liberalisation, which includes ongoing improvements in the rules and the ability to tackle global inequalities.

Delegations in Geneva have been urged to work towards consensus on various urgent issues. However, the Member States are divided on how to update trade rules to ensure they are relevant to current challenges, from COVID-19 and digital commerce to climate change, services regulation, food security and fair competition. These differences play out in negotiations happening in different tracks. Some are "multilateral", meaning all members are involved, and others are "plurilateral", meaning some countries move forward based on common interests.

The impasse around the Appellate Body has not yet been resolved, while the Biden administration has continued America's push for far-reaching reforms in the WTO to deal with the unique challenges posed by Chinese practices and the country's support for state owned enterprises.

This was also the year of COP26 in Glasgow (where limited success was booked) and when Omicron, a new Covid variant, was first detected in Southern Africa. The manner in which Western governments responded by imposing travel bans from and to Southern Africa caused havoc in the local tourism industry and has been severely criticised. Restrictions on intra-Europe travel and lockdowns are now also being implemented. These developments add to the realisation that the "new normal" is beyond the grasp of individual States.

The WTO TRIPS waiver proposal, first tabled by South Africa and India, was on the MC 12 agenda. Following the October meeting of the TRIPS Council, work had continued to identify areas of convergence towards a collective intellectual property (IP) response to the pandemic, expected at MC 12. The production and distribution of vaccines remains critical for a concerted, collective response to the pandemic. Development of pharmaceutical capacity in Africa and other developing regions is important, but will require more than an IP solution. In December, it was announced that South Africa's Biovac Institute will start making Pfiser-BioNTech's COVID-19 vaccine, using the necessary drug substance from the Pfizer-BioMTech facilities in Europe, in early 2022. This follows Biovac's "fill and finish" deal with Pfizer, which was announced in July, making it one of the few companies processing COVID-19 vaccines in Africa. Investment, the requisite scientific and technical expertise, and distribution capacity are all necessary to develop the capacity to produce vaccines and related pharmaceutical products. For African countries it also makes sense to add healthcare services to the trade in services agenda of the AfCFTA to enhance the continent's capacity to address the COVID-19 pandemic and be prepared for future health crises.

Municipal elections were held in South Africa on 1 November 2021 and for the first time the African National Congress (ANC) could not secure a 50% majority vote. Civil unrest and looting occurred in South Africa's KwaZulu-Natal and Gauteng provinces in July 2021, sparked by the imprisonment of former President Jacob Zuma for contempt of court. Some commentators called those events an attempted coup.

The International Monetary Fund (IMF), in the concluding statement to its 2021 Article IV Mission to South Africa, called for urgent structural economic reforms, including to how Eskom, the South African electricity public utility, is operating. The disruptions in power supplies (a way of life for many years now) bring a hollow ring to announcements on attracting investment and about industrialisation. A sustainable solution to the energy crisis is undoubtedly the singular most important initiative to support they country's industrialisation.

Despite premature deindustrialisation in recent decades, South Africa remains the most industrialised sub-Saharan African economy. Its contribution to fulfilling some of the immediate aims of the AfCFTA will be very important. The sooner the AfCFTA is completed, implemented and operational, the better the prospects for clarifying the roles of the various institutions, the relationship with the African Union, and the adoption of additional legal instruments to realise this ambitious and necessary initiative. Its most important contribution might be to improve trade governance and trade facilitation.

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