How flexible (and effective) will the AfCFTA be?

Factsheet

The founding instruments of the African Continental Free Trade Area (AfCFTA) do not explicitly say they want to bring about a "flexible" new trade and integration arrangement. Nevertheless, the AfCFTA is by implication designed to be flexible. It must co-exist with long-standing Regional Economic Communities (RECs), must liberalise trade in goods and services on a continental scale, advance continental integration, address the complications of overlapping REC membership, adopt additional Protocols, and allow individual State Parties to pursue their own trade and development policies.

Is there a plan to achieve these outcomes or is it expected that things will happen as implementation unfolds? Does the AfCFTA have a core element where the necessary initiatives can be devised, and national policies be coordinated? Who takes responsibility for what happens with and under the AfCFTA? These questions require that some of the basic features of the AfCFTA and the intentions behind it be recalled.

The AfCFTA is not of an entirely new endeavour; African continental integration has a long history. The AfCFTA is thus flexible in a specific sense; it allows for the continuation of what existed before. The Preamble of the AfCFTA Agreement says that the State Parties are determined "*to build upon our respective rights and obligations under the Constitutive Act of the African Union of 2000, the Abuja Treaty and, where applicable, the Marrakesh Agreement Establishing the World Trade Organisation of 1994*". They are conscious "*of the need to establish clear, transparent, predictable and mutually-advantageous rules to govern Trade in Goods and Services, Competition Policy, Investment and Intellectual Property among State Parties, by resolving the challenges of multiple and overlapping trade regimes to achieve policy coherence, including relations with third parties*."

These statements admit that previous strategies and existing trade arrangements have caused problems of their own kind. The most obvious examples are **multiple and overlapping trade regimes** and the lack of **policy coherence**. There are no specific plans in the AfCFTA Agreement on how to resolve these issues. They are inherent in African trade arrangements. It will be difficult to untangle the structures and practices that have grown over time.

In the Preamble to the AfCFTA Protocol on Trade in Services additional challenges are mentioned. It is urgent "*to consolidate and build on achievements in services liberalisation and regulatory harmonisation at the Regional Economic Community and continental levels*"; that "A*frican services suppliers, in particular at the micro, small and medium levels, [must] engage in regional and global value chains*"; but that the State Parties also have "*the right to regulate in pursuit of national policy objectives, and to introduce new regulations, on the supply of services, within their territories, in order to meet legitimate national policy objectives, including competitiveness, consumer protection and overall sustainable development with respect to the degree of the development of services regulations in different countries*". It is recognised that the least developed, land locked, island states and vulnerable economies face their own and serious difficulties and financial needs.

The AfCFTA is inherently flexible because of its design. It is a **member-driven** and it is a **Free Trade Area**. Integration into the global economy is a matter for individual AfCFTA Governments. In FTAs the Member States retain policy space over their trade relationships with third parties and the use of the import tariff as dictated by national development and industrialisation policies. If Kenya wants to negotiate a trade and investment agreement with the United States it only has to square its plans with the East African Community (EAC) Partner States.

Then there is the flexibility regarding the **settlement of disputes**. A dispute settlement system has been added to the AfCFTA regime which replicates that of the World Trade Organisation (WTO). It is characterised by compulsory jurisdiction, firm time frames, an automatic decision-making process, and is based on a two-tier mechanism of panels of first instance and an Appellate Body (AB).[1]

It is not very likely that the AfCFTA State Parties will make active use of this dispute settlement mechanism. African Governments do not sue each other over the application or interpretation of the trade agreements concluded amongst them. Neither do they create supra-national institutions that will enforce obligations vis-à-vis the Member States. These countries implement home-grown practices and solutions for accommodating different national policies and measures. Their governments "own" and

[1] See the tralac Factsheet on What to expect from the AfCFTA Dispute Settlement Mechanism?

control the regional integration regimes which they have established,[2] despite linkages to long-standing political ideals about continental solidarity and integration.

African trade and integration arrangements are also flexible because of inevitability. The Member/Partner States are at different levels of economic development and face unique challenges. Many are Least Developed Countries (33 of the world's 46 LDCs are in Africa) and are landlocked. The RECs will not survive if enforced as strict legal regimes. There will, as a result, be a general adherence to **variable geometry**, which is also one of the AfCFTA Principles.[3] As deeper integration unfolds, more adjustments in the form of the "stay of application", and even derogations often follow.[4] Flexibility is an entry ticket to REC membership. The same applies to the AfCFTA.

Variable geometry is a general feature of African trade and economic integration deals. It allows the associated agreements to be implemented at different speeds and under unique conditions. The East African Court of Justice has observed of this concept that it "*is a strategy of implementation of Community decisions… it can comfortably apply, and was intended, to guide the integration process*". The Court advised that "*for avoidance of internal conflict and a possible emergence of mistrust among the Partner States… simultaneous implementation thereof need not be forced upon an unready Partner just as refusal or delay of implementation thereof need not be used to block a ready Partner or Partners. Simultaneous implementation is impracticable in some circumstances and Partner States cannot be expected to operate within such strait jacket or one size fits all situations. Variable geometry allows those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable certain future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so*." [5]

The implication of this interpretation of variable geometry is that there should be mechanisms to ensure that at some point obligations are in fact fully complied with. Progress should be monitored. At a particular moment further delay must cease. In the absence of supra-national institutions or legal structures with the required powers to monitor variable geometry practices this is unlikely to happen. Variable geometry is not the same as the temporary granting of a waiver.[6]

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[2] A drastic example of what this "ownership" amounts to is the fate of the SADC Tribunal. In 2011 the Member States unanimously agreed to abolish the SADC Tribunal when Zimbabwe so insisted; after a ruling against it for expropriating private land without any compensation. SADC has not had a Tribunal since.
[3] Art 5 AfCFTA Agreement.
[4] See, for example, Art 3 of the SADC Protocol on Trade.
[5] Application No 1 of 2008, *In the Matter of a Request by the council of Ministers of the East African Community for an Advisory Opinion*
[6] For the AfCFTA waiver clause, see Art 15 AfCFTA Agreement.

Another and related reason why flexible rules on implementation are necessary is the **overlapping memberships** of the RECs. When Member/Partner States belong to more than one "rules-based" trade regime, legal complications will follow. States cannot, for example, belong to more than one customs union. Rather drastic "flexibilities" are often required to make things work. Overlapping membership means there must be adjustments to how deeper integration arrangements in the form of customs unions or common markets normally work. Several of the RECs have decided to deepen their trade regimes to custom union (and even common market) levels but this is a very gradual process; in those instances where REC FTAs in fact exist. The WTO Trade Policy review of the East African Community (EAC) of 2019 for example states that "*sectoral policies are not harmonised within the EAC, but countries are making joint efforts under several regional initiatives*".[7]

To provide an example of the implications of these different regimes for compliance with the obligations accepted by Member States as well as for private parties, a brief discussion of certain features of the certain RECs is provided. The East African Community (EAC) is officially a customs union. It has also adopted a Protocol to form a common market. A customs union has a single customs territory and a Common External Tariff (CET). The latter regulates trade in goods with third parties. For this aspect there must be a uniform legal regime regarding tariff administration and collective tariff offers when negotiating trade agreements with third parties. Tanzania is also a Member of the SADC Free Trade Area. Most other EAC Partner States belong to COMESA. It means, inter alia, that goods exported from a Member State of the Southern African Customs Union (SACU) to Tanzania will enter the latter's territory under SADC preferences,[8] but cannot be re-exported under the same preferences to any other EAC member because there is no preferential trade arrangement between SACU and the EAC. The single customs territory benefits of the EAC customs cannot apply vis-à-vis other EAC Partner States with respect to goods imported into Tanzania under the SADC preferences.

There have been adjustments along the road of continental integration, and there will probably be more. The Abuja Treaty of 1991 has been built on the idea that the RECs are its building blocks (as is also the case in the AfCFTA) but that they will, in stages, merge into the African Economic Community. This did not happen and the AfCFTA does not go that far. It wants "*to deepen the economic integration of the African continent*" but will "*lay the foundation for the establishment of a Continental Customs Union at a later stage*".[9] Several of the existing RECs are not yet FTAs, as required under the Abuja Treaty. Some (SADC is an example) seem to have lost their appetite to become Customs Unions.

[7] WTO Trade Policy Review of the East African Community: Summary at p. 7
[8] All 5 SACU Member States are Parties to the SADC Protocol on Trade.
[9] Art 3 AfCFTA Agreement.

AfCFTA flexibility will impact on joint action. Subsequent deeper continental integration and additional obligations will depend on what the AfCFTA State Parties can agree on and what they will be able to implement. They should, in their capacity as members of the Council of Ministers, take consensus-based decisions to "*ensure effective implementation and enforcement of the Agreement*" and shall take measures "*necessary for the promotion of the objectives of [the] Agreement and other instruments relevant to the AfCFTA*".[10] When they do so, they will be guided by what happens simultaneously in respect of the REC agendas of which they are of which they are part. According to the text of the AfCFTA Agreement, "*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*".[11]

The AfCFTA is not about starting continental integration afresh, but it adds an important new dimension: a preferential trade regime for trade in goods and services alongside the existing FTAs. Under the AfCFTA all State Parties will in future be able to trade with each other as part of a preferential arrangement. But the RECs will remain part of this tapestry. There are based on their own founding agreements and legal commitments. The AfCFTA must be flexible enough to co-exist with the RECs, and to use their Secretariats and structures as platforms for improving continental trade governance generally, for undertaking national and regional reforms, and for improving trade facilitation. In these vital endeavours, the AfCFTA and the REC structures need each other. Neither has self-executing powers nor supra-national institutions.

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[10] Art 11(3) AfCFTA Agreement.
[11] Art 8(2) AfCFTA Protocol on Trade in Goods.