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TRADE BRIEF

tralac Trade Brief
No. S13TB02/2013
June 2013

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This publication should be cited as: Erasmus, G. 2013.
Redirecting the Tripartite Free Trade Agreement negotiations?
Stellenbosch: tralac.

This publication has been financed by The Swedish Embassy Nairobi. The Swedish Embassy Nairobi does not necessarily share the views expressed in this material. Responsibility for its contents rests entirely with the author.

Redirecting the Tripartite Free Trade Agreement negotiations?

by Gerhard Erasmus

The original plan

At the first summit of the Tripartite Free Trade Agreement (T-FTA) states in October 2008 in Kampala, certain decisions were adopted on how to launch and undertake the process of establishing this new regional trade arrangement called the Tripartite FTA. There were promising ideas about an opportunity to achieve a new design for intra-Africa trade and there was a plan. The objective at the time was, as stated in the adopted documentation, to establish one proper FTA with the typical legal and institutional features of such an arrangement.[1] The draft agreement subsequently prepared for the purpose of directing the negotiations reflected this assumption; it proposed a single agreement for all 26 states involved by virtue of their membership of the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC).

One of the Kampala Summit decisions stated:

> In the area of trade, customs and economic integration, the Tripartite Summit approved the expeditious establishment of a Free Trade Area (FTA) encompassing the Member/Partner States of the 3 RECs with the ultimate goal of establishing a single Customs Union and directed the three RECs to undertake a study incorporating, among other things, the following elements:
>
> i) Development of the roadmap, within 6 months, for the establishment of the FTA which would take into account the principle of variable geometry;
>
> ii) The legal and institutional framework to underpin the FTA; and
>
> iii) Measures to facilitate the movement of business persons across the RECs.
>
> Summit directed the Chairpersons of the Councils of Ministers of the three RECs to ensure that the RECs speed up the development of joint programmes that enhance co-operation and

[1] See, for example, the terms of reference for the 'Study on the Establishment of the COMESA-EAC-SADC Free Trade Area (FTA)', available at http://www1.uneca.org/Portals/ctrci/7th/Tripartite%20_COMESA_EAC_SADC_FTA%20Study%20FINAL%20REPORT.pdf

deepening of co-ordination in industrial and competition policies, financial and payments systems, development of capital markets and Commodity Exchanges.

Somewhere along the line the focus has shifted rather dramatically. What is presently discussed will lead to a very different outcome. One of the original objectives, to address the problem of overlapping membership, will not be achieved. The opposite will come about. How did this happen and what will the implications be? Is it possible to revert back to the original plan?

Preparatory work and subsequent developments

Subsequent to the Kampala summit a study to examine options on the establishment of a Tripartite FTA was undertaken and provided input into the draft FTA Agreement. The Tripartite Task Force, through the Tripartite Trade and Customs Sub-Committee, prepared a Draft FTA Roadmap and a Draft Agreement for establishing the Tripartite FTA, including annexes on tariff liberalisation, non-tariff barriers, rules of origin, customs cooperation and related matters, transit trade and transit facilities, trade remedies, competition policy and law, technical standards, sanitary and phytosanitary measures, movement of business persons, intellectual property rights, trade development, trade in services, and a dispute settlement mechanism. This was a comprehensive blueprint for an inclusive FTA. This was a first instalment on the plan to have a proper FTA with a single tariff regime.

In addition to the draft Roadmap and draft FTA Agreement, other documents necessary for the establishment of the FTA were prepared. They were Negotiating Principles (NPs) and a Declaration Launching the FTA Negotiations.

All the FTA draft documents were formally submitted to the Tripartite FTA members for consideration in preparation for the negotiations. A number of country missions to explain the contents of the draft Agreement and the benefits were undertaken. Regional consultations were also undertaken at individual Regional Economic Community (REC) level and technical workshops organised at the Tripartite level.

In June 2011, another Tripartite Summit was convened in Johannesburg where a Declaration and the Negotiating Principles were formally adopted to guide the process. The Negotiating Principles were stated as separate principles (single undertaking, variable geometry, *acquis*[2], and so forth) but they were not defined. They have subsequently become the real focus and basis for conducting the actual

[2] *Acquis* is a French term meaning 'that which has been agreed'.

business of establishing the T-FTA. They have also undergone major changes and were given detailed 'clarifications' at the end of 2012.

The negotiations are no longer about the original plan. At present they focus on the accommodation of only those member states which do not at present have FTAs between them. The principle of the *acquis* is the anchor for this scaled-down and redirected process. The recent clarification of the Negotiating Principles explains what is now foreseen.

The 'Clarified' Negotiating Principles

The new version of the Negotiating Principles (NPs) is central to the negotiating process. They are now formulated as follows:

i) The negotiations shall be REC and/or Member/Partner State driven

This is taken to mean that Member/Partner States can either negotiate as blocks or individual countries.

ii) Variable geometry

Variable geometry means the principle of flexibility which allows progression in cooperation among Member/Partner States in a variety of areas at different speeds.

The Tripartite Free Trade Agreement will allow the co-existence of different trading arrangements which have been applied within COMESA, EIC and SADC Member States and any trading arrangements that may be reached during the negotiations. The principles of variable geometry, reciprocity and *Acquis* are complementary.

iii) Flexibility and Special and Differential Treatment

Flexibility, special and differential treatment should apply, among others, to transitional periods for implementation of agreements under the TFTA by countries who are at different levels of economic development and who have individual specificities as recognized by other Member States. (The application of S and D treatment would be considered during the negotiations.)

Tripartite FTA countries should allow flexibility and recognize the special challenges facing different economies.

iv) Transparency including the disclosure of information with respect to the application of the tariff arrangements in each REC

This is a standard requirement in all trade negotiations and refers to the need to share information on tariffs, trade statistics, trade policy instruments and other trade related measures as greed by the first Tripartite Trade Negotiating Forum held in December 2011 which all parties in the negotiations. In this case, the TFTA principles ensure that all Member/Partner States and RECs share information in all areas. In the TFTA situation, the agreement is to share information on trade taxes and related taxes at the 8-digit HS level as well as information on trade values, also on the 8-digit HS level for both extra and intra-regional trade.

This will also entail an open and predictable negotiating process in which all interested parties are free to participate in an inclusive manner.

v) 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.

vi) A single undertaking covering Phase I on trade in goods

The Single Undertaking means that all components of the negotiations are parts of the whole and indivisible package and cannot be agreed separately. The Single Undertaking is usually described as meaning 'nothing is agreed until everything is agreed'.

The Single Undertaking as it refers to the Tripartite Free Trade areas could be interpreted as the all tripartite countries negotiating the TFTA should agree on components covering phase 1 on trade in goods.

vii) Substantial liberalisation

Substantial liberalization means that the TFTA should cover substantially all trade among the Tripartite FTA.

viii) MFN Treatment

Most Favoured Nation (MFN) Treatment would mean that advantages that any tripartite country offers to third parties outside the tripartite FTA would be offered to other tripartite countries. The purpose is to ensure that TFTA partners trade amongst each other on terms as good as or better than that offered to non-FTA partners. These advantages would be extended on reciprocity.

ix) National Treatment

National Treatment means, the products of the territory of any tripartite member state imported into the territory of any other tripartite member state shall be accorded treatment no less favourable than that accorded to light products of national origin in respect of all laws, regulations and requirements affecting their sale, offering for sale, purchase, transportation, distribution or use.

x) Reciprocity

Reciprocity means that Member/Partner States or RECs in the TFTA will grant to each other mutually agreed trade concessions.

xi) Decisions shall be taken by consensus

This means that all decisions will be taken on the basis of consensus as defined in the TTNF Rules of Procedure.

Some implications

The list of NPs starts off by noting that the negotiations 'shall be REC and/or Member driven' and be guided by certain 'overarching principles'. The real objective behind the present negotiations needs clarification. What exactly is to be established and how will this happen? The participating countries have specific expectations but the historical record suggests the original intent was to embark on an innovative approach and an honest effort to find solutions to the serious problems confronting regional integration endeavours in southern and eastern Africa. The effect which the 'clarified' a*cquis* will

have is of paramount importance. This principle now implies a very limited outcome and a restrictive approach to the negotiations. The process will actually start with tariff negotiations which will consist of 'the exchange of tariff concessions .... among Member/Partner States of the Tripartite FTA that have no preferential arrangements in place between them'. This formulation does not make sense: there are no 'Member/Partner States of the Tripartite FTA' which can make tariff offers. The only member states that can do this are those which belong to the three RECs.

This means, further, that the eventual agreement will not take place between the 26 states which constitute the membership of the three RECs.[3] Only those countries without FTAs between them at present (e.g. South Africa and Egypt or Kenya and Namibia) will make tariff offers to each other. And since there are two customs unions in the present configurations (Southern African Customs Union – SACU and the East African Community – EAC) their members will have to make joint offers in order to protect their common external tariffs. In the case of negotiations between, for example, South Africa and Kenya (which presumably will be interested in new mutual market access arrangements) there is a specific problem. Tanzania is a member of SADC too and the EAC is a customs union. The strict interpretation of the *acquis* means that present tariff concessions enjoyed by Tanzania as a member of SADC must be preserved. However, South African offers to Kenya will have to benefit all members of the EAC customs union. That should, by implication, result in an improvement for Tanzania.

What will happen to the existing rules of origin? Once the *acquis*-based tariff offers (for new ad hoc FTA configurations) have been adopted, they will need their own rules of origin. The overall outcome will be messy and more overlapping complications will result. The existing RECs will be undermined, not consolidated. The present rules of origin should be discussed. How this will happen is not foreseen. It is generally known that the SADC rules of origin are considered by many to be a stumbling block and a reason why intra-SADC trade levels are low. Unlocking the potential for more trade amongst SADC members requires a debate about the effect of the existing rules of origin, Non-Tariff Barriers (NTBs) and trade facilitation issues. It may now never happen since there will not be a single new FTA.

The overall design as now foreseen is problematic. The agreements which will have to embody the implications of the *acquis*-based tariff offers will result in different configurations of parties. This will mean more trade agreements, new notifications and more overlapping membership challenges. All

[3] See Article 50 of the Draft T-FTA Agreement.

these new agreements will have to be FTAs in their own right. This seems a clear recipe for more complications – as if the existing challenges are not daunting enough. The recent SADC audit (2012) contains a sober reminder: 'The key problem with implementing SADC's deep integration agenda within the context of overlapping membership is simply that countries cannot implement two sets of rules'. The same consideration applies to the EAC and COMESA.

The formulation of the NPs poses major challenges for the mutual consistency of the package; it is as if they were put together from different angles with different expectations. 'Variable geometry' is defined as follows:

> [T]he principle of flexibility which allows progression in cooperation among Member/Partner States in a variety of areas at different speeds. The Tripartite Free Trade Agreement will allow the co-existence of different trading arrangements which have been applied within COMESA, EAC and SADC Member States **and any trading arrangements that may be reached** during the negotiations. The principles of variable geometry, reciprocity and acquis are complementary. (Emphasis added)

This 'co-existence' will be troublesome. The highlighted part will mean fragmentation into new FTAs inspired by *sui generis* aspirations for each of them.

It is doubtful whether all these NPs can be reconciled with each other. Some of them are about procedure (e.g. the one on consensus) while others are clearly about substance and outcome. They cannot be of equal standing. The Reciprocity principle says, for example, that 'Member/Partner States or RECs in the TFTA will grant to each other mutually agreed trade concessions'. However, if they are engaged in different configurations of negotiations, this will not happen. Different offers to different states (or a single state) will have to be worked out in an ad hoc fashion and there cannot be comprehensive reciprocity. There will not be a single agreement. The proposal by the Task Team contained in the proposed Agreement to establish the COMESA- EAC-SADC Free Trade Area must now be off the table.

The NP about the 'single undertaking' does not make sense any more. It reads:

> 'The Single Undertaking means that all components of the negotiations are parts of the whole and indivisible package and cannot be agreed separately. The Single Undertaking is usually described as meaning 'nothing is agreed until everything is agreed'. The Single Undertaking as

it refers to the Tripartite Free Trade areas could be interpreted as that all tripartite countries negotiating the TFTA should agree on components covering phase 1 on trade in goods.'

In the light of the specific (and rather restricted) meaning given to the *acquis* and of variable geometry there cannot be an 'indivisible package.' There will now indeed be many separate packages, which makes it doubtful whether many governments will be tempted to embark on this journey. If they still are they should focus on efforts to save the original plan.

Can the T-FTA process still be saved?

The new Negotiating Principles constitute a package which address (and in some instances foreclose) crucial negotiating issues. Several of them display conflicting content. The first aspect which needs clarification is their technical status. Are they mere guidelines or do they have a more fundamental function in the sense that the final product will be measured against the yardstick of the NPs? Could it, for example, be argued that unless the *acquis* as presently formulated is **not** adhered to, there can be no negotiations and no agreement? If the latter interpretation is true, the parties have already locked themselves into a specific and obligatory outcome with very little to be achieved for many of them. Was this the intention?

The answer with respect to this particular point is probably that the parties did not agree to a prior agreement about the agreement. They still want to engage in proper negotiations to establish a comprehensive FTA. Nothing is concluded till everything is concluded.

The most fundamental issue is the *sui generis* meaning of the *acquis*. The fundamental problem lies in its peculiar interpretation and how it wants to 'preserve' the existing REC tariff regimes. Instead of being a forward-looking modality for enhancing freer trade, it has now become a restrictive protector of the status quo. Where this mandate comes from is a mystery. It could easily have been interpreted to achieve the opposite of what has now been stated. Why has this conservative approach been adopted? And it refers to tariffs only, which is not where the real challenges lie. The main obstacles to intra-Africa trade are to be found elsewhere – in rules of origin, trade facilitation and NTBs. Strictly speaking, the *acquis* of the three RECs covers their existing legal frameworks in their totality. They are not limited to a single aspect, namely their tariffs regimes.

It is also important to consider the way forward. If the first round of T-FTA negotiations (about trade in goods) will bear the limited fruits (if any) suggested by the tariff-based *acquis* approach, the benefits to be had during the second round when trade in services and trade-related issues have to be

negotiated, will be seriously undermined. That is not what the Kampala Summit agreed upon. It actually adopted a built-in agenda for the next logical generation of issues too. The 'ultimate goal' was to develop 'the legal and institutional framework to underpin the FTA; to facilitate the movement of business persons across the RECs' and to address services, and so forth. Under the restricted format which is now on the table there will be no useful lessons which other African integration endeavours would want to follow.

The new package deviates from the original intention. The better approach would be to reconsider the function of the NPs and to state them as ideals and as guidelines for the process on intergovernmental negotiations. However, then there must be agreement first as to what is to be achieved. The only logical way to save the process will be if the joint political will can be mustered to redirect these negotiations. In a fundamental way it means a return to the original drawing board and to view the *acquis* as a bottom line, not as a ceiling.

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