

The Relation between the Tripartite FTA and the Continental FTA

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1. Introduction

In the afternoon of 10 June 2015, in Sharm el Sheikh, Egypt, the Heads of State and Government signed the agreement establishing the Tripartite FTA and the declaration launching the FTA. Out of 26 countries, 23 signed the declaration and 15 signed the agreement. The following signed the agreement: Angola, Burundi, Congo DR, Egypt, Comoros, Djibouti, Kenya, Namibia, Seychelles, Tanzania, Malawi, Rwanda, Sudan, Uganda, and Zimbabwe. Swaziland signed the following week to bring the total to 16, followed subsequently by Zambia and Libya bringing the total to 18 by March 2017. Those yet to sign the agreement are Ethiopia, Lesotho, Botswana, Eritrea, Madagascar, Mauritius, and Mozambique.

The Tripartite FTA covers a combined population of 708 million and GDP of \$1.3 trillion - half the continent. It provides a single policy and regulatory regime in an array of trade-related areas such as nontariff barriers, customs cooperation, trade facilitation, health and technical standards, and dispute settlement. This is a sizeable economic space and market by any standards.

In January 2012 the Heads of State and Government took a decision to establish the Continental Free Trade Area by 2017 and the Continental Customs Union by 2019.¹ This decision included also the adoption of an action plan for boosting intra-Africa trade, based on seven clusters: trade policy, trade facilitation, productive capacity, trade-related infrastructure, trade finance, trade information, and factor market integration. The economic case for this action plan was sound. Analytical work done by the ECA demonstrated that intra-Africa trade would more than double from 10.2% to 21.9% by 2022 if the Continental FTA is established by 2017, accompanied by trade facilitation measures such as elimination of nontariff barriers.²

Second, there was a glaring gap in the six stages for forming the African Economic Community: that is, there was no provision for a continental FTA, which should be a logical step before the 2019 continental customs union. It should be quickly added though that the a customs union conceptually entails a free trade area, as the former must have free movement of goods among the members and prohibition of non-tariff barriers. It can be added as well as that the continental common market by definition will involve free movement of goods, services, labour and capital; which covers the element of the free trade area in terms of free movement of goods. The implication therefore could be that there is ample basis for formation of the Continental FTA.

Third, the Tripartite FTA, covering COMESA, EAC and SADC (a total of 26 out of the 55 countries of the African Union), would provide a strategic launch pad for a continental FTA. Besides, experience would seem to suggest that progress on FTAs can be faster than operationalising a customs union and in light of the Tripartite FTA, strategists would see

absolute sense in leveraging on this achievement and fast tracking the establishment of the Continental FTA. Following a process of consultations with multiple stakeholders including the academia and the private sector, the African Union Assembly adopted the decision.

At an event hosted by President Jacob Zuma in South Africa on 15 June 2015, AU Heads of State and Government launched negotiations for the Continental Free Trade Area. The negotiations, spanning the whole continent, were to be completed and the Continental FTA launched by December 2017. Following closely on the heels of the tripartite FTA, the momentum for regional integration in Africa is palpable.

The Continental FTA will have a combined GDP of about \$2.3 trillion and a population of about one billion people, with more than half comprising the youth. It is estimated that in 2016, consumer and business-to-business spending in Africa was at \$3.9 trillion and was projected to reach \$5.6 trillion within eight years by 2025.³ The Continental FTA initiative therefore injects a new dimension in international relations, building on Africa's solid record over the last decade of speaking with one voice and engaging the world actively as a united bloc, whether in seeking better representation or rules in WTO, climate change, World Bank, IMF, or UN negotiations.

The template for continental integration has been set out in the Abuja Treaty. The goal is to form the African Economic Community (AEC) by the year 2028 using the eight recognized regional economic communities (RECs) as the building blocs. The eight RECs are the Arab Maghreb Union, Sahara Sahel Community of States, Common Market for Eastern and Southern Africa, East African Community; Economic Community of Central African States, Economic Community of West African States, Intergovernmental Authority for Development, and Southern African Development Community. The economic integration initiative is a core basis for achieving Agenda 2063, which aims for a prosperous and peaceful Africa.

It will be recalled that the AEC will be achieved through six progressive stages that started in 1991 and will end in 2028, subject to the possibility of fast-tracking. The six stages are as follows: the RECs establish and strengthen FTAs followed by customs unions, the customs unions of the RECs merge to form a Continental Customs Union, which becomes an African Common Market, which in turn becomes the African Economic and Monetary Union. The African Union Heads of State and Government are to decide whether and when to move on to the next successive stage.

So far, FTAs have been established in the RECs and need to be continuously strengthened, especially those of Central and North Africa. But above all, the Tripartite FTA now covers half of the continent, through COMESA, EAC and SADC. The East African Community and the Economic Community of West African States have made good progress in establishing and operationalising their customs unions. The EAC is now working on its monetary union after having successfully launched its customs union in 2005 and its common market in 2010. This indicates that the first stage of establishing FTAs in the RECs has been substantially achieved. As indicated in the ECA's Africa Regional Integration Index of 2016 available at http://www.uneca.org/sites/default/files/PublicationFiles/arii-report2016_en_web.pdf, trade integration has progressed more than other pillars of integration such as movement of persons,

infrastructure, industrialization and financial and macroeconomic integration – these five are key pillars of developmental integration.

2. Lessons?

Building on the Tripartite FTA would require an incremental or a learning process or both; incremental in terms of other RECs especially ECOWAS joining up with the COMESA-EAC-SADC Tripartite to fast-track the Continental FTA on the basis of the principle of variable geometry, and learning in terms of utilizing the documentation, principles, and lessons from the tripartite negotiation process.

Planned to be completed within two years by December 2017, the CFTA negotiations had a lot to learn from the Tripartite which was negotiated for three years and a half from December 2011 to June 2015. The Tripartite negotiations were launched on 12 June 2011 but started only half a year later on 9 December 2011.

The pertinence of the lessons was undeniable. The 26 countries that negotiated and launched the Tripartite were among the 55 that negotiated the Continental FTA. Being half of the total, their relevance and potential influence was quite obvious, if they were to put the power of their number to some use. It was difficult to imagine that the 26 countries would be quick to forget or even throw away their Tripartite outcomes. The practical thing to expect was rather that the 26 countries would wish to carry their outcomes into the CFTA negotiations as their positions. This could be a bonus for the continental negotiations as half of Africa would already be a Free Trade Area, to which to add the remaining half. The addition could take the form of extending the Tripartite levels or standards of market integration to the rest of African countries subject to reciprocity or of improving those levels or standards.

There were certain systemic issues that arose from the juxtaposition of the Tripartite and the Continental FTAs. Could they co-exist eventually? If not, should the Tripartite FTA be wiped off the face of the earth, together with the regional economic communities that were supposed to be the building blocs for continental integration, on the ground that the Continental FTA amounts to the conclusion and culmination of a process having been faithfully served by the Tripartite and the RECs? If they co-existed, it was absolutely necessary to avoid conflicting or contradictory regulatory and policy frameworks that governments and economic operators would otherwise have to cope with at great cost and inconvenience. Consistency between the regimes to the greatest extent possible would be the optimal desiderata; or should the Continental FTA manage to have comparably better rules and policies, then the inconsistency be resolved by the better trumping the worse as an overarching continental rule. The challenge of the subjectivity inherent in such a judgment would need to be addressed through allowing co-existence of the various regimes and granting users the flexibility and right to choose on a case by case basis. In practical terms, all existing Tripartite and REC regimes should have equal legal validity to allow a choice of the best regime in a given case. Exporters for instance should have the possibility to choose a rule of origin under which their products qualify and then to choose the most generous market access regime to use for a consignment. With automation of customs systems, this would be perfectly possible. This kind of regime with multifarious possibilities that allow the best rules to be used has been in existence in COMESA and in the EAC, through the kinds of rules of

origin that operate (five criteria to choose from in the case of COMESA) and the principle of variable geometry which envisages multi-speed integration.

3. Areas for negotiations

Negotiation of Africa's free trade areas is likely to cover at least the following six main areas: setting of objectives and principles as well as interpretation of the principles, the preparatory or house-keeping matters of rules of procedure and establishing institutions, preparation of the text for the instruments, legal scrubbing of the text after it is negotiated, choice of approach to and elaboration of rules of origin, and choice of modalities and finalisation of offers for market opening.

Setting the vision and objectives as well as time-precise targets with a built-in monitoring and evaluation system provides clarity of direction. This tends to be done at a high political level by the presidents and ministers. However, this high level political guidance should be fully owned at the technical level by the negotiators, advisors and the secretariats. Such ownership can come from a careful selection of passionate and smart integrationists, and skills conversion or re-tooling to build the requisite technical base in governments, the secretariats, and other actors such as the .

Similarly, principles to govern the negotiations can provide useful parameters and clarity, if a consensus on the meaning of the principles is reached. Again this can be done at a high political level, but ownership and a shared understanding at the technical level will help take the negotiations to clearer outcomes.

4. What to watch

Much of the negotiation will be a technical bean counting exercise. Therefore, supportive technical institutions will need to be put in place. There will be a main technical body in which the negotiations take place, but this body will need thematic specific working groups or sub-committees, to take care of the various technical fields such as rules of origin, non-tariff barriers, customs cooperation, trade facilitation, product standards, trade remedies, and dispute settlement. Under a developmental approach to economic integration, parallel work on industrialisation and infrastructure will need to be provided for, to be undertaken by experts in those areas. Then, the overall overarching high level bodies responsible for supervising the negotiations and adopting the final deals, will need to be established.

The decision to venture into a new massive free trade area should be evidence based. A clear case should be made on the basis of demonstrable welfare gains in the context of the quest for social economic transformation. Without such a case, it would be difficult to galvanise the required support and ownership by key stakeholders on the public and private sector required.

The evidence based policy should be formulated within the broader approach of developmental integration, which is based on at least three pillars, namely, open markets, industrialisation and infrastructure development. FTAs in economic integration in Africa are much more than just trade agreements; they are foremost tools for economic development.

Enough time should be allowed for an inclusive consultative awareness creation and consensus building process involving all relevant players in policy formulation and implementation. This process should be designed to result in good appreciation of the issues at stake and understanding of the proposed ways forward in terms of vision, road map, policy thrusts and interventions, Institutional framework, resource requirements, and business processes or roles of stakeholders and drivers.

As broadly explained by Henry Etzkowitz's triple helix⁴, key players include government at Central and local levels as well as parliaments, grassroots organisations covering the private sector and civil society organisations, and thinkers, innovators and knowledge generation and management institutions including universities and embedded research institutes.

The secretariats of regional organisations must rise to the occasion by providing technical and analytical input. This involves initiating and explaining studies and proposals to facilitate the negotiation and engagement processes, convening and organising the inter-governmental events that bring governments and other stakeholders together to transact business, as well as in-country events that contribute to the regional level outcomes.

In performing this critical role, secretariats should work closely with other relevant intergovernmental or peer organisations, including other secretariats, regional and international knowledge institutions, the media and shapers of public opinion, individual scholars and thinkers, and supportive people of good will.

The rule of thumb is ensuring adequate preparations for the negotiation sessions on the part of the negotiators and secretariats, and to get the logistics and documentation right.

There will be mundane things like choosing a convenient venue that is easy and friendly to travel to and from in terms of duration and connectivity air or surface transportation as well as the quality of the carriers, entry requirements including immigration and health, foreign exchange rules, and the hospitality infrastructure and culture. The point is to avoid having irritated or exhausted negotiators who will be destructive or eager to postpone matters.

During the negotiations, a number of challenges are bound to crop up and if not carefully addressed can fatally derail the process and lead to an outcome that misses vast opportunities for social economic transformation.

Then there will be the need to have technically adequate and user-friendly working documents for the negotiations. Having such documents good technical expertise and analytical skills in the secretariats; but also comparable skills on the part of the negotiators or at least the capacity to internalize the issues and engage in a relevant and constructive manner in line with given negotiation objectives.

Working documents have to be presented and explained in an easy manner and here is where the secretariat can greatly facilitate the negotiations. In addition, negotiators will need to have adequate national consultations before going to the negotiation sessions, and even then to have

rapid response mechanisms for adjustment of positions in line with the dynamics of the negotiations. The ability to consult and get quick instructions from capitals by email or social media can come in handy and unlock last minute stalemates. In addition, the mandate given to the negotiators should be reasonably flexible or have the elbow-room to allow a negotiation to happen. Or better still, the mandate should have fall-back positions that anticipate and accommodate priorities of other parties. Working documents can indicate such Priorities and other pertinent considerations that can come into play.

The CFTA negotiations could indeed benefit from lessons learned in negotiating the Tripartite FTA. Some of these lessons included: (1) avoiding wasting time on procedural issues and giving priority to substantive negotiations regarding rules of origin, tariff elimination/reduction offers, and the text of the Agreement; (2) ensuring good analysis and working documents on key issues arising from the negotiations are complete and negotiators receive them in a timely manner well before the negotiation sessions; (3) strong political oversight at ministerial and presidential levels exercised through regular meetings to review progress, resolve sticking issues, and to maintain a high momentum; (4) drafting the emerging text early to make it useable to incrementally build up the Agreement as negotiations unfold; (5) leveraging partners that can provide technical backstopping of the negotiations such as the Economic Commission for Africa, UNDP, and UNCTAD; and (6) ensuring adequate financial resources for governments and the African Union Commission.

Other lessons included the following: (1) There should be proactive engagement with member states during the preparatory phase, to assist ensure that the time is actually used for preparations. (2) Clear political direction given upfront can assist the technical negotiators in not getting stuck in a labyrinth of their own making. (3) Meetings should allow enough time for negotiators or ministers to complete their work. (4) There should be a degree of standardization in the editorial policy, referencing, and racking of the various versions of documents, to assist record keeping and use. (5) Imagination and resourcefulness in finding the phrases and words that satisfactorily capture the varying positions and priorities in the negotiations are critical for negotiations to advance to a conclusion. (6) Technical hands-on assistance from the secretariat and other partners can enable government officials to undertake the extensive technical work required in finalizing the negotiation, for preparing the tariff offers and making sense of rules of origin. (7) For very technical areas to be negotiated, such as health and technical standards, a group of technical experts can have working sessions to produce working drafts for the negotiations. (8) Leaders will emerge in the negotiations, and this will be beneficial to the entire region if they represent the best interests of the region. Such leaders can be nurtured early on in the process and supported throughout with analytical work and guidance through the issues up for negotiation at every turn. (9) A precise timetable for the negotiations, indicating what to accomplish at each given session is absolutely critical, and needs to be adhered to. (10) Last but not least, variable geometry is the key to moving ahead.

Just as in the Tripartite, the Continental FTA is complemented by other initiatives to support industrialisation and infrastructure. A comprehensive Action Plan for Boosting Intra-Africa Trade has been adopted and is already being implemented, covering seven clusters, namely, trade policy, trade facilitation, productive capacity, trade-related infrastructure, trade finance, trade information, and factor market integration. This complementary action plan assists to ensure that

benefits accrue across a wide range of sections of society and that countries can benefit from the larger market that opens up.

The African Union Commission's Department of Trade and Industry will provide the Secretariat services for these negotiations and has so far demonstrated admirable technical competence and capacity to mobilise and work closely with the secretariats of the RECs and stakeholders as well as technical partners especially the Economic Commission for Africa. Transparency in the negotiations will be key to generating ownership among stakeholders and users of the outcome of the negotiations. The Commission deserves every support.

5. The role of the RECs in a continent-wide FTA

As building blocs, the eight regional economic communities are expected to merge in order to form the AEC. According to the stages set out in Article 6 of the AEC Treaty, the regional economic communities are to start merging to form the continental customs union, then the continental common market, and eventually the monetary and economic union. Before merging into the continental customs union, each of the regional economic communities is expected to have formed a free trade area and a customs union. Any analysis of the provisions of the constitutive instruments of the regional economic communities, however, shows a varying picture.

The RECs are each proceeding under a legal framework that differs in terms of rules of origin and criteria for preferential treatment under the community regime⁵, product coverage for trade liberalisation⁶, sources of funding community operations and organs⁷, and powers and functions of community organs established. The RECs will be able to integrate to form a continental customs union and common market, if a common or harmonised regime in all those areas has been agreed, otherwise the multiplicity of conflicting rules would be inconsistent with the very idea of freedom of movement or common policies.⁸

Regarding the organs, there are at least two options. At the adoption of the continental common market, organs established under RECs could be dissolved on the ground that jurisdiction under the AEC vests in AEC organs. If this happens, any inconsistencies in powers of and in organs created under RECs will dissolve after the transition. The other option is for the RECs to function as divisions of the AEC, on the grounds that running the whole AEC from one station at headquarters in Addis Ababa would require a bureaucracy exceeding Africa's resources. As such organs of the RECs such as the courts, technical committees, and secretariats would be subordinate to corresponding AEC organs. The RECs would maintain their organs, functioning under relevant AEC instruments. In both cases, differences in both organs created and their functions will not constitute fundamental obstacles to the transitions, provided a harmonising instrument can put REC organs under appropriate AEC organs. But such an instrument would be unnecessary if the RECs had uniform organs, for these would simply be designated as subordinate to AEC organs, and would at once start functioning as such even within the RECs before adoption of a continental customs union or common market, with the benefit of spreading out the financial burden and of locating the organs out in the field enabling an effective reach. Uniform organs would politically strengthen the AEC process due to clear channels of coordination and interaction.

A problem with differences in organs is that citizens of RECs may enjoy different rights and benefits. For instance, the ECCAS⁹, ECOWAS¹⁰ and COMESA¹¹ Treaties establish proper community courts, and the ECOWAS Treaty in addition provides for an Arbitration Tribunal¹², whereas SADC provides for only a Tribunal¹³, among other things. Furthermore, The COMESA and ECOWAS treaties apparently provide for the participation of civil society to a greater extent than the other RECs (with the SADC treaty providing the least amount of engagement).

These differences in involvement and rights do not foster a community feeling at the continental level, and they may enhance a regionalism that can subsequently undermine the aims of African unity generally and of the AEC specifically. In addition, a more involved interpretative role for courts with such varying jurisdiction can lead to REC and AEC jurisprudence developing at variance. Furthermore it would be improper for the REC courts/tribunal to be part of the AEC Court, perhaps as registries exercising jurisdiction under both the AEC Treaty and the relevant REC treaties, when they have such differing jurisdiction.

In this context, the Tripartite Arrangement is expected to help expedite the process of continental integration by merging three RECs into a single free trade area. This merger will be achieved through the Tripartite FTA Agreement taking precedence over the constitutive instruments of the RECs in the event of inconsistency.

6. Conclusion – the Role of the REC Secretariats in the CFTA Negotiations

Tripartite FTA negotiations covered a number of areas as well as the subsequent negotiations for the Continental FTA, which many negotiators wanted to learn from, build upon and do better than the former. The areas included opening of markets for trade in goods and services, rules of origin, customs cooperation, health and technical standards, non-tariff barriers, trade facilitation, trade remedies, and dispute settlement. Accordingly, the CFTA negotiations had agenda items for presentations by the secretariats of the regional economic communities on key issues and areas, for information to guide the negotiations, though it has to be quickly added that the REC secretariats had to fight for this space and were lucky to have the overwhelming support of many government negotiators.

The African Union has tasked President Kagame of Rwanda to look in the issue of reforming the African Union to make it fit for purpose in light of the aspirations of Agenda 2063 to achieve a free and prosperous Africa. Proposals for strengthening and streamlining the African Union, including its institutions, would do well to carefully look into, lessons from the regional economic communities that can inform the continental integration process, the roles of the regional economic communities as institutions in continental frameworks such as the Continental FTA, and the role of the secretariats of the regional economic communities as well as relations between the secretariats and the African Union Commission, the Economic Commission for Africa and the African Development Bank as joint secretariat for continental integration.

Where lessons are learnt, successes multiply, and mistakes need not be committed twice, for those who have ears to hear.

Endnotes

¹ AU Decision referenced: Assembly/ AU/Dec.394 [XVIII]

² Simon Mevel and Stephen Karingi, Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Continental Customs Union. Economic Commission for Africa, 2012

Also available at

<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/Deepening%20Regional%20Integration%20in%20Africa%20A%20Computable%20General%20Equilibrium%20Assessment%20of%20the%20Establishment%20of%20a%20Continental%20Free%20Trade%20Area%20followed%20by%20a%20Continental%20Customs%20Union.pdf>, visited on 14 April 2015

³ Mckinsey Global Institution, Lions on the Move 2.0, 2016 at [file:///C:/Users/fmangeni/Downloads/MGI-Lions-on-the-Move-2-Full-report-September-2016v2%20\(3\).pdf](file:///C:/Users/fmangeni/Downloads/MGI-Lions-on-the-Move-2-Full-report-September-2016v2%20(3).pdf)

⁴ http://triplehelix.stanford.edu/Etzkowitz_pubs

⁵ Rule 2 of the ECCAS protocol on Rules of Origin, annexed to the treaty, in addition to the usual methods of place of consignment and classification, substantial transformation, and equity holding, includes a power for the Council of Ministers to draw a list of products deemed to originate in a member state on account of their importance for the development of the member states: r. 2(1)(b)(iv).

⁶ The lists are typically drawn subsequent to conclusion of treaties, whereas they should be an integral part of the negotiating process, if the treaty is to comply with the requirement in Articles XXIV GATT and Article V of GATS for substantial coverage of the intra-community trade.

⁷ Thus whereas under Articles 28(1) of the SADC Treaty and 79(4) of the ECCAS Treaty, the community budget is funded by contributions made by members, under Articles 168(1)-(2) of the COMESA Treaty and 72 of the 1993 ECOWAS Treaty a common market/community levy is imposed in addition to members' contributions [Articles 166-167 and 73 respectively].

⁸ U.O. Uzodike, "The Role of Regional Economic Communities in Africa's Economic Integration: Prospects and Constraints," *Africa Insight*, Vol. 39, no. 2 (2009): 26-42.

⁹ Article 16.

¹⁰ Article 15 of the 1993 Treaty.

¹¹ Articles 19-44.

¹² Article 16 of the 1993 Treaty.

¹³ Article 16 – the provisions on the Tribunal are under review [August 2011]