

The Architecture of the Continental Free Trade Area

1. Background

In January 2012 the Assembly of Heads of State and Government of the African Union (AU) took certain decisions to enhance intra-African trade and set a continental agenda for the 21st century. It endorsed an Action Plan for Boosting Intra-African Trade and agreed on a roadmap to establish a Continental Free Trade Area (CFTA). The CFTA had to be built on new arrangements still to be constructed. The latter consisted of the following Milestones:

- Finalization of the Tripartite FTA by 2014
- Completion of FTAs by non-Tripartite RECs through parallel arrangements similar to the TFTA or reflecting the preferences of their Member States; between 2012 and 2014.
- Consolidation of the TFTA and other FTAs into the CFTA between 2015 and 2016.
- Establishment of the CFTA by 2017.¹

2. Where do we stand with regard to the Milestones?

- The Tripartite FTA (TFTA) initiative was launched in 2008. The original idea to form an inclusive FTA consisting of the 26 Member States of COMESA, the EAC and SADC, did not materialize. The text of the agreement will be signed in June 2015 and will enter into force upon ratification by a simple majority of the Parties. Those who do not join will continue to trade under existing arrangements.

¹ This is an indicative date. The information about the CFTA approach comes from the Report of that meeting.

- The reasons for the delay in concluding the TFTA have to do with the inherent challenges in reaching agreement on sensitive issues (e.g. trade remedies, dispute settlement, and movement of business persons), finalizing tariff offers between key players (South Africa, Egypt, and the EAC); and adopting the associated Rules of Origin.
- The text of the TFTA Agreement reveals a complicated settlement. The establishment of a new and inclusive FTA for trade in goods proved to be beyond the reach of the negotiators; at least as something to be constructed in one bold act. Article 5 of the Agreement lists the objectives of the TFTA to “*progressively eliminate tariffs and non-tariff barriers to trade in goods; liberalise trade in services; cooperate on customs matters and implementation of trade facilitation measures; establish and promote cooperation in all trade-related areas among Tripartite Member States; establish and maintain an institutional framework for implementation and administration of the Tripartite Free Trade Area*. Elsewhere it is stated that “*trade in goods and services, infrastructure and cross-border investment should be major areas of cooperation. The Scope of this Agreement shall comprise of trade in goods; trade in services; and other trade related matters*”.
- The structure of the Agreement is to be noted. It consists of an Agreement containing general objectives and principles but the detail about specific obligations are listed in the Annexes. They are detailed sub-agreements; where the real substance is to be found.
- The Parties “*agree to negotiate*” a second phase in which Protocols (not Annexes) on services and trade related matters will be negotiated.² The Parties will *endeavour to* conclude these negotiations within 24 months upon entry into force of the TFTA Agreement. This is not a binding obligation which will result in the 26 Members of the RECs concluding a services agreement. And these negotiations are scheduled for after the entry into force of the TFTA; which may take some time.
- The three RECs (COMESA, the EAC and SADC) will continue to exist. There is no obligation to disband them. Overlapping membership challenges will increase as a result of the fact that tariff offers were only extended between these Member States not presently part of FTAs. This is a result of an explicit Negotiating Principle to that effect adopted prior to the TFTA negotiations.
- The TFTA negotiations show that the blending of existing Regional Economic Communities (RECs) into a new and inclusive FTA is a daunting task. Trade in goods negotiations offer little space for creating a bold and realistic new African trade arrangement. Important lessons can be learned from this exercise.
- The immediate implication of these developments for the CFTA negotiations is that the TFTA is not a ready-made launching pad for a continental trade deal. The CFTA cannot come about by simply adding on to a secure foundation in the form of the TFTA. And it cannot be assumed that the CFTA negotiations will be plain sailing; at least not if conceptualized as a typical market access for goods endeavour. The CFTA initiative will have to find its own unique formula for clarifying its aims and for conducting its negotiations. There is a mandate but it needs further work. Political legitimacy is necessary.
- Another noteworthy post-TFTA development concerns the change in vocabulary. The concept of what an FTA is, has changed; it has become a term for a comprehensive trade arrangement

² The trade related matters are competition policy, cross-border investment, trade and development, and intellectual property.

which goes beyond trade in goods. The TFTA Agreement reflects this new vocabulary but does not spell it out as part of the first phase of the negotiations.

- The other Milestone mentioned in 2012 of “*parallel arrangements similar to the TFTA consisting of FTAs by non-Tripartite RECs*” did not come about. Another constitutive element as conceived in 2012 is, therefore, still to be planned for. The same applies to the “*consolidation of the TFTA and other FTAs into the CFTA between 2015 and 2016*”.

3. What is now on the negotiating Agenda?

A traditional trade in goods agenda will not be the ideal basis for negotiating the CFTA; the same difficulties experienced during the TFTA negotiations will be encountered. This will derail the plans to boost intra-African trade in a meaningful manner. It is also not be the ideal recipe for a fresh and effective continental trade arrangement suitable for 21st century challenges.

It therefore came as no surprise that the meeting of AU Ministers of Trade of 27 – 28 April 2014 added the following new elements to the CFTA’s preparatory agenda; amounting to an important shift in emphasis:

- Industrial and infrastructure development are important for a CFTA which has to be beneficial to all African countries;
- The importance of including trade in services and the movement of business persons in the CFTA;
- The inclusion of the maritime dimension of boosting intra Africa trade and the special needs of Island Countries;
- Exploring the modalities of compensation for revenue loss for countries participating in the CFTA;
- Consolidating regional FTAs as a basis for building a strong CFTA;
- The CFTA should be designed in a way that promotes the development and strengthening of regional value chains.
- One should add to this list an explicit recognition of the importance of Trade Facilitation. It is in any case implied in the need to consolidate existing FTAs.

4. The Negotiating/Sequencing Process

The April 2014 meeting of the AU Ministers of Trade decided that the AU Commission should prepare Draft Terms of Reference for the CFTA-Negotiating Forum; based on best practices in the RECs and/or the Tripartite FTA. This constitutes an opportunity to design a realistic game plan for the CFTA negotiations and to clarify the political mandate.

The CFTA negotiations will be under the auspices of the AU; with its Commission being responsible for the actual work and for logistical aspects. It will not be a repeat of the more open-ended “member-driven” method of the TFTA. This offers an opportunity to prepare for focused deliberations and specific outcomes.

The lessons from the TFTA negotiations should be taken on board. What are they? The first is that typical tariff negotiations are a difficult road to travel if made the main focus of such negotiations. It seems necessary to design a different plan of action for tariff issues; focusing on tariff consolidation in and between the RECs and a monitoring mechanism for measuring and supporting the progress made.

New initiatives are needed for bringing the existing FTAs closer together. Those Milestones remain work in progress; but it cannot come about in a big bang fashion. This particular aspect will take time and should be supported by new continental machinery to usher it along.

The sequencing of negotiations is of vital importance. The first point of departure should be clarity about what is needed now for boosting intra-African trade and what is politically feasible. The CFTA could make a major contribution to the original objective (to boost intra-African trade) if the negotiations are structured realistically. There may be more immediate results from concerted efforts to boost intra-African trade by removing the well-known bottlenecks (by focusing on a concrete Trade Facilitation agenda), pursuing effective market integration efforts, advancing joint industrialization and infrastructural development, and by agreeing on commitments for trade related issues and related services.

The Milestones identified in 2012 and the decisions of 2014 contain support for such an approach; which will constitute a more realistic starting point for the CFTA negotiations. For tariff consolidation there should be a plan to advance intra REC and inter REC efforts. It requires a particular kind of built-in agenda for the CFTA.

The modus operandi suggested here raises a question about the objective to launch the CFTA as a completed deal by 2017. The TFTA negotiations teach us that a final and comprehensive new FTA in the traditional trade in goods format for the African continent is unattainable as a once off exercise. It is necessary, from the outset, to plan for a more realistic outcome. The aim should rather be to conclude an agreement which will reflect a balanced outcome; between substantive progress on measures to boost intra-African trade now and to support and consolidate tariff liberalisation efforts in and between the RECs. Another objective should be to establish continental institutions to assist African Governments which become Parties to such a CFTA and to help them with their challenges to implement the CFTA.

Actual negotiations should be well prepared and be conducted in plenary and working group sessions. The same national experts should attend these meetings.

5. Legal Aspects

- Legal arrangements are not an end in themselves; they should achieve what the objectives require and what the needs dictate. And they should do so in a manner which stands a realistic chance of succeeding.
- The proposed CFTA aims to bring about a comprehensive, effective, modern and rules-based trade agreement to boost intra-African trade. This objective has consequences for the design of the agreement to be concluded and the obligations to be contained in its legal text.
- The CFTA should emphasize the need for legal certainty and predictability. It is well known that the RECs struggle with the compliance by members with their obligations. The reasons have to do with insufficient domestic technical capacity, lack of clarity regarding enforcement and implementation, weak national governance frameworks, a failure to domesticate agreements, the absence of regional institutions, as well as vague legal texts. And there is a tendency for Governments to invoke their sovereignty when it comes to complying with international legal obligations.

- These difficulties and complications will not disappear once the CFTA is launched. It will be necessary to plan for support systems and assistance to members with implementation challenges. Such efforts should emphasise the benefits of legal certainty and remedies for private sector traders and firms; the real traders and investors. Compliance with obligations needs to be monitored. The establishment of appropriate institutions should be part of the effort.
- The REC record on tariff liberalization is often quite impressive. It is with regard to NTBs, trade remedies, dispute settlement and the protection of the rights of private firms and traders that we fall short. The CFTA should recognise these challenges and address them.
- Objective dispute resolution arrangements and structures for deciding technical issues will in fact protect sovereignty and good neighbourliness. The CFTA will made a major contribution if it can establish and administer a suitable dispute settlement mechanism.
- The TFTA negotiations reveal a growing concern among African Governments about remedies to address unfair trade practices. This is a genuine need. Trade remedies are typical of trade arrangements.³ However, anti-dumping and countervailing measures based on WTO disciplines are difficult to implement, have to comply with strict multilateral rules, and need sophisticated domestic machinery. The TFTA could not agree on *sui generis* and flexible anti-dumping and countervailing provisions. Agreeing on rules-based preferential safeguards might be the better initial approach; provided national safeguard measures can be justified in terms of binding and objective criteria. Safeguards are essentially ‘emergency’ measures to use in cases where an increase in imports has caused or threatens to cause serious injury to a domestic industry. They do not deal with unfair trade practices. Liberalising trade amongst unequal partners may well result in such increases in imports to specific countries, necessitating safeguard action.
- Many unfair trade practices which firms and governments complain of can be tackled through national and regional competition laws and institutions. The CFTA agreement should provide for this need.
- In terms of a general design the CFTA would require a general agreement (with objectives and principles) and additional Annexes explaining the detail about e.g. NTBs, standards, trade related services, remedies, dispute settlement etc. These instruments should form one integrated legal instrument.
- The negotiations to adopt the necessary instruments should preferably be concluded during one inclusive trade round. The example of the TFTA, to stagger negotiations over two phases, should be avoided. It will be difficult to retain momentum; while the impression might be created that trade in goods and trade related issues and services are distinct sets of disciplines which belong in separate agreements. This is misleading and counter to the objective to achieve what is necessary to boost intra-African trade.
- The CFTA should preferably be launched with a framework agreement of a particular kind; which will allow for gradual consolidation and the alignment of different tariff regimes as explained above. It should have a clear built-in agenda; for tariff and REC consolidation as well as other needs.
- Variable geometry will make agreement easier. This is another TFTA lesson. It will also be in line with the consolidation dimension of the CFTA.

³ The GATT recognises anti-dumping and countervailing measures, as well as safeguards.

- WTO compatibility and formal notification should not be the main concern now. Notification will only become an issue once a new continental tariff arrangement comes about. The CFTA member states will be and are engaged in trade negotiations with third parties. It will be more urgent to ensure that such third party deals are aligned to the continental scheme of things. This points to another technical need --- to allow for the possibility that the CFTA agreement can be strengthened by subsequent protocols or similar legal instruments. They should, once adopted, form part of the CFTA compact.
- For trade related service negotiations the priorities will include regulatory reforms and harmonization (of e.g. transport regimes) and sectoral liberalisation. We may learn lessons from how the new mega deals such as the Trans Atlantic Trade and Investment Partnership(TTIP) and Trans Pacific Partnership (TPP) handle this aspect. The GATS too allows for sectoral deals such as telecoms and financial services.

6. Institutional Aspects

If the CFTA is to become a new and dynamic instrument for boosting intra-African trade and for consolidating existing FTAs, it will need appropriate institutions and a longer life. These institutions should monitor compliance, assist those governments which need implementation assistance, take responsibility for keeping the momentum going, and be sufficiently equipped in terms of technical expertise to perform specialized support functions regarding NTBs, services, standards and guiding national regulatory reforms.

Dispute settlement is necessary. It could consist of a panel procedure; which has specific advantages. It is *ad hoc*, cheaper than a permanent court, and allows for the involvement of specialists to make findings about specific disputes. An appeal procedure will make it easier for governments to accept the jurisdiction of a continental dispute settlement system. Linkages to exiting African dispute settlement structures can be investigated. Specialist judges will be needed.

7. Some immediate Challenges

- The CFTA process is challenged by a more complicated landscape now. The world of 2012 has moved on.
- The CFTA negotiations have to deal with the TFTA results and non-results. Important lessons can be learned from that exercise. Some of the Milestones which were to anchor the CFTA did not come about. A novel approach for consolidating existing FTAs has become necessary. The CFTA has to find a way to deal with this factor.
- To some extent the CFTA process has become a *de novo* exercise. It is no longer about forming a new FTA in one single step. The AU Commission needs a unique *modus operandi* and the political mandate to design one.
- Important external developments (such as the Bali Agreement on Trade Facilitation) and a new understanding about how trade in services negotiations are best conducted on a sectoral basis (as in the TTIP⁴) and through domestic regulatory reforms and harmonisation, will have to be taken on board.

⁴ See the recently published VoxEU.org book: *Catalyst? TTIP's Impact on the Rest*, edited by M. Sait Akman, Simon Evenett and Patrick Low, CEPR Press, March 2015.

- Value chains, pre-existing trade agreements and the challenges with regard to global competitiveness are paramount. A proper negotiating agenda will include industrialization, infrastructural development and market integration.
- Implementation assistance should be a feature of this agreement. Weaker states need technical support and implementation assistance; and should be helped to join arrangements anchored in variable geometry. These could be tasks of the CFTA institutions.
- How will the CFTA be married to existing RECs? The answer lies, to a considerable extent, in designing the CFTA as a framework agreement with a built-in consolidation agenda and function.