

The Tripartite FTA: Entry into Force and Implementation

1. Background

Agreements establishing Free Trade Areas (FTAs) are international legal instruments of a particular kind. The Parties are states and the trade arrangements agreed between them have to comply with multilateral rules;¹ while often touching on sensitive national policy spheres. Their successful implementation depends, to a considerable degree, on the commitment of the Parties, effective oversight over compliance, and respect for accepted obligations. Private sector needs, transparency, and legal certainty are key requirements. Institutions which provide for a collective voice, national good governance practice, and harmonized regulatory reforms are typical of those cases where regional integration has been a success story. Disputes are preferably to be settled in a final and binding manner.

The implementation of agreements is about how the state parties give effect to their obligations; and depends on the clarity of the language used to spell out state duties. This aspect requires a critical look at exactly what the parties agreed to by way of binding obligations. Textual analysis then becomes important. Trade agreements display another general feature; they allow for exceptions but only under prescribed conditions. Parties invoking these exceptions carry the burden of demonstrating that the applicable rules have been complied with. Failure to do so allow other parties to retaliate or withdraw their commitments.

¹ Art XXIV GATT or the Enabling Clause have to be complied with for trade in goods. For services it is Art V GATS.



The REC experience shows that African FTAs are not easy to establish and utilize as platforms for deeper regional integration, although they often do demonstrate progress on tariff liberalization. When a large number of states are involved and existing commitments have to be accommodated; as in the case of the Tripartite FTA (TFTA), the challenges and complexity increase. The implementation of African trade agreements has not always been smooth; with Governments being concerned about loss of sovereign policy space. The TFTA negotiations faced all these and additional challenges.

This background note discusses the entry into force and implementation provisions of the scrubbed version of TFTA text; which is expected to be signed in June 2015. It also refers to some of the more complicated issues which the negotiators had to address.

2. What has been agreed in terms of substance?

The TFTA idea was launched, at the first TFTA Summit in 2008, as an endeavour to form one new Free Trade Area between the 26 members of COMESA, the EAC and SADC. This objective proved, after four years of negotiations, to be beyond the reach of the negotiators; at least as something to be constructed in one binding agreement.

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.* (Emphasis added.)

The text of the TFTA Agreement reveals a complicated settlement; with little in terms of “hard law” obligations for an integrated market for trade in goods. It cannot be said that a proper rules-based dispensation has been added to the African collection of RECs. Obligations are mostly of a best endeavour kind or allow members states a margin of freedom on implementation. To provide one example from the dispute settlement clause: *The settlement of any dispute among Tripartite Member/Partner States shall, whenever possible, imply removal of a measure not conforming with the provisions of this Agreement or causing nullification or impairment of a benefit under such provision.*² (Emphasis added.)

The three RECs (COMESA, the EAC and SADC) will continue to exist. There is no obligation (or a clearly articulated desire) 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.

This Agreement is also work in progress. At the time of writing (end of March 2015) the tariff offers, rules of origin, trade remedy provisions, and Annexes are still to be finalized. This has to happen before a meaningful document can be signed. The Parties also “agree to negotiate” a second phase in which Protocols (not Annexes) on services and trade related matters will be negotiated.³ The Parties will

² Art 30 (2); at the time of writing still to be finalized.

³ The trade related matters are competition policy, cross-border investment, trade and development, and intellectual property.

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 Agreement addresses what has become a growing concern among African Governments; to counter unfair trade practices. This resulted (perhaps unexpectedly) in the discussion of trade remedies to one of the most difficult issues; despite the fact that trade remedies and safeguards are typical of trade arrangements.⁴ 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 flexible anti-dumping and countervailing provisions. This matter is still to be finalized. 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. Many unfair trade practices which firms and governments complain of can be tackled through national and regional competition laws and institutions.

3. Structure of the Agreement

The structure of the Agreement is an important feature of the outcome of the negotiations. There is an overarching Agreement containing general objectives and principles, and another 14 Annexes. The latter are detailed sub-agreements; where the real substance on specific disciplines is to be found. The Agreement and the Annexes form an integral part. New Annexes may be concluded and added.

Some of the provisions invoke WTO disciplines; such as for technical, health and sanitary standards. The agreement also contains a “built-in” agenda in the second last article:

Tripartite Member/Partner States undertake to conclude negotiations on outstanding issues under Phase I set out in Annex [] (Annex to list all outstanding issues) after the launch of this Agreement.

4. Entry into force Provisions

International agreements enter into force in terms of their own entry into force provisions. In this instance the procedure is as follows:

This Agreement shall be signed by the Tripartite Member States.

- 1. This Agreement shall be ratified by Tripartite Member States in accordance with their national laws.*
- 2. This Agreement shall enter into force after the deposit of the instrument of ratification by a simple majority of the Tripartite Member/Partner States that are party to this Agreement.*

One of the implications is that those REC members which decide not to become parties will remain outside the TFTA and will continue to trade with African counterparts in terms of existing arrangements.

5. Concluding Observations

Trade agreements are not an end in themselves. They have to make it possible for the participating states to achieve jointly what proves impossible by way of unilateral effort. Trade (by private firms) should become easier, while the benefits of what the global economy offers should be reaped in a more effective,

⁴ The GATT recognises anti-dumping and countervailing measures, as well as safeguards.

transparent and predictable manner. When measured against these yardsticks, the TFTA does not add many new achievements. These negotiations show that the blending of existing RECs into a new and inclusive FTA is a daunting task. Important lessons can be learned from the TFTA negotiations; trade in goods negotiations offer little space for creating a bold and realistic new African trade arrangement.

The change in vocabulary is worth mentioning. The understanding of what an FTA is, has changed; it has become a term for a comprehensive trade arrangement which goes beyond trade in goods. The TFTA Agreement reflects this new vocabulary but does not spell out how the underlying objective will be achieved. There will be more negotiations but it remains to be seen how much energy will be left and what new insights may be found as part of a binding and inclusive compact.

Legal certainty and predictability have not been advanced in any significant manner. 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.

One has to note that this agreement does not contain provisions on implementation support. The fact that variable geometry has been included as one of its explicit provisions may serve to indicate that coalitions of the willing has also become a more acceptable notion.

The REC record on tariff liberalization is often quite notable. It is with regard to NTBs, trade remedies, trade facilitation, effective market integration, dispute settlement, and the protection of the rights of private firms and traders that we fall short. For these challenges the TFTA does not provide new solutions.

The final impression is that the political momentum behind the exercise had become its ultimate engine; it could not fail to produce an agreement. How it will be implemented and what new building blocks the TFTA will add to Africa's integration and ability to meet the challenges of the 21 century remain to be seen.