

Negotiating the CFTA: Legal and Institutional Issues

The decision of the June 2015 AU Summit provides for a “*comprehensive and mutually beneficial trade agreement among the Member States of the AU*”, a freer market for goods and services, building upon the RECs, and resolving the challenges of overlapping membership.

A key objective for the CFTA is to boost intra-African trade. The negotiations should pursue “trade facilitation” outcomes; to tackle the bottlenecks obstructing intra-African trade in goods and services. This requires that 21st century needs be addressed.

The negotiations shall cover Trade in Goods, Trade in Services, Investment, Intellectual Property Rights and Competition Policy and shall be conducted in two phases. The first phase shall cover negotiations about trade in goods and trade in services, in separate tracks. There shall be two separate legal instruments for Trade in Goods and Trade in Services. The second phase shall cover investment, intellectual property rights and competition policy.

Member States have adopted the following overarching Negotiating Principles

- *The CFTA negotiations shall be AU Member States/RECs/Customs*
- *Territories driven with support of the African Union Commission and its structures*
- *RECs FTAs are building Blocks for the CFTA*
- *Reservation of Acquis*
- *Variable geometry*
- *Flexibility and Special and Differential Treatment, Transparency, and disclosure of information*
- *Substantial liberalisation*



- *MFN Treatment*
- *National Treatment*
- *Reciprocity*
- *Decisions shall be taken by consensus*
- *Adoption of Best Practices*

Comments

- The CFTA will result in stand-alone trade Agreements. It will bring about legal obligations only for those States which ratify the Agreements; which will have to be notified to the WTO. Most African states are WTO members.
- How will these agreements speak to each other and form a single arrangement? One possibility is to agree, at the outset, on a framework agreement which will bring about an institutional arrangement. This will also constitute an 'early harvest'. Subsequent agreements can form part of the umbrella structure; with additional institutions where necessary. Separate structures which function independently of each other will cause fragmentation.
- The 'variable geometry' principle provides a basis for those willing to move forward, to expeditiously conclude the necessary agreements. Others can accede when ready.
- Some Governments might want the Negotiating Principles to be 'clarified' before the negotiations start; as happened with the TFTA. An interpretation of the *acquis* to freeze existing trade arrangements and prevent their Members to make new offers in disciplines necessary to boost trade, should be avoided.
- To ensure internally consistent outcomes Technical Working Groups should not function in silos. Trade in services impact on many goods disciplines (transport and finances are examples).
- The TFTA services negotiations will overlap with those of the CFTA; it makes sense to align these processes.
- The integrity of the negotiating process merits special attention. Member states' delegations should be well prepared and the same experts should participate in successive rounds.
- The aim must be to secure effective outcomes, rules-based arrangements, institutions to monitor compliance, and dispute settlement.
- The RECs are CFTA building blocks - will they continue to exist as separate entities? The TFTA shows that this is likely to happen; this may undermine the ideal to address the overlapping membership problem.

It is doubtful that a traditional trade in goods approach is the ideal starting point for the negotiations. There is little appetite for tariff liberalisation, and related issues, such as rules of origin, are divisive. After four years of TFTA negotiations, agreement on tariff schedules and rules of origin have not been reached. Trade negotiations are about technical issues within a political context; the CFTA endeavour needs champions. This is an opportunity to up the game of African regional integration.