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Ideas about the Architecture of the CFTA

The Continental Free Trade Area (CFTA) will be established through international agreements which the 54 AU member states must negotiate and ratify. This Note offers ideas about how the overall arrangement can be constructed in order for these agreements to relate to each other and form one *comprehensive* pact; as the CFTA Framework requires.

The CFTA Framework does not explain the technicalities of the CFTA as a single legal construct forming one *comprehensive* trade arrangement. It provides as follows: *CFTA negotiations shall be conducted in two phases. The first phase shall cover negotiations on trade in goods and trade in services. There shall be two separate legal instruments for Trade in Goods and Trade in Services to be negotiated in two separate tracks. The second phase shall cover negotiations on the following areas: investment, intellectual property rights and competition policy. Negotiations in these areas shall be undertaken by dedicated structures.*

This point of departure has several implications. Separate agreements (five are implied) create the danger of different configurations of state parties (those which will ratify each agreement) bound by different obligations. This will undermine the objective of a *comprehensive* trade arrangement. It will also cause fragmentation; one of the obstacles impeding intra-African trade. This is one of the conditions which the CFTA wants to address.

The CFTA needs a compromise between the optimal outcome of a single, comprehensive trade arrangement for all, and the challenge to accommodate the reality that the AU members are at different levels of economic development and have different needs. Their readiness to move to a higher level of shared obligations vary. Without such a compromise the CFTA will drift to the level of the lowest common denominator.

The CFTA accepts the need for a compromise, by including *Variable Geometry*. Those member states, ready and willing to accept additional obligations, can do so at a faster pace. However, Variable Geometry is only possible if there are common basic obligations (about essential trade principles such as non-discrimination, liberalization, and that exceptions must be rules-based) and a membership structure for all. There must be a shared minimum. Once

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that shared minimum is in place all AU members can belong to the CFTA, while graduation to higher levels of commitment can happen at different speeds. Some will accept the CFTA obligations from the outset. These challenges require an appropriate legal basis. We suggest that the CFTA be founded on an overarching CFTA Treaty and that all AU members should be parties thereto. Variable Geometry will be accommodated through the pace at which some will accept additional CFTA obligations contained in those agreements which deal with the substantive obligations about liberalizing trade in goods, trade in services; as well as all related disciplines.

Certain aspects about this proposal need clarification. What should the overarching CFTA Treaty provide for? What should be covered in the other Agreements? How will the latter relate to each other and to the Treaty? How to ensure that all AU members will accept the additional obligations and will do so within a reasonable period of time? What would be the relationship between the AU and the CFTA? How would the CFTA relate to other trade agreements to which the parties already belong? The CFTA Treaty will establish the CFTA; with all AU members becoming parties thereto. The CFTA will have certain institutions such as a Council (making interaction with the AU easier) and provisions about decision-making. It must provide for foundational principles such as non-discrimination, the general and specific undertakings of members, the relationship with national legal orders, dispute settlement (but with a reversed consensus requirement in order to prevent opting out from the effect of binding decisions), entry into force, and other typical aspects falling under the “final provisions “ of such instruments. The Preamble of this Treaty should mention the objectives in the CFTA Framework.

The REC *acquis* (relevant for the CFTA negotiations) supports the present proposal. SADC is, for example, founded on the SADC Treaty; of which each SADC member is a party. The SADC Treaty provides for the adoption of SADC Protocols. They enter into force in terms of their own entry into force provisions. The de facto result is variable geometry. The other CFTA Agreements (they might be called *Protocols*) will cover all the disciplines mentioned and implied by the CFTA Framework; to be concluded as part of the CFTA negotiations. They will only bind those AU members which have ratified them. However, since variable geometry must be reconciled with the ideal of one comprehensive CFTA; there should be a procedure and a time frame for expanding the Protocols’ membership. All such Protocols should, once in force, form an integral part of the CFTA arrangement.

The CFTA negotiations will start by negotiating both trade in goods **and** services during the first phase. Trade in goods negotiations should not commence with tariff offers. Should this happen the CFTA process will, like the TFTA, get bogged down in drawn-out and complicated negotiations about tariff offers and counter offers, the configurations of states targeted for this purpose, carve outs for sensitive goods, and the concomitant use of rules of origin. Agreement on binding tariff schedules for all 54 AU members as a precondition for forming the CFTA will delay the process in a major way. The TFTA negotiations, which involve only 26 nations, were launched in 2011 and are still incomplete five years later. The CFTA trade in goods negotiations should start with those aspects which do not involve tariff offers and rules of origin (e.g. standards, trade facilitation, NTBs, trade remedies etc.) and conclude them as CFTA Protocols. Services negotiations should target priority sectors and regulatory reforms. Services negotiations should, in addition, address trade in goods aspects which require services inputs; such as transport and finances. The CFTA negotiations should not be conducted in silos.

Since an FTA must have tariff schedules it would be better to latch this aspect of the CFTA on to final TFTA results. In the meantime intra-African trade in goods will continue in terms of the tariffs currently in force (REC schedules or MFN rates); while reaping those other benefits of CFTA advances for trade facilitation, services and generally better rules which have entered into force as specific CFTA Protocols.