

## The African Continental Free Trade Area

### Much Ado about Nothing or Important Step to African Integration?

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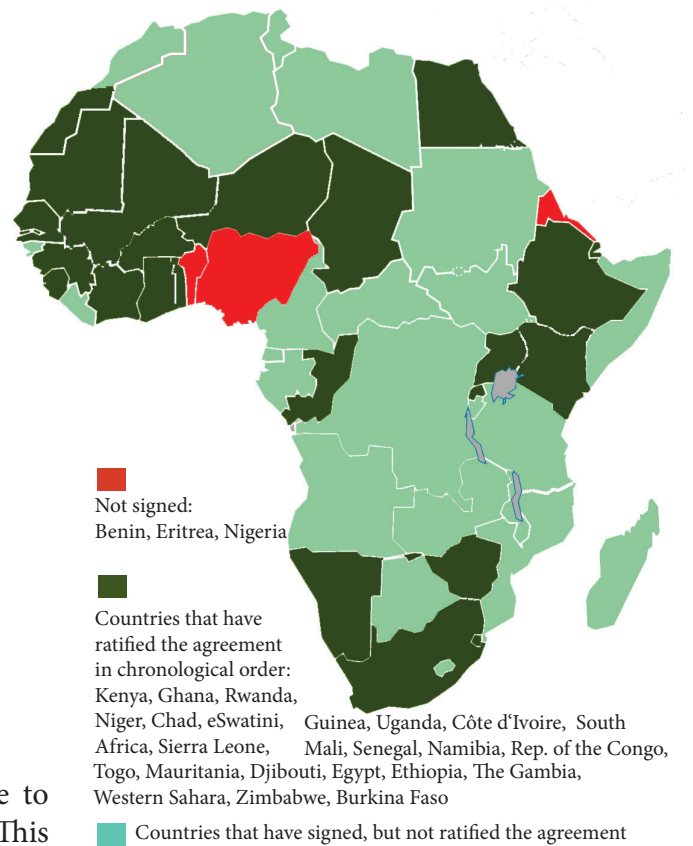
Since May 2019, Africa has been the host of the World's largest potential free trade area. The African Union (AU) with its vast majority of members agreed in March 2018 to form the *African Continental Free Trade Area* (AfCFTA), which has since been signed by 52 countries with Nigeria as the most notable exception. The AfCFTA became officially effective on 30 May 2019 as by April 22 countries had ratified it. However, it will take some time until the agreement really works. The AfCFTA contains provisions about trade in goods, trade in services as well as the movement of persons. These are subject to negotiations in a first phase. The agreement also covers competition policies, *intellectual property rights* (IPR) and investment, which will be negotiated in a second phase.

The primary objective of the AfCFTA is to boost intra-African trade flows as well as further industrialization in Africa. This is necessary, as African countries have rather deindustrialized in the past years. A secondary objective is to harmonize African trade arrangements and institutions, in order to enable trade to flow and be governed more effectively. This objective is reflected in the eventual goal of establishing a single African common market, and continental customs union, encompassing 55 countries. This short article addresses the question of whether the AfCFTA will meet both objectives and thereby enhance African development.

#### The Framework and Basic Results

The AfCFTA is not an international organization in itself. Its organisational framework consists of four bodies, namely the General Assembly

of the AU, the Council of Ministers (of the State Parties, not the whole AU), the Committee of Senior Trade Officials (again of the State Parties) and the (to be established) Secretariat. Apart from some general functions, the exact procedures and the division of labour is not



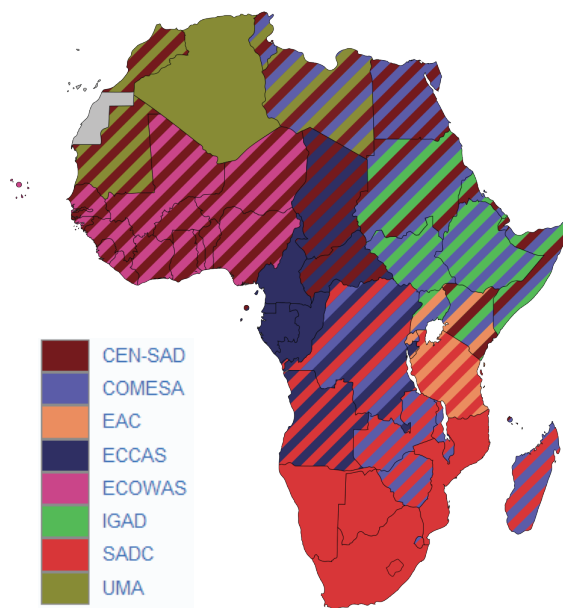
clear yet. Only the mooted Secretariat has an own legal personality. Its exact job description is also lacking so far. There is also a *Dispute Settlement Mechanism* (DSM), which is based on the DSM of the *World Trade Organization* (WTO). The whole agreement is modelled on the WTO agreements, which definitely makes sense.

It is important to note that most AU members are also members of *Regional Economic*

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*Communities* (RECs). The relation between the AfCFTA and the RECs is not clarified yet, and it is difficult to do so, as there is no coherent standard or procedure for the eight existing RECs. In the same vein, for some countries the whole agreement is novel, as not all AU members are also WTO members.<sup>1</sup>

Services negotiations are still – relative to the trade in goods area – nascent. The eight RECs have divergent approaches and/or experiences of liberalizing trade in services, meaning



that there is no obvious “*acquis*” on which to build. This concerns both actual negotiations of market access commitments, wherein three of the eight RECs have no experience at all, and the scope, coverage, meaning, and timing of negotiations of regulatory frameworks as well as how these will relate to the schedules of market access commitments. And while the schedules of specific commitments, as well as the Protocol itself, are derived from the *General Agreement on Trade in Services* (GATS) and accord closely with it, for those AfCFTA State Parties that are not WTO members this is a novel process. Since the negotiating guidelines were still being negotiated at the time of writing, it is clear that the trade in services negotiations are likely to take years to complete. Given the complexities, different visions and ambitions

for the negotiations, it is also not obvious how much commercial value they will yield.

State Parties have also concluded a separate protocol on Free Movement of Persons. Finally, at the time of writing early exploratory work on competition, *intellectual property rights* (IPR), and investment is underway, with negotiations slated to commence in 2019. Not surprisingly, the area that has made most progress, and which constitutes our focus, is trade in goods.

## Open questions

As many commentators have argued, there are several obstacles in the way of achieving the Trade in Goods Protocol’s objectives. Some are structural; others, institutional.

Structural barriers are primarily economic. While each African economy is unique, for the most part they share some key characteristics. Many are relatively poor, largely agrarian and subsistence-based, and rural, outside of a few large and rapidly growing urban centres. With few exceptions they mainly export primary products, such as mining commodities and cash crops, and import a variety of manufactured and capital goods produced predominantly outside the continent. Private sectors tend to be relatively shallow and comprise predominantly small and informal enterprises. Consequently, manufacturing production, where it is to be found in substantial concentrations, tends to be driven by relatively large foreign firms, or firms based in one of the major regional economies, particularly South Africa, through foreign direct investment.

Partly for these reasons, most African governments actively participate in RECs, through which small markets are pooled, making them more attractive to both foreign firms and domestic firms with capacity to export. Furthermore, regional public goods such as transport and electricity networks can be more optimally and efficiently designed, established and funded, working with international development partners, than at the national level alone. RECs also

<sup>1</sup> Algeria, Equatorial Guinea, Ethiopia, Libya, Somalia, South Sudan and Sudan are not members of the WTO.

have institutional capacities to supplement generally weak national institutions and can broker the deals needed to overcome regional barriers to trade and investment. Consequently, the RECs construct trade deals encompassing barriers at the border, such as import tariffs, customs procedures, and visa requirements. They also address a variety of behind the border barriers such as licensing requirements, national technical standards and specifications. The RECs that comprise the AfCFTA are at various stages of implementing these initiatives (and more), and some have not moved beyond a focus on regional security matters to encompass a trade agenda.<sup>2</sup> As a result, some observers are sceptical that the AfCFTA could add much value in terms of achieving its objectives as discussed above.

Consequently, the AfCFTA is consciously constructed on the basis of the various legal arrangements comprising the RECs; or what is known as the “acquis”. As such its legal architecture is intended to be in conformity with the RECs, rather than in competition with them.

The [Trade in Goods Protocol](#) is complete, along with most of its [nine annexes](#). The three outstanding annexes are the most significant:

**Table 3: Annexes to the Trade in Goods Protocol**

Annex 1: Schedules of Tariff Concessions
Annex 2: Rules of Origin
Annex 3: Customs Cooperation and Mutual Administrative Assistance
Annex 4: Trade Facilitation
Annex 5: Non-tariff Barriers
Annex 6: Technical Barriers to Trade
Annex 7: Sanitary and Phytosanitary Standards
Annex 8: Transit and Transport Facilitation
Annex 9: Trade Remedies

1 (Schedule of Commitments); 2 (Rules of Origin); and 9 (Trade Remedies).

Regarding Annex 1, at the time of writing there has been growing consensus on the tariff modalities to govern goods trade liberalisation, with the following issues still to be decided:

- Since intra-African trade levels are low, the concern expressed by some State Parties is that even with a small exclusion basket a country could effectively exclude all imports from its African trading partners from liberalization. Hence, the anti-concentration clause would prevent this from happening, by obliging said country not to concentrate all its exclusions on particular sectors and products. However, State Parties seem still divided on how the corresponding anti-concentration formula could or should be constructed; the issue remains on the agenda.

- How tariff liberalisation will be applied to least-developed countries (LDCs) within customs unions, as well as to their non-LDC counterparts in those customs unions. All existing customs unions contain LDCs. Since it is already agreed that LDCs will have longer tariff phasedown periods – 13 years for sensitive products versus 10 years for non-LDCs – it is apparent that this issue could be difficult to resolve.

- The tariff level, in the tariff book, to which negotiations, and subsequent liberalisation, would apply. State Parties implement different versions of the Harmonised System (HS), with some apparently not being Contracting Parties to the HS system at all, although Annex 3 requires those not implementing it to do so.

Nonetheless some issues have been agreed:

- The proportion of tariff lines to be designated as “sensitive” or “excluded” has been negotiated, and the criteria for designating products as sensitive or excluded have allegedly been agreed upon on the AU’s Thirty-Second Ordinary Session, 10–11 February 2018, details are not published.

- Tariff negotiations will be between Member States and Customs Unions or RECs that have no preferential trade arrangements between them;

<sup>2</sup> This is the case with the Communauté des Etats Sahélo-Sahariens (CEN-SAD), the Intergovernmental Authority on Development (IGAD), and the Arab Maghreb Union (AMU), in particular.

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- Member States' negotiations shall be undertaken confidentially until concluded; and

- Tariff phase downs shall be in equal instalments upon entry into force of the Agreement, with a period of five years envisaged for the initial basket of goods slated for liberalisation.

As for Annex 2 (Rules of Origin), businesses will need to be clear on the rules of origin applicable to tariff concessions. Every preferential trade agreement has an underlying philosophy concerning its rules of origin. Put simply, this oscillates between flexible and strict criteria, with the latter generally requiring more complex specification and adherence procedures. Since African states, generally speaking, have relatively weaker institutional capacities to monitor and enforce complex rules of origin, the approach has been to apply more flexible rules; an approach we endorse. However, this is not the case in Southern Africa, where a strict approach prevails under the Southern African Development Community's FTA. At the time of writing this tension had not been resolved.

As laid out in Annex 3, trade remedies are of importance. They entail use of anti-dumping, countervailing, and safeguard investigations and duty impositions. As such they constitute a "safety valve" to be used in the event of substantial and sudden trade disruptions caused by surges in imports, whether fairly (safeguards) or unfairly (anti-dumping and countervailing duties) traded.

Currently very few African countries make use of trade remedies, but a growing number are developing the institutional frameworks to do so. If targeted against other African countries, given the very low levels of intra-African trade they could conceivably negate the market openings achieved through negotiations.

Finally, services are of importance. The negotiations are focused on five sectors: finance;

telecommunications; transport; tourism; and entertainment. The "network services" – finance, telecommunications, and transport – are essential inputs into any manufacturing production process. Similarly, access to fast, quality, affordable telecommunications is a *sine qua non* for coordinating complex supply chains, including across borders, and effective management of companies more broadly. Since these services are not fully available in most African market places, and in some cases could be more competitively sourced from foreign, including African, providers – whether through direct investment or cross-border supply – it is in African manufacturing firms' interests to ensure more competition in their provision.

## **No Clear Assessment Possible**

If, as we do and the AfCFTA's objectives clearly set out, one accepts the view that import liberalization will promote economic development and industrialization, then it is important to note that the AfCFTA may not actually deliver meaningful liberalization. Key to understanding this is the overall lack of ambition embodied e.g. in the widely shared negotiators' goal of building into the Agreement sufficient policy space to insert 'circuit breakers' should serious social/economic disruption be threatened by enhanced liberalization.

Overall, the jury is still out regarding the market access content of the AfCFTA. Consequently, it is too soon to answer the question posed in our title. That said, the way the negotiations have shaped up so far suggests to us that for the foreseeable future, and assuming a successful conclusion to negotiations, the AfCFTA will incline towards the former, ie Much Ado About Nothing. In particular, an agreement with a substantial sensitive/exclusion list for goods tariffs, combined with strict product-specific rules of origin, and backstopped by evolution of trade remedies institutions that could be abused (as elsewhere) to protect domestic lobbies, points towards minimal goods trade liberalization given the low levels of intra-African trade. Furthermore,



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the regulatory content of the AfCFTA could perhaps best be described as ‘WTO-minus’, although it does have the substantial benefit of bringing non-WTO members into the fold. Similarly, the level of ambition in the services negotiations seems to be correspondingly low.

Notwithstanding these limitations, though, the agreement is perhaps best viewed as a starting point from which to build more meaningful continent-wide economic integration. It is to be hoped that African leaders will grasp the necessity of doing so.



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