

# **The Tripartite Free Trade Area and the African Continental Free Trade Area: The Case for Consolidation**

**by  
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## **Introduction**

June 2015 marked two significant events in the economic integration of the African continent. The Tripartite Free Trade Area (TFTA) Agreement, bringing together twenty-six member and partner States of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) was signed by the Third Tripartite Summit on 10 June 2015 in the resort town of Sharm El Sheikh, Egypt.

Five days after the TFTA signing on 15 June 2015, the African Union (AU) Summit of Heads of State and Government launched negotiations for the Continental Free Trade Area (CFTA), subsequently renamed African Continental Free Trade Area, (AfCFTA) in Johannesburg, South Africa. These negotiations were to encompass 54 African Union member States (this number became 55 after Morocco rejoined the African Union in 2017).

Both of these initiatives were aimed at rationalizing multiple memberships of African countries in regional economic communities, for integration purposes as well as for consolidating market potential. In the case of TFTA, this was to be achieved by creating a free trade area bringing COMESA, EAC and SADC together in a market with a population of 632 million people and a combined GDP of \$1.3 trillion; in the case of AfCFTA, by creating a continent-wide market of 1.2 billion people and a continental GDP of \$2.3 trillion.

The proximity of the two events on 10 and on 15 June 2015 highlighted a challenge for the African trade liberalization agenda. Rationalization of multiple memberships of trading arrangements was a key objective in both TFTA and AfCFTA. In fact, the initial expectation was that TFTA would be a ‘building block’ of AfCFTA. That is to say, that TFTA would be incorporated into AfCFTA. There was a similar expectation that the existing free trade area (FTA) arrangements on the continent would similarly be incorporated into AfCFTA. This has not happened. Instead, AfCFTA has added a new layer to the other FTAs on the continent. It remains unclear how and when these FTAs will be phased out to consolidate the African market through AfCFTA. There is a strong case for deeper integration within the regional economic communities including through customs union arrangements. However, at the FTA level (or level of preferential trading partnerships), rationalization requires consolidation through AfCFTA.

This policy brief reviews the salient provisions in the TFTA and AfCFTA agreements. It will become clear that a number of elements are duplicated in the two agreements. We argue that a road map for effective transition of all FTAs on the continent into AfCFTA is urgently required. This policy brief is divided into three sections. The first briefly revisits the decision of the African Union Assembly to consolidate FTAs into AfCFTA. The second highlights a number of similarities in the

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legal structure of the TFTA and the AfCFTA agreements. The third concludes with the argument on the need for consolidation.

## **1. Rationalization as a key objective of TFTA and AfCFTA**

According to the “Declaration on Boosting Intra-African Trade and the Establishment of a Continental Free Trade Area (CFTA)” adopted by African Heads of State and Government at the 18th Ordinary Session of the African Union Assembly in January 2012, the following milestones and timelines were agreed:

“Finalization of the East African Community (EAC) - the Common Market for Eastern and Southern Africa (COMESA) - Southern African Development Community (SADC) Tripartite initiative by 2014; - Completion of FTA(s) by Non-Tripartite RECs, through parallel arrangement(s) similar to the EAC-COMESA-SADC Tripartite initiative or reflecting the preferences of their member States, between 2012 and 2014; - Consolidation of the Tripartite and other regional FTAs into a Continental Free Trade Area (CFTA) initiative between 2015 and 2016; Establishment of the Continental Free Trade Area (CFTA) by 2017 with the option to review the target date according to progress made ” (Extract from Assembly/AU/Decl.1(XVIII)).

There was slippage from the timelines envisaged in 2012 by the African Union Assembly as the Tripartite Agreement was signed in 2015. More importantly, TFTA and AfCFTA were negotiated as separate agreements. In fact, other free trade agreements on the continent remain parallel arrangements to AfCFTA. Nonetheless, AfCFTA is a comprehensive trade liberalization and partnership agreement encompassing 55 countries. It provides the most logical framework for conducting trade throughout the continent, underpinned by the African Union vision for one continent-wide arrangement.

Article 19(1) of the Agreement Establishing the African Continental Free Trade Area provides that “In the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail ...”. All Tripartite member States either signed the Kigali Declaration for the launch of the African Continental Free Trade Area or the AfCFTA Agreement itself. This implies an uncontested acceptance of Article 19. However, a provision under this article allows for deeper integration in the regional economic communities (RECs) including through customs unions. It should be noted that within the three RECs in the Tripartite arrangement, some countries are already operating as customs unions (EAC and the Southern African Customs Union (SACU) subset within SADC) while the others aspire to become customs unions (COMESA and SADC).

## **2. Similarities between the TFTA and AfCFTA provisions**

The approach to the two negotiations and the substance of the agreements that were reached were remarkably similar. This begs the question, what is the point of having two agreements that are almost identical? The TFTA negotiations were to be conducted in two phases, phase I covering trade in goods and a separate and parallel track on movement of business persons. Phase II negotiations were to cover trade in services, competition policy, intellectual property rights, cross-border investments and cooperation in trade and development. Other pillars of TFTA include cooperation for industrial development and infrastructure development.

Similarly, the AfCFTA negotiations have been conducted in two phases, with the first phase covering trade in goods and trade in services. The second phase will cover competition policy, intellectual property rights, investment, and possibly e-commerce. AfCFTA is complemented by other continental initiatives, including the Protocol on Free Movement of Persons, Right to Residence

and Right to Establishment, which is expected to promote free movement of people. The Single African Air Transport Market (SAATM) is expected to lead to improvement in continental air transportation and to contribute to increasing the continent's global share of the aviation industry.

## **Trade in Goods**

Both the TFTA and AfCFTA agreements on trade in goods follow World Trade Organization (WTO) best practices. Both cover tariff liberalization and disciplines on non-tariff barriers, rules of origin, trade remedies and provision for dispute settlement lie at the core of what was agreed. Other provisions include elimination of quantitative restrictions, customs cooperation, trade facilitation, transit trade, infant industries, and balance of payments among others.

### *Tariff liberalization*

With regard to tariff liberalization, the ultimate aim of TFTA is to liberalize 100 per cent of tariff lines taking into account the usual general, specific and security exceptions. This is to be achieved by consolidating the tariff regimes of EAC, which as noted above, is a customs union and SACU subset of SADC member States, into TFTA in line with the principle of building on the *acquis*<sup>2</sup> and subject to reciprocity. In addition to the ten EAC and SACU countries, ten COMESA countries participating in the COMESA FTA made TFTA tariff offers based on the COMESA *acquis* of 100 per cent tariff liberalization on a reciprocal basis. It should be noted though that the modalities for tariff negotiations agreed among Tripartite countries in 2013 were not too ambitious. It was agreed that 60-85 per cent of tariff lines would be liberalized upon entry into force of the Agreement and the remaining 15-40 per cent would be negotiated over a period of 5 to 8 years. This presents a challenge for countries that have fairly liberalized trade regimes (with more than 80 per cent of their tariff lines at 0 per cent most favoured nation (MFN) vis-a-vis the principle of *building on the acquis*.

Bilateral meetings on tariff exchanges have taken place between Egypt and EAC, EAC and SACU and Egypt and SACU between 2015 and 2018. The EAC/Egypt negotiations have been concluded while those between EAC/SACU and Egypt/SACU are at an advanced stage. The process of negotiating tariff offers took longer than anticipated.

In the case of AfCFTA, the African Union member States adopted modalities for the liberalization of trade in goods. This required the removal of 90 per cent of tariffs on goods imported from other member States at the time of entry into force of the AfCFTA agreement. The remaining 10 per cent of tariffs is to be distributed between sensitive and excluded products with varying timelines for progressive liberalization over a maximum of 15 years to reach a level of liberalization contained in the bracket of 90 to 100 per cent. At the time of writing, it had not been fully clarified how the 10 per cent is to be distributed between sensitive and excluded products and whether the 90 per cent refers to 90 per cent of total tariff lines only or a combination of a minimum of 90 per cent of total tariff lines and not less than 90 per cent of total value of imports, also known as double qualification. Following the clarification of this issue, it is expected that the member States will notify and submit new tariff schedules to the African Union Commission (AUC).

### *Non-tariff barriers*

To address the challenges of non-tariff barriers (NTBs), TFTA provides for harmonization of the COMESA, EAC and SADC NTB arrangements into a single mechanism and process for identifying, categorizing, reporting, monitoring, and resolving NTBs in the tripartite region. The

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<sup>2</sup> *Building on the acquis* is one of the negotiations of TFTA principles, which means building on what has been already achieved or agreed.

institutional framework includes a tripartite sub-committee on NTBs as well as national monitoring committees and focal points.

AfCFTA has similar provisions in the protocol on trade in goods. It also provides for a mechanism on NTBs based on arrangements at the REC level, including the COMESA, EAC, and SADC arrangements.

### *Rules of origin*

The TFTA Agreement sets out the criteria and conditions for goods to qualify for preferential treatment based on a list of product-specific rules of origin. Negotiations of product-specific rules is ongoing as part of the built-in agenda. Interim arrangements on rules of origin were agreed, pending negotiations of the product-specific rules. As of September 2018, more than 60 per cent of tripartite product list rules had been agreed and the requisite instruments developed such as certificates of origin, export declaration and import declaration forms, among others.

The AfCFTA provisions on rules of origin follow a similar approach. It is based on a product list of rules with interim transition arrangements while product-specific rules are being negotiated. It is known that some AfCFTA negotiators hold the view that the non-contentious TFTA product rules should simply be incorporated into AfCFTA in order to expedite the work on product list rules.

### *Trade remedies*

The TFTA Agreement provides for the application of anti-dumping, countervailing and safeguard measures to address dumping, subsidization, imports surges, among others. There are accompanying guidelines on implementation of trade remedies.

AfCFTA has similar provisions with accompanying guidelines.

### *Other provisions*

Other provisions in both the TFTA and AfCFTA agreements include those on the elimination of quantitative restrictions, customs cooperation, trade facilitation and transit trade, infant industries, balance of payments, among others. These are generally consistent with WTO obligations and international best practices.

## **Trade in Services**

A Protocol on Trade in Services underpinned by agreed modalities for the liberalization of priority service sectors was concluded under AfCFTA. Five sectors, namely, transport, communication, tourism, financial and business services were selected as the priority sectors with flexibility for market access requests to be made in other sectors. On entry into force of AfCFTA, each State party is required to provide a schedule of commitments including initial market-access offers.

The Tripartite phase II negotiations to cover trade in services were put on hold in light of the participation of its member States in the AfCFTA protocol on services.

## **Dispute Settlement**

The TFTA agreement provides for a Dispute Settlement Body and its powers include, among others, the establishment of panels and an appellate body, and surveillance over the implementation of rulings and recommendations of panels and the appellate body.

The AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes has almost the same provisions.

## **Institutional Arrangements**

The institutional arrangements for oversight and implementation of the agreements are almost exactly the same. In the case of TFTA this includes among others, the Summit of Heads of State and Government, the Council of Ministers, the Tripartite Task Force (made up by the secretariats of the three RECs), the Tripartite Sectoral Ministerial Committee, the Tripartite Committee of Senior Officials and the Tripartite Committee of Experts.

AfCFTA has a similar institutional structure that cascades down from the African Union Assembly, and Council of Ministers, among others, with provision for an autonomous secretariat within the African Union system responsible for coordinating and enforcing the provisions of the agreement.

## **Ratification and Entry into Force**

TFTA requires ratification by fourteen (14) of the twenty-six (26) parties to the agreement for entry into force. At the time of writing, four countries had ratified the agreement. AfCFTA requires twenty-two (22) ratifications. Eleven (11) ratifications were concluded by the time of writing. With half the required number of ratifications already attained, there appears to be stronger momentum behind AfCFTA than behind TFTA. It is interesting to note that three of the four countries that have ratified TFTA have also ratified AfCFTA.

## **Phase II negotiations**

The Tripartite phase II negotiations on intellectual property rights, competition policy and cross-border investments have been put on hold. Lack of human and financial resources as well as evident duplication under AfCFTA seem to have reduced the appetite to proceed.

The better resourced AfCFTA is on track to launch negotiations on intellectual property rights, competition policy, investment, and possibly e-commerce in early 2019.

### **3. Conclusion: The case for consolidation**

A comparison of the TFTA and AfCFTA provisions demonstrates great convergence between the two agreements. A situation has been created whereby Tripartite member States could opt to trade under either regime when trading among themselves. This duplication is not only unnecessary but also costly in maintaining parallel institutional support systems. The vision in the 2012 Declaration of the African Union Assembly for consolidation of the African market has not been realized. The coexistence of parallel regional FTAs with AfCFTA not only challenges the integrity of AfCFTA but also undermines the attractiveness of Africa as an investment destination. It further complicates the negotiation of trade deals with third parties, such as the European Union, that maintains AfCFTA consistency. A peculiarity in both the TFTA and AfCFTA agreements requires TFTA and AfCFTA member States to accord to each other, on a reciprocal basis, preferences that are

no less favourable than those given to third parties under their respective MFN provisions. This risks giving third parties the same preferential access that trade liberalization among African countries provides for the African market.

What is now needed is a roadmap for the phasing out of the regional FTAs, consolidation of AfCFTA, and an MFN provision that safeguards the African economic space. Such a roadmap should further clarify the relationship between AfCFTA and customs unions at the REC level as well as the pathway for AfCFTA itself to evolve into a continental customs union.