The ‘Fourth Way’? WTO Dual Notification of the AfCFTA Protocol on Trade in Goods

By:

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What is the issue?

This piece intends to contribute to the current debate addressing the relationship of the AfCFTA to the multilateral trading system, notably WTO rules governing the formation of Regional Trade Agreements (RTAs). So far, the options that have been addressed are: (1) the AfCFTA should be considered a full-fledged GATT Article XXIV; (2) the AfCFTA should be considered as an interim agreement; and (3) the AfCFTA should be considered under the Enabling Clause.

I have argued on this blog that, if not a full-fledged RTA, the AfCFTA should at least be considered as an ‘interim agreement’. While this route comes with some hurdles, it would signal the intention to break away from the practice of concluding substandard RTAs under the Enabling Clause.[1] That perspective is

explored at length elsewhere.[2] Daniel Achach, on his part, is of the view that ‘Full Agreement pathway to notification should be considered’ in view of the AfCFTA’s ambition.[3] While I do not intend to repeat these positions, what these approaches have in common is that they somehow discourage the use of the Enabling Clause as legal coverage for the AfCFTA when it comes to WTO notification. In this piece, I explore a fourth option: that of notification of the Protocol on Trade in Goods of the AfCFTA Agreement under several WTO provisions relating to the formation of RTAs.

In effect, Paragraph 4 of the 2006 General Council Decision on the Transparency Mechanism for Regional Trade Agreements stipulates that ‘[i]n notifying their RTA, the parties shall specify under which provision(s) of the WTO agreements it is notified’. The use of the plural on ‘provision(s)’ here may suggest that it is possible to notify an RTA under several WTO provisions. In other words, one could contemplate a situation where the AfCFTA is notified simultaneously under GATT Article XXIV and the Enabling Clause.

How is that possible? Law and/vs practice?

While this may sound as his a purely academic scenario, it has actually happened in practice several times. It all began with the formation of the MERCOSUR, notified to the GATT in 1992 under the Enabling Clause.[4] When the WTO was created in 1994 and a GATT ad hoc Working Party had not completed its examination, the WTO Committee on Trade and Development (CTD), which is in charge of examining RTAs notified under the Enabling Clause, felt the need to amend its terms of reference in light of the new WTO disciplines and the new institutional realities. Accordingly, instead of limiting itself to the examination of the Agreement under the provisions of the Enabling Clause, the CTD adapted its terms of reference as follows:

> To examine the Southern Common Market Agreement (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the GATT 1994, including Article XXIV, and to transmit a report and recommendations to the Committee on Trade and Development for submission to the General Council, with a copy of the report transmitted as well to the Council for Trade in Goods. The examination in the Working Party will be based on a complete

notification and on written questions and answers.[5]

The Committee on Regional Trade Agreements (CRTA) was established in 1996 to examine RTAs notified under GATT Article XXIV and GATS Article V. In light of its functions, which included completing 'the outstanding work of the working parties already established under the provisions of GATT 1947,'[6] the CRTA later took over the review of the MERCOSUR. MERCOSUR was thus considered before the CTD and the CRTA. Since then, many RTAs have also followed this path. For instance, in 2007 the Gulf Cooperation Council (GCC) Customs Union was notified to both the CTD (as an Enabling Clause RTA)[7] and the CRTA (as a customs union liberalizing trade in goods under GATT Article XXIV).[8] The notification under the Enabling Clause was in fact a change to the notification status of the GCC initially made under Article XXIV. The Comprehensive Economic Partnership Agreement (CEPA), an FTA, between South Korea and India was also notified under both provisions in its goods component.[9]

In 2010, the General Council adopted a decision on the Transparency Mechanism of Preferential Trade Arrangements (i.e. non-reciprocal trade arrangements), which repeated almost verbatim the provision of Paragraph 4 of the 2006 Transparency Mechanism for RTAs. While that text did little to clarify this matter, it have may instead legitimized the possibility of dual notification. The relevant part states that '[n]otifying Members shall specify under which *provision or provisions* in paragraph 1 their PTAs are notified.[10] Clearly, this later 'treaty' clarifies that the word 'provision(s)' in the 2006 RTA Transparency Mechanism should also be read to mean 'provision or provisions'.

The legality of dual notification has been on the agenda of the CTD for more than 10 years now and is still unresolved. In 2010, China, Egypt, and India in a joint communication pointed to the systemic concerns relating to the legal and procedural implications of the dual notification of RTAs under both the Enabling Clause and GATT Article XXIV.[11] In 2019, the United States considered that this issue 'had long ago fulfilled its purpose of informing Members of the notification made, and therefore needed to be removed from the agenda', while developing countries, chief among which India and China, continue to believe that this matter should be maintained on the agenda.[12]

Conclusion

Although the use of the plural on ‘provisions’, in the Transparency Mechanism could also be interpreted as meaning notification under GATT Article XXIV (for RTAs in goods) and GATS Article V (for RTAs in services) only, it remains an open question. Consequently, notification of the Protocol on Trade in Goods of the AfCFTA under both routes (GATT Article XXIV and Enabling Clause) would come as no surprise despite the dubious legality of such a practice.

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[1] Regis Simo, ‘African Continental Economic Integration and the Multilateral Trading System: Questioning the Reliance on Differential Treatment’, *AfronomicsLaw* (10 June 2020), available at: https://www.afronomicslaw.org/2020/06/10/african-continental-economic-integration-and-the-multilateral-trading-system-questioning-the-reliance-on-differential-treatment/

[2] Regis Y Simo, ‘The African Continental Free Trade Area in a Stagnating Multilateral Trading System: On the Likely (Ir) Relevance of the Enabling Clause, 29 *Italian Yearbook of International Law* (forthcoming, 2020), draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3501539

[3] See Daniel O. Achach, ‘Full Agreement or Interim Agreement? In Search of a Pathway for WTO Notification for the AfCFTA’, AfrononomicLaw (13 July 2020), available at: https://www.afronomicslaw.org/2020/07/13/full-agreement-or-interim-agreement-in-search-of-a-pathway-for-wto-notification-for-the-afcfta/

[4] See GATT Docs L/7044 (9 July 1992) and L/6985 (5 March 1992).

[5] See World Trade Organization, Committee on Trade and Development (Third (Special) Session) – Note on the Meeting of 14 September 1995, WTO Doc. WT/COMTD/M/3, 23 October 1995, para. 3.

[6] See WTO Doc. WT/L/127, footnote 2.

[7] See Committee on Trade and Development, Notification of Regional Trade Agreement, WTO Doc WT/COMTD/N/25, 31 August 2008.

[8] See Committee on Regional Trade Agreements, *Gulf Cooperation Council Customs Union – Notification from Saudi Arabia*, WTO Doc. WT/REG222/N/1, 20 November 2006. See also WTO Doc. WT/REG276/N/1 (8 October 2009) and WTO

Doc. WT/REG276/N/1/Rev.1 (17 November 2009).

[9] See Committee on Regional Trade Agreements, WTO Doc. WT/REG286/N/1, 1 July 2010; and Committee on Trade and Development, WTO Doc. WT/COMTD/N/36, 29 September 2010.

[10] World Trade Organization, *Transparency Mechanism for Preferential Trade Arrangements General Council –Decision of 14 December 2010*, WTO Doc. WT/L/806, 16 December 2010, para. 4 (emphasis added).

[11] See Committee on Trade and Development, *Systemic and Specific Issues Arising Out of the Dual Notification of the Gulf Cooperation Council Customs Union – Communication from China, Egypt and India*, WTO Doc. WT/COMTD/W/175, 30 September 2010.

[12] See Committee on Trade and Development (110th Session), Note on the Meeting of 22 November 2019, WTO Doc. WT/COMTD/M/110, 2 April 2020, paras 68-71.

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