Existing in the Eternal Twilight Zone of WTO Consistency: The case of the African Continental Free Trade Agreement

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Africa is currently at a risk of reaching the zenith of bilateralism/regionalism in terms of the number of regional trade agreements (RTAs) present in the continent. Yet the advantages of close economic integration have not yet been adequately witnessed in African Regional Trade Agreements (RTAs). Moreover, it is generally the case that each African state is a member to at least two or more RTAs. This has created the quintessential spaghetti bowl on the continent. This has resulted in an entanglement and enmeshing of countries in multiple and cross-cutting RTAs that cover a myriad of substantive areas including what has now been termed as the 'new issues' of investment and competition policy, procurement, and even extending to labour, environment, and human rights. Since RTAs are legally acceptable or 'qualified' under the multilateral system under Article XXIV of GATT 1994, Article V of GATS, and the GATT Council

Decision titled: "Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries" (Enabling Clause) it important to assess the WTO consistency or compatibility of these African RTAs. This is because if the said RTAs have a trade creating advantage from the vantage view of the WTO, then the WTO consistency of these RTAs would signify their desirability as part of the building blocks of the multilateral trading system. Otherwise these RTAs will constitute undesirable stumbling blocks for the liberalization of trade. The African Continental Free Trade Agreement (AfCFTA) is the newest entrant in the process of creating a risk of the apotheosis of regionalism described above.

It is therefore important that questions of WTO consistency/compatibility are tackled at this early stage. The legal requirements and qualifications of WTO consistent RTAs can be made either under Article XXIV of GATT 1994, Article V of GATS, or under the Enabling Clause. The Most Favoured Nation treatment (MFN) clause is widely accepted as the cornerstone stone of the multilateral trading system. The two instruments noted above, Article XXIV and the Enabling Clause, are the most notable exceptions to the MFN clause in the multilateral trade system. Under the Enabling Clause, States can exchange both a system of vertical and horizontal preferences. Developed countries can provide generalized non-reciprocal preferences to all developing countries or to all least developed countries LDCs. This is termed as the vertical system of preferences. Additionally, developing countries can also freely and without constraints provide each other with preferential market access. This forms the horizontal system of preferences. Since the AfCFTA aims at amalgamating both currently existing Free Trade Areas (FTAs) and Custom Unions (CUs), the issue of whether the resultant FTA will meet the strictures of requirements under either the Enabling Clause of Article XXIV is important. Additionally, another controversial issue as regards WTO compatibility of RTAs has been on the question of notification of the RTAs to the two committees empowered to receive such notifications: The Committee of Regional Trade Agreements (CRTA) is charged with implementing the Transparency Mechanism for RTAs under Article XXIV of GATT and Article V of GATS. For its part, the Committee on Trade and Development (CTD) for all arrangements under the Enabling Clause. As the AfCFTA will bring together RTAs already in existence including the recently concluded Tripartite Free Trade Agreement (TFTA), it is important to

survey the terrain on the notifications of the current preferential arrangements on the continent as a prelude to figuring out what this portends for the AfCFTA. The table below is an appropriate summary:

RTA	Notification Status	Type of RTA	Notified Under	Date of Notification	Date of Entry into force
Africa Continental Free Trade Area	Not notified				
African Maghreb Union	Not notified				
Common Market for Eastern and Southern Africa (COMESA)	Notified	Customs Union	Enabling Clause	04-May-1995	08-Dec-1994
East African Community (EAC)	Notified	Customs Union & Economic Integration Agreement	Enabling Clause GATS Art. V	09-Oct-2000 01-Aug-2012	07-Jul-2000 01-Jul-2010
Economic Community of West African States (ECOWAS)	Notified	Customs Union	Enabling Clause	06-Jul-2005	24-Jul-1993
Economic and Monetary Community of Central Africa (CEMAC)	Notified	Customs Union	Enabling Clause	21-Jul-1999	24-Jun-1999

Intergovernmental Authority on Development (IGAD)	Not notified				
Southern African Customs Union (SACU)	Notified	Customs Union	GATT Art. XXIV	25-Jun-2007	15-Jul-2004
Southern African Development Community (SADC)	Notified	Free Trade Agreement	GATT Art. XXIV	02-Aug-2004	01-Sep-2000
Tripartite Free Trade Area	Not notified				
West African Economic and Monetary Union (WAEMU)	Notified	Customs Union	Enabling Clause	27-Oct-1999	01-Jan-2000

Source: http://rtais.wto.org/ui/PublicAllRTAList.aspx The provisions of Article XXIV apply if the members of the PTA are developed countries or a combination of developed and developing countries and the Enabling Clause's horizontal provision (Para 2c) applies in case the members of the arrangements are developing countries. There are several legal requirements that a WTO consistent RTAs should met in order to 'qualified' RTAs in the multilateral system. It is vital to note that the requirements under Enabling Clause on the rubric of tariff elimination are generally less stringent than those in Article XXIV. This is because Article XXIV (Article XXIV:8(b)) requires the "…elimination of duties and other restrictive regulations of commerce" on substantially all the trade, while the Enabling Clause merely requires "…the mutual reduction [or elimination] of tariffs." Since most of the countries in Africa are either developing or least developing, the AfCTA would most probably be qualified under the Enabling Clause and should be notified under the provisions of the Enabling Clause.

The AfCFTA will, however, face the challenge of its breadth as alluded to at the beginning of this piece. While it is referred to as an FTA, these arrangement is much wider: "akin to a comprehensive partnership agreement because the disciplines will go beyond trade in goods to over services, investment, competition and intellectual property." The challenge of notification and 'qualification' is an issue that all members of the AfCFTA that are members of the WTO will soon have to contend. Accordingly, it might be impossible to qualify the AfCFTA using the Enabling Clause and the stringent requirements of Article XXIV. In conclusion and based on the assessment above, AfCFTA should be notified under the provisions of Article XXIV of GATT and Article V of GATS. Two specific reasons explain this conclusion. Firstly, the South African arrangements shown above are notified under the provisions of Article XXIV. This choice of notification provision is not surprising since South Africa as a state has self-identified as a developed state in the WTO since its GATT (pre-1995) days. Secondly, the breadth of substantive coverage of the AfCFTA would reasonably require that Article XXIV of GATT and Article V of GATS be applied as the appropriate provisions for qualification and notification. Despite the onerous qualification requirements required under Article XXIV of GATT, it would be advisable and indeed desirable that the AfCFTA is qualified and notified under the provisions of Article XXIV of GATT and Article V of GATT. This is not to shun the provisions of the Enabling Clause but because of the projected trade creation effects of the AfCFTA, which is a desirable outcome under the multilateral system of trade.

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