African Continental Economic Integration and the Multilateral Trading System: Questioning the Reliance on Differential Treatment

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Regional integration is a multidimensional process and includes trade, financial, monetary, economic and political integration. Since Balassa's 1961 *Theory of Economic Integration*, the literature has continued to rely widely on the "stages" enunciated by the author, a trend that continues even today. These stages in a way conditioned the formation of post-colonial African Regional Trade Agreements (RTAs) and the perception that they have failed to achieve what they were established for. Indeed, the prevailing narrative has been to compare any other RTA in the world, including African ones, to their more successful peers in Europe and North America, mainly based on Balassa's stages.

According to that view, the demise of African RTAs lies principally in their adherence to a stepwise model of integration starting from the free trade area (FTA) to the expected economic and monetary union. In doing so, African countries have sometimes relied on flexibilities provided by the 1979 Enabling Clause of the World Trade Organization (WTO) whose rules are more lenient than those of Article XXIV of the General Agreement on Tariffs and Trade (GATT).

The recent conclusion and entry into force of the Agreement establishing the African Continental Free Trade Area (AfCFTA) breaks with past paradigms and tackles the liberalisation of goods, services and other factors concurrently. Upon entry into force, State Parties that are also Members of the WTO are required to notify the trade agreement to the other WTO Members (per Article 26 of the AfCFTA Treaty). Yet, while AfCFTA Services Protocol clearly states its intention to conclude an agreement compatible with Article V of the WTO General Agreement on Trade in Services (GATS) (per Art. 3.2(g) Services Protocol), no such mention is made for Protocol on Trade in Goods. Thus, the question of the choice of the regime under which the AfCFTA goods RTA would find itself under the WTO legal system remains an open one. This piece therefore reflects on the (un)desirability to rely on the enabling clause when it comes to the WTO multilateral surveillance of the scheme.

WTO Rules and African RTAs

RTAs, sometimes regarded as “termites” in the trading system because they undermine the central feature of post-war trade arrangements based on non-discrimination, are a permanent feature of global trade landscape. Recently driven by the stalemate in the Doha Round, the current trend is the increasing surge of preferential solutions either to secure existing concessions, or to establish new ones. Although in practice the establishment of existing RTAs has not been conditioned on the satisfaction of multilateral rules on the issue, what follows is an examination of the regime under which the AfCFTA should be scrutinised under WTO rules.

The principal provision on RTAs in the WTO regime is Article XXIV of the GATT 1994. That provision requires FTAs and CUs to eliminate “duties and other

restrictive regulations of commerce" on "substantially all the trade" between the participants. These are however not binding requirements for RTAs formed under the Enabling Clause. In effect, the Enabling Clause is the legal basis for RTAs between developing countries. Its Paragraph 2(c) allows developing countries to legally deviate from the MFN clause and provide tariff preferences among themselves without extending the same conditions to other WTO Members. And as far as this piece is concerned, they can do so without having to satisfy the stringent requirements of GATT Article XXIV, notably the elimination of *other restrictive regulations of commerce* on *substantially all the trade* between the parties.

In other words, these RTAs would normally be illegal from a GATT Article XXIV standpoint but are merely tolerated because of the developing-country status of its members. The test of compatibility of a GATT Article XXIV RTA is therefore rendered more stringent than one that applies to RTAs concluded under the Enabling Clause, which does not even distinguish between a FTA and a CU. While this may reasonably appear as an opportunity for developing countries, too much reliance on flexibility has been decried in literature. In effect, critics contend that the relaxation of Article XXIV requirements in the enabling clause has been counterproductive in regulating developing countries' RTAs and has directed them to conclude mediocre RTAs.

Empirically, pre-1979 African trade pacts were notified under Article XXIV GATT 1947. This was the case for instance of the African Common Market (1962) between Algeria, United Arab Republic (Egypt), Ghana, Guinea, Mali and Morocco; the Ghana – Upper Volta Trade Agreement (1962); or the Equatorial Customs Union – Cameroon Association (1959) between Cameroon, Central African Republic, Chad, Congo and Gabon. The only exception in that period was a cross-regional agreement between Egypt (an African country), India and Yugoslavia concluded in 1968 at a time when calls for special and differential treatment were also getting ground. This pre-1979 practice contrasts with the tendency recorded since the adoption of the Enabling Clause as the majority of African RTAs have relied on this course.

Should the 'Interim' be the Alternative Route?

If GATT Article XXIV is considered too strict considering the developing status of African states, and the Enabling Clause too lenient a test for an area such as the AfCFTA aspiring for deeper integration, how should the AfCFTA be notified?.While recognising the special character of African RTAs as "flexible" schemes, sometimes relying on variable geometry among its participants, it is the contention here that, if not a full-fledged Article XXIV upon its formation, the AfCFTA at worst should be notified as an "interim agreement" in that regard. While Article XXIV:8 defines CUs and FTAs as territories in which tariffs and ORRCs *are* effectively eliminated, Article XXIV:5 on its part regulates "an interim agreement necessary for the formation" of a CU or an FTA. As their name suggests, interim agreements are agreements that have not yet reached the stage of FTA or CU. However, choosing this route does not deprive incumbents from abiding to a set of requirements, notably those relating to the internal trade.

Indeed, Article XXIV:5(c) states that an interim agreement must include "a plan and schedule for the formation of such a [CU] or of such a [FTA] within a reasonable length of time", which should, in normal circumstances, not exceed 10 years. This would ideally oblige AfCFTA to accelerate the free movement of goods among themselves should the spectres of the lack of political will come looming again.

Consequently, an interim agreement should attain the status of a full RTA in at most 10 years, except in exceptional circumstances, and other WTO Members are able to make binding commitments to the RTA participants to make sure that they achieve that status. However, the requirement to table a roadmap towards the completion of a FTA or CU is not placed on notified full agreements, based, according to commenters, on the presumption that they already provide for liberalization on substantially all the trade between the parties. It follows that, while few RTAs actually meet the requirements of Article XXIV and are never challenged for falling short of expectations, selecting the 'interim agreement' route also comes at the risk of having to comply with a predetermined chart. This is without prejudice to the WTO practice, not always supported by law, of treating interim agreements as full RTAs for notification and review purposes.

Concluding remarks

The aim of this piece is to contribute to the evolving debate around the AfCFTA and its relationship with the WTO. It considers whether the practice of African RTAs to rely on the Enabling Clause since 1979 should be replicated. Considering the ambition of the AfCFTA for a deep integration, aiming at liberalising trade in goods, services, investment, intellectual property, competition, etc, the Enabling Clause appears as a second-best option. This view is also supported by claims that reliance on variable geometry has been counterproductive in regulating African RTAs. While the full-fledged RTA may also sound, at least theoretically, too ambitious for a scheme composed of developing country, this paper suggests contemplating the “interim agreement” alternative, which, nevertheless, comes with some strict rules regarding completion timeframe. Whereas adherence to such a schedule is generally not a requirements for full fledged RTAs and may in such a scenario sound like an “undue” burden on African countries, this would alleviate the predicaments of lack of political will that has marred regional integration projects on the continent.

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