Full Agreement or Interim Agreement? In Search of a Pathway for WTO Notification for the AfCFTA

By:

Daniel O. Achach

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Introduction

Focusing on the African Continental Free Trade Area (AfCFTA), this essay examines the legal requirements for notification of interim and fully fledged agreements under article XXIV of the GATT 1994.

Interim and Full Agreements Under GATT

Articles XXIV of the GATT 1994 and V of the GATS, WTO allows for exemptions from the principle of non-discrimination through the formation of Regional Trade Agreements (RTAs). Following the Transparency Mechanism, which was negotiated under the Doha Development Agenda, as read together with

paragraphs 4 to 10 of Article XXIV of GATT 1994, paragraph 2(c) of the Enabling and Article V of the GATS the WTO requires early notification of any RTA that comes into force.

Article XXIV: 5 of the GATT 1994 sets the legal basis for the formation of RTAs and is explicit that the requirements of non-discrimination under the GATT shall not prevent member states from the formation of a Customs Union (CU), Free Trade Area (FTA) or an Interim Agreement necessary for the formation of a CU or FTA. Article XXIV: 8 of the GATT 1994, on the other hand, defines an FTA as a trade arrangement where duties and other restrictive regulations of commerce are eliminated on 'substantially all the trade' between the constituent territories in products originating in such territories. A reading of these two paragraphs lends credence to a deduction that only agreements which have already been implemented are 'full' RTAs within the meaning of Article XXIV: 8. An agreement that does not yet meet this definition but merely includes an implementation period is an 'interim agreement' leading to an RTA.

Notably, the Chapeau of Article XXIV:5 refers to '*an interim agreement necessary for the formation of a Customs Union or of a Free-Trade Area*'. On the other hand, Article XXIV: 5(a) and (b), Article XXIV: 7(a) and paragraphs 1 and 12 of the Understanding on the Interpretation of Article XXIV of GATT 1994 (the Understanding) refer to 'an interim agreement leading to the formation of a *Regional Trade Agreement*.' This terminological difference has, however, in practice, not come to the fore.

The text of the GATT 1994 in attempting to differentiate an Interim from a Full Agreement by prescribing conditions precedent to the formation of either has often blurred the line and marred the distinction. For instance, as a condition precedent, Article XXIV:5(a) and (b) provides that duties and other restrictive regulations of commerce may not be higher on the adoption of an RTA or Interim Agreement leading to an FTA than before the adoption of such agreements. This condition places both Interim and Full Agreements on the same pedestal with no difference at all.

On the other hand, there seems to be a clear difference between Interim and Full Agreements in so far as the requirement for internal trade liberalization is

concerned. Article XXIV: 5(c) of the GATT 1994 provides to this end that an Interim Agreement must include 'a *plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time* '. Paragraph 3 of the Understanding delimits the length of time to 10 years unless a plausible explanation is proffered to the Council for Trade in Goods for an extension. As noted by Lorand Bartels, there is no such requirement for Full RTAs for the obvious reason that these are formally presumed already to provide for liberalization on 'substantially all the trade' between the parties.

WTO Oversight for Interim and Full Agreements

Article XXIV: 7(a) of GATT 1994 provides as follows regarding the issue of notification of RTAs:

Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

Paragraph 7 of the Understanding elaborates on this provision thus:

All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

In cases where members notify Full Agreements to the WTO, the foregoing provisions are unequivocal that the superintendence role of the WTO is significantly reduced to making appropriate recommendations with no corresponding obligation on the part of the contracting members to accept. As was stated in the Turkey Textiles Case, this does not preclude recourse to dispute settlement proceedings on the question of the overall legality of the

agreement.

Conversely, for Interim Agreements, the supervisory role of the WTO seems to be more pronounced and explicit. Article XXIV: 7(b) provides to this end that if WTO Members find that a notified interim agreement is not likely to result in the formation of a CU or an FTA within the period contemplated by the parties to the agreement or that such period is not a reasonable one, they may make recommendations to this effect. In this event, unlike for a Full Agreement, the parties to the Interim Agreement are under an obligation *'not to maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.'*

The Understanding concretizes these obligations by stating in paragraph 8 thereof that ' *the working party may in its report make appropriate recommendations on the proposed timeframe and on measures required to complete the formation of the customs union or free-trade area. It may if necessary, provide for further review of the agreement.*' Paragraph 10 of the Understanding, on the other hand, seems to add a new set of obligations. Firstly, it obliges the working party to recommend a plan and schedule if, contrary to Article XXIV: 5(c), the parties have not included one in an interim agreement. Secondly, it requires the parties not to '*maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations*'. There are no similar obligatory requirements in cases of Full Agreements.

The Mythical 'Substantially all Trade' Requirement for Full Agreements

The interpretation and application of the 'substantially all trade' requirement under Article XXIV: 8(b) of GATT 1994 has been the subject of numerous criticisms by academics and trade negotiators alike. This requirement seems to be one of the major considerations by member states to an RTA on how to make notifications to the WTO. Since the Enabling Clause has no similar 'substantially all trade' requirement, most RTAs among developing countries are notified under the Enabling Clause. In Africa, almost all post-WTO era RTAs are notified under the Enabling Clause as opposed to Full Agreements under Article XXIV. What does the 'substantially all trade' requirement entail in the

context of notification, and why would RTAs be afraid of it?

An analytical note by the South Centre posits that Article XXIV was negotiated when developing countries were colonies mostly of developed European countries. As such, it did not provide for the rise of RTAs between developed and developing countries. The implicit understanding was that partners in RTAs would be of similar levels of development. It identifies the most contentious parts of Article XXIV to be paragraphs 8a and b which state that the *'duties and other restrictive regulations of commerce...are eliminated with respect to substantially all the trade'*between the constituent territories. These paragraphs imply that such trade agreements are reciprocal between developed and developing countries, and that substantially all duties and other restrictive regulations are to be eliminated.

But what amounts to 'substantially all trade'? Conversely put, when can an RTA be considered WTO non-compliant based on the 'substantially all trade' requirement? The meaning of the 'substantially all the trade' requirement is notoriously contested. In *Turkey – Textiles*, the Appellate Body said that:

Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term 'substantially' in this provision. It is clear, though, that 'substantially all the trade' is not the same as all the trade, and also that 'substantially all the trade' is something considerably more than merely some of the trade.

Given the illustrated *lacuna*, different RTAs have adopted different definitions and approaches to the 'substantially all trade' requirement. For example, the EU defines substantially all trade to mean 95% of trade and not of tariff lines. The definitional problem more often presents itself in practice where an RTA is made up of developing and developed countries, often referred to as North-South RTAs. For instance, the industries and agricultural sector of many developing countries are not as advanced as those in developed countries. For most developing countries, therefore, it is likely that eliminating 'substantially all' duties and other barriers when entering into RTAs with developed countries will lead to the collapse of both their less competitive industries and their agricultural sector.

Another fear is that many developing countries still depend heavily on tariff revenues – sometimes even up to over 40 percent of government budgets. The elimination of duties when entering into RTAs with developed countries will drastically cut down on this important source of revenue. This could have serious ramifications on the ability of governments to provide health care, education, and essential services and infrastructure. Consequently, as a result of this challenge, many developing country RTAs avoid the Full Agreement route when it comes to notification in order to side-step the strict definition of the *'substantially all trade'* requirement. This could explain why most African RTAs are notified under the Enabling Clause as opposed to Article XXIV.

But why would 'substantially all trade' be a hindrance rather than a motivation for South-South RTAs? As noted in the South Centre Reports, many developing countries are interested in regional integration within their regions and sub-regions as an important pillar of their development strategy. Regionally based industries can have a better chance of producing for their regions rather than for the international market since competition will not be as stiff. Goods produced and traded within regions can use standards that are tailored to regional needs, realities and capacities.

Liberalization Ambitions of the AfCFTA

The Agreement Establishing the African Continental Free Trade Agreement (AfCFTA) entered into force on 30th May 2019 for the 24 countries that had deposited their instruments of ratification. According to Article 23 of the Agreement, entry into force occurs 30 days after the 22nd instrument of ratification is deposited with the Chairperson of the African Union Commission (AUC) – the designated depositary for this purpose – an essential step for the AfCFTA to enter into force. On 29 April 2019, Sierra Leone and the Saharawi Republic deposited their instruments of ratification with the depositary, paving the way for the AfCFTA's entry into force.

The liberalization ambitions of the AfCFTA can be deciphered from the legal text of the agreement. The Preamble lists several ambitious goals that the agreement is intended to achieve, including to realize the aspirations of Agenda 2063, promoting agricultural development, food security, industrialization and

structural economic transformation.

As eloquently elucidated by Vera Songwe, the scope of the AfCFTA exceeds that of a traditional FTA which generally focuses on trade in goods, to include trade in services, investment, intellectual property rights and competition policy, and possibly e-commerce. The AfCFTA is complemented by other continental initiatives, including the Protocol on Free Movement of Persons which encompasses, *inter alia*, Right to Residence and Right to Establishment, and the Single African Air Transport Market (SAATM). The scale of AfCFTA's potential impact, she concludes, makes it vital to understand the main drivers of the agreement and the best methods to harness its opportunities and overcome its risks and challenges.

According to the United Nations Economic Commission for Africa, the implementation of the agreement could increase intra-African trade by 52%, compared to 2010 levels, by 2022, thus reducing the gap with intraregional trade quotas currently characterizing Asia (51%), North America (54%) and Europe (67%). The report further provides that in the short term, the main beneficiaries of the AfCFTA would be small and medium-sized enterprises, , whereas in the medium to long term, the benefits will extend to all African citizens, who will achieve a welfare gain estimated at 16.1 billion dollars, especially favouring women and young people. The intra-African economic and commercial growth would mainly affect the industrial and manufacturing sectors, thus demonstrating AfCFTA's potential role in guiding the structural transformation of African countries.

Should the AfCFTA be Notified to WTO as an Interim or Full Agreement?

As already discussed, the test of an RTA's compatibility with GATT Article XXIV is rendered more stringent than one that applies to RTAs concluded under the Enabling Clause. As demonstrated above, one of those requirements that makes Article XXIV more stringent is the dreaded 'substantially all trade' requirement. Dr. Regis Simo in his paper '*African Continental Economic Integration and the Multilateral Trading System: Questioning the Reliance on Differential Treatment*' articulately observes of the Enabling Clause notification that '*while this may reasonably appear as an opportunity for developing*

countries, too much reliance on flexibility has been decried in literature....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'. In his concluding remarks, Dr. Regis opines that notification of AfCFTA as a full-fledged agreement would be too ambitious, and argues a case for notification as an interim agreement. He however acknowledges the limitations of an interim agreement notification, including WTO superintendence concern as discussed above.

As already noted, the ambitions of the AfCFTA as depicted in the legal text of the agreement far exceed the traditional RTA models. The political goodwill and commitment have already been demonstrated in the signing of the agreement and ratification process. This essay suggests that against this backdrop and the admitted limitations of an 'Interim Agreement', a notification of the AfCFTA as an interim agreement exposes the ambitions of the African states to the superintendence of the WTO regarding completion timeframes and deflates the process of the inbuilt political goodwill and impetus.

To fully harness the political goodwill exhibited during the ratification process, the AfCFTA must rid itself of the strictures of overreliance on Special and Differential Treatment provisions that has characterized Africa's integration journey, to avoid the AfCFTA falling into what Dr. Simo describes as the '*mediocre RTAs*' box. Just as they have set the bar higher in negotiating an RTA outside the traditional strictures, so must the African states set the bar higher by embracing a notification method that fully accommodates their ambitions in equivalence. From the text of GATT 1994 to the Understanding thereto, there is no legal hurdle stopping the AfCFTA from being notified as a Full Agreement.

Moreover, the Preamble to the AfCFTA is explicit in acknowledging the Regional Economic Communities (RECs) and Free Trade Areas as building blocs towards the establishment of the AfCFTA. Accordingly, the intention must be understood to be to 'build' from the achievements of the constituent RTAs while avoiding the mistakes made by them, including the mistake of conservative notification hence '*mediocre RTAs'.*

Considering the ambition of the AfCFTA for deep integration, aiming at

liberalizing trade in goods, services, investment, intellectual property, competition and e-commerce, and to guarantee that compliance schedules are absolute results of negotiated arrangements among African countries as opposed to the superintendence and policing of the WTO, this essay suggests that a Full Agreement pathway to notification should be considered.

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