Ambiguities in the AfCFTA Text: Red Herrings or Problems with Bearing on the Implementation of the AfCFTA

By:

Luladay Berhanu Mengistie

December 15, 2021

Introduction

The African Continental Free Trade Area (AfCFTA) agreement is the culmination of efforts towards economic and political integration. The agreement aims to create a single market for goods and services, facilitated by the movement of persons, a mission that has been the hallmark of the Pan-African Vision enshrined in Agenda 2063. Initially scheduled to launch in July 2020, trading under the auspices of the AfCFTA had to be postponed due to the global pandemic, COVID-19. Despite the gloom and doom foreseen for the already ambitious undertaking, member States re-grouped and continued to negotiate the complex conditions for free trade virtually, whilst battling the multifaceted challenges the pandemic posed within their respective borders.

Following intense virtual negotiations in the run up to the Extra-Ordinary Summit, the Assembly endorsed a Declaration on the Start of Trading under the AfCFTA on the 5th of December 2020. Accordingly, State Parties resolved to open their respective borders to free trade on the 1 January 2021. To date, 54 African States have signed the AfCFTA, 41 of which have submitted their instruments of ratification. As per the update provided during the 8th meeting of the Committee of Senior Trade Officials of the African Continental Free Trade Area between 23-24 June, 2021, in Accra, Ghana, the AUC has so far received offers from 41 States on Trade in Goods and 33 States for Trade in Services.

Despite the commendable progress made by member States in readying the ground for the start of trading, there are nonetheless some important outstanding issues, which have been deliberated and yet remain unresolved, and some, which remain ambiguous thus likely to stand in the way of the launch of a commercially meaningful trade. This piece aims to bring the later to the forefront with hopes of addressing the same to ensure successful launch of trade.

Before highlighting the ambiguities that remain to be dealt with, it's important note the following. First, only 86% of the tariff lines have agreed rules of origin. Trading will thus be limited to these tariff lines. Second, not all of the States that have submitted their offers have ratified the instrument. And although the AUC has approved all offers submitted thus far, only schedules of tariff concessions submitted by countries that have ratified the instrument and hence can be considered State parties will be appended to the AfCFTA, with members allowed to engage in trade. The same principle holds true in the case of CUs. Only offers from CUs whose members have ratified the instrument or whose rules allow for individual implementations will be allowed to trade in accordance with the AfCFTA. This reality challenges whether the value/volume of trade following the commencement of trading would be commercially meaningful.

Third, though member States have been deliberating on customs procedures and documentation requirements, with short-term fixes designed to address immediate hurdles, like the Continental Guidelines on Trade and Transport Facilitation for the movement of persons, goods and services across Africa during the COVID-19 pandemic (its worth nothing that continental guidelines

have been designed to support cross-REC harmonization of COVID-19 guidelines; advance coordination and implementation of common guidelines; and lock in trade facilitation gains to gear up for start of trading under the African Continental Free Trade Area (AfCFTA)), the whole body of rules governing customs and documentation procedures, especially at the national level remains outstanding.

Finally, although notable progress has been made on services negotiation, member States are yet to undertake inter alia bilateral negotiations with respect to the conditions for service liberalization. Recognizing the difficulties of meeting the June deadline set by the Assembly, the 8th meeting of the Senior Trade Officials recommended that an extension of six months be given for the finalization of the negotiations on the 5 priority sectors.

Ambiguities that remain to be addressed under Phase I of the negotiations

I. Bilateral negotiations on specific tariff concessions and their implication on the administration of trade

The Protocol on Trade in Goods defines schedules of tariff concessions as *"a list of negotiated specific tariff concessions and commitments by each State Party. It sets out, transparently, the terms, conditions and qualifications under which goods may be imported under the AfCFTA."* Bilateral negotiations on specific tariff concessions, which define the conditions under which goods are to be traded under the AfCFTA, have been undertaken between State Parties which have submitted their offers. These negotiations are being undertaken behind closed doors and thus its not clear how far along the negotiations have come or whether or not they have bore fruit. It is also not clear whether these negotiations will lead to a patchwork of offers and acceptances, which will make administration of trade more cumbersome.

Another uncertainty that is likely to have implications on the administration of trade is the condition of the reciprocity attached to the Most Favored Nation Treatment (MFN) principle under the AfCFTA. Although the requirement to reciprocate addresses inter alia the risk of free riding and thus ensures commercially meaningful trade, it also raises a host of other risks that can

jeopardize the continental integration objectives under the AfCFTA. First, the reciprocity caveat on the MFN principle will likely have an implication on the pace and degree of continental integration. This is especially true for the 7% of the tariff lines that States are allowed to bracket as sensitive products to be liberalized over a longer period of time (10 years for non LDCs and 13 years for LDCs) and the 3% that can be excluded from liberalization if bracketed as sensitive per the modalities for tariff liberalization agreed to under the AfCFTA. This risk will however likely be minimal vis-à-vis 90% of the tariff lines that are required to be liberalized in full by all State Parties per the agreed modalities.

Second, its not clear whether MFN on the basis of reciprocity gives leeway for States to forgo further negotiations on the tariff lines outside of the 90% (the remaining 10%) in the instance where the terms on the table are not reciprocated by other State Parties. The implications of this are complex and needs further deliberation since nothing in the agreement gives guidance.

Finally, States should also be weary of the risks of better terms that cannot be reciprocated by African States being offered to third party States. Along with this, the risk of third party States dictating the pace and degree of integration. This concern has already begun to sidle into the forefront with the recent agreements like the EU-OACPS Partnership Agreement risking the prioritization of the AfCFTA implementation.

Finally, negotiators should also take into account the complications that are bound to arise with a web of offers and acceptances governing trade relations between State Parties if States begin exercising their right to tailor offers to other State parties during their bilateral negotiations. This right is recognized under the template for goods tariff concessions adopted at the 7th African Union Ministers of Trade.

II. Governing the interface between Regional Economic Communities (RECs) and the AfCFTA

The patchwork of schedules of offers and acceptances governing trade between State parties to the AfCFTA are only likely to be more complex when RECs are factored into the equation. Not only do RECs have multiple and overlapping memberships, but each vary considerably in their degree of integration and have members at different stages of the economic development ladder. This is

bound to create both complications and administrative burdens.

First, though the AfCFTA recognizes RECs with the assumption that these arrangements would contribute to deepening continental integration by inter alia maintaining AfCFTA-Plus commitments (Article 19 (2) of the AfCFTA Framework Agreement), it still does not have a mechanisms of ensuring that AfCFTA Plus commitments are indeed maintained or that only RECs that do maintain these conditions are recognized. This is because the preliminary requirement for the recognition of RECs under the AfCFTA is recognition of the REC by the AU. This in turn means that even RECs which provide for less stringent trading rules in one or multiple aspects (for instance, although tariff preferences are deeper in ECOWAS, some rules of origin are more restrictive) or in some instance those which do not have trade competencies all together (for instance IGAD) get recognition under the AfCFTA. This in and of itself might not pose a problem, however, when overlapping memberships and contradicting approaches to liberalization of trade is factored, it can lead to complications. This is especially concerning given the ambiguity on whether States parties to the AfCFTA are making offers to all AU member States, or only to parties with which these States do not have prior arrangement.

Another ambiguity has to do with how the special and differential treatment provided on the basis of State parties' economic status under the AfCFTA would be administered for REC members, especially in the context of Customs Unions, which are technically not recognized under the AfCFTA.

Customs Unions are formed when member States of the union replace their individual customs territories by one common customs territory, with the purpose of applying the same duties and other regulations of commerce, and eliminating amongst themselves substantially all duties and restrictive regulations of commerce. In forming a CU, members not only agree to a single tariff, but also entrust the CU with the key to control access to the single market. A Customs Union is therefore more than a sum of its part, it is an independent entity entrusted with the responsibility of advancing a common agenda. One important mechanism used to advance this common agenda is the negotiation of trade deals with third parties. This enables the CU to not only control access to the single market, but also determine quality standards of products traded. The AfCFTA, at least in theory limits CUs from undertaking

these inherent exercises by falling to recognize CUs as members. This not only undercuts the very purpose for which RECs are recognized, i.e the promotion of deeper integration but also opens up the room for Member States go it alone, undermining the commitments agreed to in forming CUs.

Interestingly, CUs are in practice taking part in negotiations, and are submitting offers as customs territories under the AfCFTA. Out of the total goods tariff offers made thus far, 4 come from RECs, while 2 of the offers submitted on Trade in Services comes from RECs. The Declaration on the Start of Trading sets two preconditions for the application of this offers to trade come January, i.e that all member ratify the AfCFTA and in the instance where not all member States have met this prerequisite, that the rules of the CU allows for individual implementation of the schedule of tariff concessions (see, Annex II to the Declaration on the Start of Trading). Although this understanding contributes to ensuring the participation of sizable markets in free trade under the AfCFTA, it also opens up the door for States to go it alone when un-persuaded by the "common" position taken (It is important to recognize that the AfCFTA negotiations are not the only instances where a State has opted to abandon the pack in making trade deals. In the case of the South African Development Community (SADC), an entity called the SADC EPA group and not the SADC signed EPA with the EU. The SADC EPA group contains only six of the 16 SADC member states. In Community of West African States (ECOWAS), which has supposedly achieved a customs union, Côte d'Ivoire and Ghana concluded their own separate EPAs with the EU, thereby undermining ECOWAS's, and indirectly the continents, integration programme). This in turn goes against the reason d'etre for the recognition of RECs under the AfCFTA, and leaves as ambiguous questions like the one posed above on the right to claim special and differential treatment. At this juncture, it is also important to note that the question of non-State party right to participation is still under deliberation.

Conclusion

The ambiguities highlighted above are yet to be flagged and discussed. These issues will likely have implications on the successful roll out of commercially meaningful trade and will also likely carry over to Phase II negotiations. It's therefore important to take stock whilst negotiations are still underway and before official trading commences. As the foundation for the negotiation of Phase II issues is also being laid, it's worth making note of some important

considerations so as to avoid backtracking down the line. Its therefore prudent to address questions having to do with the sequencing of the two Phases of the protocol and whether this sequencing was opted for practical reasons or if the ratification of the first set of the protocols is a precondition for the ratification of the second. The answer to this question will inter alia have implications on which States can participate in phase II negotiations and whether or not leapfrogging of protocols is a possibility for member States. Moreover, in light of the great appetite to realize the objectives of the AfCFTA and fast track trading under this instrument, it might be worth considering what incentives (price of entry) can be set to encourage early adopters.

View online: Ambiguities in the AfCFTA Text: Red Herrings or Problems with Bearing on the Implementation of the AfCFTA

Provided by Afronomicslaw