

## How will the AfCFTA contribute to better trade governance?

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The African Continental Free Trade Area (AfCFTA) has the potential to bring about major changes (and benefits) to how trade in goods and services will be conducted on the continent. Africa's global trade will also benefit from better customs administration, eliminating Non-tariff Barriers (NTBs), and generally complying with the rules about transparency and the notification of measures impacting trade in goods and services, and investments.

For the expected benefits to materialise, there must first be legal certainty. The AfCFTA negotiations must be finalised, and domestic arrangements put in place by all the State Parties. This is not an easy task. African economic integration faces unique challenges and difficult choices, as demonstrated by how long it takes to adopt the legal instruments of the AfCFTA. The negotiations on tariff reductions and rules of origin are still not done but hopefully trade in goods under AfCFTA preferences will start in the course of 2024.

The adoption of harmonised regulatory regimes for trade in services will take longer. This is an important matter. The harmonised and better regulation of services will also affect trade in goods governance. Harmonised rules on transport services and customs procedures are obvious examples. The digitalisation of customs procedures counts among the additional requirements which will be vital for better trade governance. The AfCFTA is not an event. Its success will depend on how it will be implemented and what specific steps will be taken to improve trade governance.

There are important matters still to be finalised. For AfCFTA trade in goods, 90% of tariff lines must be liberalised over a period of 10 years. Three percent of tariff lines may be excluded and 7% of tariff lines may be liberalised over 10 and 13 years for non-least developed countries (LDCs) and LDCs, respectively. During these negotiations (conducted in terms of earlier agreed modalities), the participating countries had to decide what tariff lines to exclude, how to design the AfCFTA rules of origin, and what to do about existing preferential trade regimes. Since each State (or Customs Union) decides its own list of exclusions, the rules of origin cannot be finalised before all configurations and implications are known.

The decision by some of these States (including the Non-state Parties<sup>1</sup>) to protect certain national industries (such as textiles) has resulted in the exclusion by some Governments of sectors that would be obvious candidates for continental value chain development.

The fact that REC FTAs and existing preferential trade arrangements will continue to function and may even expand, makes matters more complex. Private firms will have to study all REC and AfCFTA legal instruments binding upon the State Parties in question to determine what has been agreed, how obligations are qualified, and what new commercial opportunities and different remedies are available to them.

Africa's continental integration will be pursued through a member-driven Free Trade Area (FTA). The State Parties must implement the AfCFTA legal instruments and expand its scope. These are sovereign states and decisions are taken by consensus<sup>2</sup>. The consensus rule may result in outcomes where decisions are based on the lowest common denominator. It is only when consensus is reached that binding agreements are adopted.

Consensus also determines how the AfCFTA institutions will function. The Council of Ministers must "ensure effective implementation and enforcement of the Agreement".<sup>3</sup> The State Parties will have to agree on how the AfCFTA will evolve; they shall "take such measures as are necessary to implement the decisions of the Council of Ministers"<sup>4</sup>. But the very same State Parties will have to agree on Council decisions which they must implement.

There are provisions on transparency and notifications in the AfCFTA Agreement.<sup>5</sup> Hopefully they will be respected, and compliance will be monitored by the Secretariat and by individual State Parties.

African Governments do not establish supra-national institutions when it comes to economic integration and trade liberalisation. Neither do they give up their right to regulate. As stated in Article 8 of the AfCFTA Protocol on Trade in Services:

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<sup>1</sup> AU Member states that have not yet ratified the AfCFTA Agreement have been allowed to participate in all ongoing AfCFTA negotiations.

<sup>2</sup> Art 14 AfCFTA Agreement.

<sup>3</sup> Art 11 (3)(b) AfCFTA Agreement.

<sup>4</sup> Art 11 (6).

<sup>5</sup> Arts 16 and 17 AfCFTA Agreement.

Each State Party may regulate and introduce new regulations on services and services suppliers within its territory in order to meet national policy objectives, in so far as such regulations do not impair any rights and obligations arising under this Protocol.

In a rules-based system, questions about violations of obligations and impairment of rights are, as a rule, decided by an independent judicial forum. This will, in the case of the AfCFTA, require that a formal dispute is lodged under the AfCFTA Dispute Settlement Protocol. But African governments never litigate against each other to resolve disputes about the interpretation or application of trade agreements. The question as to whether “an impairment” of any right or obligation has occurred, may never arise in the form of a formally declared inter-State AfCFTA dispute.

Transgressions are dealt with on an ad hoc basis or through consultations, often undertaken by reference to procedures provided for in the applicable legal instruments. But the aim seems to be to accommodate the needs of the States in question. By way of an example: There is a long-standing disagreement about trade in sugar in COMESA, specifically with respect to the import of sugar by Kenya.<sup>6</sup> The COMESA Council of Ministers recently granted Kenya another two-year extension of a sugar “safeguard”. Kenyan officials had made a presentation through the COMESA technical committees and requested a further extension after the current safeguard had lapsed.<sup>7</sup>

It is difficult to view African economic integration as a truly rules-based enterprise. One of the consequences is that private firms cannot invoke the protection of their governments of nationality when foreign governments violate trade agreements and private interests are affected, or just expectations denied. Flexibility and securing policy space determine how regional integration agendas are implemented. There seems to be an implicit acceptance of the need for “flexibility” in respect of unilateral actions and implementing domestic policies.

While the establishment of the AfCFTA is a milestone event, it is based on principles which emphasise member-driven outcomes, consensus in decision-making, the preservation of the *acquis*, and the role of the REC FTAs as AfCFTA building blocks. The governance effect of the AfCFTA has, to a considerable degree, been pre-determined. Transparency, active stakeholder involvement, dissemination of information about legal instruments and domestic measures, and the availability of trade remedies and

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<sup>6</sup> <https://www.businessdailyafrica.com/bd/markets/kenya-risks-comesa-penalty-over-sugar-1946916>

<sup>7</sup> <https://www.comesa.int/comesa-extends-kenya-sugar-safeguard-for-two-years/>

safeguards will be vital for this regime to bring about the desired improvements. Better trade governance should be a permanent item on national, regional, and continental agendas.

There was a time when NGOs, business councils, and civil society generally were quite active in economic integration initiatives on the continent. This resulted in participation in inclusive policy discussions and in an awareness about legal, procedural and technical matters. Governance under the AfCFTA also needs a strong civil society and a deliberate effort to involve its relevant structures.

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