

The Design behind the AfCFTA Institutional Arrangements

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Multilateral trade arrangements require institutions to coordinate the activities of the Member States, to ensure uniformity in compliance, and to monitor implementation. They also need suitable structures for dispute settlement, adopting technical standards where necessary, and conducting further negotiations on how to advance trade and integration.

The Agreement establishing the African Continental Free Trade Area (AfCFTA) is an ambitious endeavor. It seeks to achieve the following results:

- progressively eliminate tariffs and non-tariff barriers to trade in goods
- progressively liberalise trade in services
- cooperate on investment, intellectual property rights and competition policy
- cooperate on all trade-related areas
- cooperate on customs matters and the implementation of trade facilitation measures
- establish a mechanism for the settlement of disputes
- establish and maintain an institutional framework for the implementation and administration of the AfCFTA.¹

The achievement of these objectives will need suitable overarching institutions as well as technical bodies for specific areas of cooperation and interaction. The former are listed in the AfCFTA Agreement, while the latter are established in the Protocols on trade in goods and services, the Protocol on dispute settlement, and in the Phase II Protocols on investment, competition and intellectual property. The last three Protocols are still to be negotiated.

The AfCFTA is an African Union (AU) initiative. It is designed to be an AU flagship programme to bring about a continent-wide new trade arrangement. The institutional framework for its implementation consists of the **Assembly of the Heads of State and Government of the AU**, the **Council of Ministers** (consisting of the of the Ministers of Trade of the State Parties), the **Committee of Senior Trade Officials** (consisting of Permanent or



Principal Secretaries or other officials designated by each State Party) and the **Secretariat**.

These institutions are listed in the founding Agreement of the AfCFTA. They can be described as being composed of three tiers: the highest decision-making organ of the AU, political institutions composed of representatives from the State Parties, and the Secretariat, which will have a technical assistance function.

The Assembly is the apex body and consists of the Heads of State and Government of all AU Member States, including those that may not be AfCFTA Members. It shall provide oversight and strategic guidance on the AfCFTA, including the Action Plan for Boosting Intra-African Trade (BIAT).² The Assembly shall also have the exclusive authority to adopt interpretations of the AfCFTA Agreement, on the recommendation of the Council of Ministers.³ (Decisions by the AfCFTA institutions on substantive issues are adopted by consensus.⁴)

The AU Assembly meets in ordinary session at least once a year.⁵ It may delegate its powers and functions to other AU organs. It is therefore to be expected that the African Union Ministers of Trade (AMOT) and the Department of Trade of the AU Commission will, via the Assembly, play an important role in the life of the AfCFTA.

The Council of Ministers is that forum where only the State Parties are represented. It must ensure effective implementation and enforcement of the AfCFTA Agreement and must take measures necessary for the promotion of the objectives of this Agreement. However, it shall report to the Assembly through the Executive Council, which is the *Executive Council of Ministers of the African Union*.⁶

The Committee of Senior Trade Officials is another institution composed of officials of the State Parties only. It shall implement the decisions of the Council of Ministers, be responsible for the development of programmes and action plans, and ensure proper functioning of the AfCFTA. It shall also oversee the implementation of the provisions of the AfCFTA Agreement and may request a Technical Committee to investigate any particular matter.

The AfCFTA Secretariat is a unique institution. It shall be established by the Assembly, which shall decide its nature, location and approve its structure and budget. However, the “role and responsibilities” of the Secretariat shall be determined by the Council of Ministers of Trade. The Secretariat shall be a “functionally autonomous” institution within the AU system but with an independent legal personality. (The AfCFTA is not endowed with legal personality.) Exactly what this means is not clear. When the Secretariat is finally established, it might be possible to assess how independent it will in reality be. The funds of the Secretariat shall come from the overall annual budgets of the AU.⁷

What does this institutional design say about the future functioning of the AfCFTA? The AfCFTA will not be a stand-alone Free Trade Area, but a new programme of the AU. It has no legal personality of its own. Its institutions are a compromise between an arrangement under AU control, and one with some degree of “autonomy”.

Does the AfCFTA design matter? It may indeed. Free Trade Areas (FTAs) have their origin in Article XXIV GATT, which defines them as legal constructs for liberalising trade in goods:

“A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce... are eliminated on substantially all the trade between the constituent territories in products originating in such territories.”⁸

The AfCFTA also wants to liberalise trade in services in Africa, which means that Article V GATS has to be considered. This provision deals with “*Economic Integration*” and provides that Members of the WTO may

enter into an agreement liberalizing trade in services provided that such an agreement has substantial sectoral coverage and provides for the absence or elimination of substantially all discrimination.

What prevents intra-African trade from being boosted? The AfCFTA should have a clear focus on trade promotion and trade facilitation, albeit as objectives to be implemented over time. Article 4 speaks of the *progressive* eliminate of tariffs and non-tariff barriers to trade and, very importantly, the *progressive* liberalization of trade in services. These disciplines hold the key to future economic development in Africa. For the AU this is a new challenge. Hopefully the institutions of the AfCFTA will enable it to focus on the primary task. Technical trade-related functions, not political aims, should be prioritized.

¹ Art 4 AfCFTA Agreement.

² Art 10(1) AfCFTA Agreement.

³ Art 10(2) AfCFTA Agreement.

⁴ Art 14 AfCFTA Agreement.

⁵ Rule 7 Rules of Procedure of the Assembly of the AU.

⁶ Art 1 Afcfta Agreement.

⁷ Art 13 AfCFTA Agreement.

⁸ Art XXIV (8) (b) GATT.