

## ***When will Trade under AfCFTA Preferences become a Reality?***

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International trade is embedded in treaties (agreements) concluded among States. Since States are endowed with sovereignty, they must first accept the obligations in such agreements before they will be bound by them and be under a duty to implement them. Trade happens when goods are imported and exported across borders (at the new rates) and services are provided in foreign jurisdictions.

Trade agreements are not easy to negotiate. The issues to be agreed involve sensitive policy choices about tariff reductions, rules of origin, access by foreigners to services markets, dispute settlement, trade remedies, standards, non-tariff barriers etc. Inter-state trade deals must, in addition, be complemented by domestic trade arrangements, which, for example, include new national customs and certification procedures, additional columns in national tariff books, and the regulation of new service providers.

The standard approach for concluding multilateral (as opposed to bilateral) agreements involves consecutive stages. Negotiations come first. When agreement on a final text is reached, the negotiating States will sign it, and then ratify it in terms of the requirements of their national constitutions.<sup>1</sup> Once the required number of ratifications have been deposited, the new Agreement enters into force for those countries which have become Parties to it. They must also adopt the domestic measures necessary for implementation. Only then will private parties be able to import and export goods and provide services in foreign jurisdictions in terms of the new preferences.

The Agreement Establishing the African Continental Free Trade Area (the AfCFTA Agreement) must also be adopted by the African Union (AU) Assembly.<sup>2</sup> The AfCFTA enters into force once 22 ratifications have been deposited.<sup>3</sup>

The AU Assembly adopted the AfCFTA Agreement, the Protocol on Trade in Goods, the Protocol on Trade in Services and the Protocol on Rules and Procedures on the Settlement of Disputes, in Kigali on 21 March 2018. Fifty-two AU Members have already signed these instruments. The AU Assembly decided that the AU Ministers responsible for Trade must, when they are ready, submit the Schedules of Tariff Concessions and Schedules of Specific Commitments on Trade in Services to the Assembly for adoption.

The AU Member States are actively encouraged to ratify the AfCFTA, and to do so as soon as possible. And many have done exactly this, despite the fact that important



aspects of Phase I are still being negotiated. (Phase II negotiations have not yet started.) Fifteen AU Member States have already deposited their instruments of ratification for the AfCFTA, with the AUC Chairperson, the depositary of the AfCFTA.<sup>4</sup> Another four have obtained parliamentary approval for doing so.<sup>5</sup> Indications are that there may soon (before Phase I negotiations are done) be 22 ratifications. The AfCFTA then formally enters into force.

There has been considerable progress in concluding the legal instruments of the AfCFTA but essential aspects (the Schedules of Tariff Concessions, the Rules of Origin, and the Schedules of Specific Commitments on Trade in Services) are still outstanding. Without these elements there cannot be any trade under the AfCFTA. This does not mean that, in the meantime, there will be no intra-African trade. Such trade will continue, but under existing arrangements such as the MFN rules of the WTO or as provided for by specific Regional Economic Community (REC) arrangements. Article 19 of the AfCFTA Agreement states explicitly that the RECs will co-exist with the AfCFTA.

When will trade under AfCFTA rules become possible? The AfCFTA Agreement must first enter into force and outstanding negotiations must be concluded. Only those African states which have ratified the AfCFTA (or have subsequently acceded) will be bound by the new rules and will enjoy the benefits related to trade in goods and services. These States must also adopt domestic arrangements to ensure that there will be compliance with the commitments undertaken in terms of the AfCFTA Protocols. New, continent-wide preferential trade in goods and services and with respect to other trade-related matters (investment, competition and intellectual property rights) will have to wait till both Phases of the AfCFTA are fully operational and all AU Members have become AfCFTA Parties.

There is an additional issue: How will those AU Members that do not count under the first 22 State Parties<sup>6</sup>, participate in the ongoing negotiations for Phase I of the AfCFTA? This matter is to be distinguished from subsequent accession. For acceding States (as opposed to ratifying States) Phase I Protocols shall enter into force on the date of the deposit of their instruments of accession.<sup>7</sup> Accession is *“the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force.”*<sup>8</sup>

The challenges with regard to the completion of Phase I of the AfCFTA are about concluding the outstanding schedules (which form an integral part of the AfCFTA Agreement), finding a procedure for involving all AU Members in the ongoing Phase I negotiations, ensuring legal certainty, and putting in place the domestic arrangements necessary for giving effect to what has been agreed on the inter-State level.

The benefits of the AfCFTA can be substantial but the outstanding negotiations and related matters need to be finalized soon. Uncertainties will arise if a trade agreement is ratified and is “in force” but cannot be implemented. There will be many unfulfilled expectations.

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<sup>1</sup> Art 22 of the AfCFTA Agreement: “this Agreement shall be adopted by the AU Assembly. It shall be open for signature and ratification or accession by the AU Member States, in accordance with their respective constitutional procedures.”

<sup>2</sup> Ibid.

<sup>3</sup> Art 23 AfCFTA Agreement.

<sup>4</sup> Ghana, Kenya, Rwanda, Niger, Chad, Congo Republic, Djibouti, Guinea, eSwatini, Mali, Mauritania, Namibia, South Africa, Uganda, Côte d’Ivoire.

<sup>5</sup> Sierra Leone, Senegal, Togo, and Egypt. See <http://bit.ly/2SKZzCt>

<sup>6</sup> Which may include Nigeria.

<sup>7</sup> Art 23 AfCFTA Agreement.

<sup>8</sup> *UN Treaty Practice*. [https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1\\_en.xml#accession](https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#accession)