



Completing the AfCFTA Picture

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When all the outstanding Phase I negotiations are done, implementation of the AfCFTA obligations will be the responsibility of individual State Parties. The AfCFTA does not have supra-national institutions. Subsequent technical support and surveillance measures will be necessary to prevent uneven or incomplete outcomes. Experiences in REC FTAs, where integration stands at higher levels and has a longer history, show that trade facilitation challenges, non-tariff barriers, uncoordinated domestic measures, lack of harmonization of regulatory regimes and trade governance failures remain the most serious challenges faced by intra-African trade liberalization and integration.

Several of the AfCFTA's essential building blocks will only be adopted during Phase II of the negotiations, when competition policy, investment, intellectual property rights and e-commerce will be on the agenda. There will not be a complete framework for continent-wide trade in goods and services before the required additional Protocols have been concluded. They are vital for finalizing the rules of the game and for ensuring an inherently consistent continental arrangement.

The AfCFTA regime breaks new ground by including the Protocol on Trade in Services. Trade in services is regulatory intensive. National regulators must be in place to oversee service providers. They will exercise their powers in terms of domestic legal instruments, while giving effect to the relevant AfCFTA obligations.

The different parts of the AfCFTA project should speak to each other and should become a single body of law if a truly continental regime is to come about. Rules about foreign direct investment, investment promotion and facilitation are linked to e.g. Mode Three (commercial presence) in the Protocol on Trade in Services. Harmonization (not cooperation) of the rules on transport services will be vital in order to deal with congestion at border posts. Better remedies for addressing NTBs will be equally important. There is a long list of governance reforms and convergence to be undertaken under the AfCFTA banner.

In an FTA the State Parties retain national jurisdiction over external trade policy (there is no Common External Tariff) and are individually responsible for implementing the legal instruments governing trade in goods and services and related aspects. The AfCFTA rules of origin, which identify goods entitled to preferential treatment and preventing trade deflection (an FTA does not have a single customs territory) will be a crucial feature of the

AfCFTA. The content of the AfCFTA Annex on rules of origin is not yet known but present indications are that they may require compliance with product specific rules. An institution such as the AfCFTA Secretariat (the responsibilities and tasks of which must still be finalized) will hopefully become an active continental agent and facilitator of the governance improvements required to make the AfCFTA a game changer.

Trade and integration arrangements cannot function without properly equipped institutions. There are two main layers of AfCFTA institutions. Part III of the AfCFTA Agreement (dedicated to *Administration and Organization*) provides for an “*institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the AfCFTA.*” It consists of the Assembly, the Council of Ministers, the Committee of Senior Trade Officials, and the Secretariat.¹ These are the AfCFTA’s *Framework Institutions*. They are essentially high-level political platforms for the membership, where decisions are taken on the basis of the tried and tested consensus formula. It is notable that the RECs ‘shall be represented in the Committee of Senior Trade Officials, in an advisory capacity’².

There is, in addition, a second layer of technical and *ad hoc* institutions, listed in the Protocols and in the Annexes. These are instruments for joint action in those instances where more specialized *Governance Bodies* are required.³ They will, as a rule, be composed of duly designated representatives from the State Parties and shall carry out the responsibilities assigned in the relevant Annexes. They will, in appropriate instances,⁴ be linked to National Bodies and Focal Points.

The *Governance Bodies* will consist of the following and will perform the associated tasks:

- The Committee on Trade in Goods.⁵
- The Committee on Trade in Services.⁶
- The Sub-Committee on Rules of Origin.⁷
- The Sub-Committee on Trade Facilitation, Customs Cooperation and Transit.⁸
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¹ See Arts 9 – 13 AfCFTA Agreement.

² Art 12 AfCFTA Agreement.

³ The terms “Framework Institutions” and “Governance Bodies” are the authors’.

⁴ As for Non-Tariff Barriers and Trade Facilitation.

⁵ Art 31 AfCFTA Protocol on Trade in Goods. The Council of Ministers must establish it.

⁶ Art 26 AfCFTA Protocol on Trade in Services. The Council of Ministers must establish it.

⁷ Art 38 AfCFTA Annex on Rules of Origin.

⁸ Art 13 AfCFTA Annex on Customs Co-operation and Mutual Administrative Assistance. See also Art 12 of the AfCFTA Annex on Transit.

⁹ Art 27 AfCFTA Annex on Trade Facilitation.

- The Sub-Committee on Non-Tariff Barriers.¹⁰
- The Sub-Committee on Technical Barriers to Trade.¹¹
- The Sub-Committee on Sanitary and Phytosanitary Measures.¹²
- The Sub-Committee on Trade Remedies.¹³

A Protocol on Dispute Settlement has also been adopted. It replicates the WTO Dispute settlement Understanding and provides for Panels and an Appellate Body.

¹⁰ Art 4 AfCFTA Annex on Non-Tariff Barriers.

¹¹ Art 13(1) AfCFTA Annex on Technical Barriers to Trade.

¹² Art 15 AfCFTA Annex on Sanitary and Phytosanitary Measures.

¹³ Art 12 AfCFTA Annex on Trade Remedies. The AfCFTA Guidelines on the Implementation of Trade Remedies shall, upon adoption, form an integral part of this Annex.