



When will trade under AfCFTA rules begin and where does the process stand?

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The AfCFTA Agreement formally entered into force on 30 May 2019, thirty days after twenty-two instruments of ratification had been deposited¹. However, implementation is still not possible.

The outstanding matters deal with the essential requirements for a free trade area (FTA): tariff reductions, and rules of origin.² Without agreed tariff reductions and rules of origin there cannot be an FTA. These sensitive issues must first be agreed (based on consensus) before the State Parties will open their markets to competition from the rest of the continent. The outstanding negotiations are complex reflecting concerns about tariff revenue losses, impact on domestic agriculture and industry, amongst other factors. They will take time and the careful weighing of individual States' offensive and defensive trade interests.

Once an international agreement enters into force, only the State Parties (in this instance those AU Member States that have ratified the AfCFTA Agreement or acceded to it) have rights and obligations under the new legal regime. However, since the AfCFTA negotiations have been launched as an AU project and are member-driven,³ all AU Member States participate in the outstanding negotiations. These remaining matters are being negotiated after the entry into force of the AfCFTA Agreement.

The normal procedure for adopting and ratifying treaties intended to embody one single arrangement (e.g. comprehensive trade agreements) is to complete all negotiations before the text is signed and then ratified. Nothing is complete till everything is complete. Separate entry into force procedures only apply to new legal instruments negotiated subsequently. The AfCFTA Agreement does not permit reservations.⁴

¹ As required by Art 23 of the AfCFTA Agreement.

² For trade in services, member states are still negotiating specific commitments for the 5 priority services sectors – financial services, communication, transport, business services and tourism.

³ Art 5 AfCFTA Agreement.

⁴ Art 25 AfCFTA Agreement.

Being a signatory to the AfCFTA is not enough. Articles 22 and 23 of the AfCFTA Agreement (read together with the applicable definitions in Article 1) are clear; an AU Member State can only become a State Party to the AfCFTA Agreement through ratification or accession.

The outstanding AfCFTA negotiations must clarify additional issues: Several legal instruments (tariff schedules, annexes on rules of origin and on trade in services for the selected areas) must be formally **adopted** and must be domestically in force for all State Parties. It should be clarified when they become binding (and for whom) as well as when implementation commences. A formal declaration to this effect seems necessary.

Those AU Members that have already become AfCFTA State Parties can then start trading under AfCFTA rules, provided their domestic measures are in place. Customs officials will only give effect to AfCFTA preferences if the national tariff book contains a new AfCFTA column. For the remaining twenty-five or so non-State Parties (Nigeria is one of them) this will only be possible once they have complied with the requirements on entry into force in Articles 22 and 23, and their domestic measures are ready. It would be unfortunate (and legally questionable) if implementation of the AfCFTA is again postponed in order to allow actual trade to commence at a subsequent date set by the present negotiators. What is at stake here is legal certainty. Sovereign States are not bound by international agreements to which they have not consented.

The AfCFTA is not a legal person in its own right⁵, but the relationship between the AfCFTA as a binding legal regime on the one hand, and the municipal (domestic) legal systems of the State Parties (as well as those of the existing RECs, intra-African trading arrangements and customs unions) on the other hand, should be clarified. The AfCFTA Agreement does not do so in any detail.

This is an important matter since the AfCFTA is designed to co-exist with the regional economic communities (RECs), regional trading arrangements and customs unions which have attained among themselves higher levels of regional integration than under the AfCFTA. The State Parties *shall maintain* such higher levels among themselves.⁶ The AfCFTA will be an additional African FTA existing alongside several other trade arrangements to which the same State Parties belong. This requires legal and procedural clarifications. It will also contribute to overlapping membership burdens.

⁵ The only provision akin to legal status is found in Art 13 of the AfCFTA Agreement. It deals with the position of the Secretariat.

⁶ Art 19(2) AfCFTA Agreement.