

What will happen when the AfCFTA is implemented?

The short answer to this question is that a continent-wide process for liberalizing trade in goods and in certain services will start.¹ This will happen in terms of commitments adopted in the package of legal instruments constituting the African Continental Free Trade Area (AfCFTA). These commitments are to be implemented by the AfCFTA **State Parties**. Only those African Union (AU) Member States that have ratified the AfCFTA Agreement will have benefits and obligations under this Agreement. At present (end of July 2021) 37 AU Member States have ratified this Agreement.² African countries can also join later by acceding to the AfCFTA Agreement.³

When will this process begin? The AfCFTA Agreement entered into force on 30 May 2019, (30 days after the 22nd instrument of ratification was deposited with the Chair of the AU Commission⁴), but no preferential trade based on this arrangement has yet begun. There are outstanding matters (tariff schedules, rules of origin and conditions for trade in the 5 priority services sectors) still to be agreed. The indications are that the outstanding negotiations (which are complex and sensitive⁵) should be completed before the end of this year. The AfCFTA negotiations began in 2015.

There will not be a sudden burst of new trade in goods and services when the AfCFTA is finally implemented. Tariff reductions will happen in phases. Ninety percent of **tariff lines** (not total trade) will be liberalised over 5 years. Least Developed Countries (LDCs) have 10 years to implement their tariff cuts. Each State Party shall apply preferential tariffs to imports from other

¹ The 5 priority services sectors are transport, communications, tourism, and business and financial services.

² See update on tralac website <https://www.tralac.org/resources/infographics/13795-status-of-afcfta-ratification.html>

³ Art 23 AfCFTA Agreement.

⁴ The Chairperson of the AU Commission is the Depository of this Agreement.

⁵ Many States at very different levels of economic development must agree (on the basis of consensus) to open their markets to foreign competition. Sensitive products may be excluded but 90% of all tariff lines must be liberalised.

State Parties in accordance with its own Schedule of Tariff Concessions.⁶ Rules of Origin must be met to benefit from the new preferences.

Article 4 of the AfCFTA Agreement contains important indications about what can be expected:

*“The State Parties shall **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 concerning their rights and obligations; and establish and maintain an **institutional framework** for the implementation and administration of the AfCFTA.”* (Emphases added.)

There must also be domestic follow-up action and reforms within the State Parties. National tariff books (and those of customs unions) must be updated, while new procedures for issuing certificates of origin and for new customs and border procedures must be put in place. For trade in services the required national regulatory regimes must be provided. This will require legislative reforms.

One of the most important features of the AfCFTA relates to the fact that the existing Regional Economic Communities (RECs) will continue to function as before. *“State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this agreement, shall maintain such higher levels among themselves.”*⁷

This facet of the AfCFTA regime has important implications. The first is that there will be different streams of preferential trade regimes on the African continent. Whereas many African States presently trade with each other under the higher MFN rates of the World Trade Organization (WTO) or under the so-called General Tariff in instances where such countries are not WTO members, all the AU Member States will in future be able to reap the benefits of preferential trade, if they so choose. These preferences will be in either the REC Free Trade Areas (FTAs) to which they already belong, or in the new AfCFTA regime. There could be preferential trade for the whole African continent, as per the agreed rules and conditions. The extent of the new benefits will depend on matters such as the degree of flexibility in the Rules of Origin, a matter still being negotiated.

Since the RECs are not abolished (they are in any case founded on separate treaties binding only their own Member States and they often have many additional protocols of their own that go beyond trade regulation⁸),

⁶ Art 8(1) Trade in Goods Protocol.

⁷ Art 19(2) AfCFTA Agreement.

⁸ The Southern African Development Community (SADC) has almost 30 protocols. They cover matters such as the sharing of regional rivers, energy, the environment, policing, security etc., in addition to trade.

they will continue to implement and advance their own regional integration agendas. “*State Parties that are members of other RECs, which have attained among themselves higher levels of elimination of customs duties and trade barriers than those provided for in this Protocol, shall maintain, and where possible improve upon, those higher levels of trade liberalisation among themselves.*”⁹ (Emphasis added.)

Will the scope of the AfCFTA grow? This is the intention. A more comprehensive regime is being planned, albeit one based on an incremental approach. During Phase II of the AfCFTA Protocols on cooperation in respect of competition, investment and intellectual property rights will be negotiated. This will be followed by Phase III when Protocols on E-Commerce and Women, Youth and SMEs, will be on the agenda.

Will there be efforts to advance deeper continental integration? The general spirit seems to do so,¹⁰ but the AfCFTA does not contain a plan of action for continental integration. Article 3 of the Agreement refers to *successive rounds of negotiations* in order to create a liberalised market for goods and services. When it comes to the movement of capital, natural persons and investments, the aims are more modest; the AfCFTA will *build on the initiatives and developments in the State Parties and the RECs*.¹¹ A continental customs union (the benefits of which are questioned by many) is a matter for a *later stage*.¹²

What will happen in respect of trade with third parties? The AfCFTA Agreement is clear: *Nothing in this Protocol shall prevent a State Party from concluding or maintaining preferential trade arrangements with Third Parties, provided that such trade arrangements do not impede or frustrate the objectives of this Protocol, and that any advantage, concession or privilege granted to a Third Party under such arrangements is extended to other State Parties on a reciprocal basis.*¹³ This confirms that the AfCFTA is, in terms of its legal design, an FTA. In FTAs, the State Parties retain policy space over the use of the import tariff for domestic industrialization purposes and for establishing trade relations with third parties. A *third party* is any State that is not a party to the AfCFTA Agreement.¹⁴

Where and how does the private sector fit into this picture? Private parties (firms, legal or natural persons) are not parties to this Agreement but their decisions on investment and new commerce across borders will be vital for the success of the AfCFTA. The fact that there will be more overlapping memberships could be a

⁹ Art 8(2) Protocol on Trade in Goods.

¹⁰ The AfCFTA Preamble (which does not obtain obligations for the State Parties) refers to the *objectives and principles enunciated in the Abuja Treaty*.

¹¹ Art 3(c) AfCFTA Agreement.

¹² Art 3(d) AfCFTA Agreement.

¹³ Art 4(2) Protocol on Trade in Goods.

¹⁴ Art 1 AfCFTA Agreement.

negative factor. One of the general objectives of the AfCFTA is to “*resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes*”.¹⁵

What long-term benefits could flow from the AfCFTA? The most significant ones are related to a better trading environment. Trade facilitation, the removal of non-tariff barriers at border posts, and modernised customs procedures (for which there are a dedicated Annexes) should be prioritised. Since the AfCFTA is a **member-driven** arrangement, concerted action and special initiatives by the AfCFTA Secretariat will be vital. This concern applies to most of the disciplines in the AfCFTA. If properly implemented the AfCFTA could usher in desperately needed reforms.

There are also new challenges to be met. COVID-19 has placed the spotlight on economic resilience.¹⁶ Individual States cannot defeat the scourges of our time, such as pandemics and the consequences of climate change. Joint action and global partnerships are necessary. A properly designed, empowered, and flexible AfCFTA, if implemented, could make a major contribution in this regard. But the AfCFTA will be a regime which reaffirms “*the right of State Parties to regulate within their territories and the State Parties’ flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, public morals and the promotion and protection of cultural diversity*”.

¹⁵ Art 3(h) AfCFTA Agreement.

¹⁶ *Building a Better Future of Work for Resilience and Growth in Post- COVID-19 Africa*, Contemporary Issues in African Trade and Trade Finance CIAT Vol 6, Number 1, Dec 2020. COVID-19 Special Issue.