



How will the Obligations of the AfCFTA State Parties be implemented?

The African Continental Free Trade Area (AfCFTA) has been designed as a continent-wide Free Trade Area (not a Customs Union) for liberalising trade in goods and services and for regulating all related governance aspects. It is a legal compact in terms of which sovereign states (the members of the African Union) have negotiated and adopted the international legal instruments required for giving effect to this ambitious member-driven arrangement for liberalising and boosting intra-African trade, while remaining part of global trade arrangements.

The obligations of the AfCFTA State Parties cover different kinds of disciplines; to liberalise trade in goods and in services, and to implement the Protocols on Investment, Competition, Intellectual Property Rights. These are the Protocols mentioned in the AfCFTA Agreement. The State Parties subsequently added Protocols on Digital Trade and on Women and the Youth to the AfCFTA compact. They may decide to add more Protocols in future.¹ The relevant aspects of these Protocols must be made part of the law of the land of individual State Parties in order to be implemented on the intra-state level. In doing so national constitutions must be adhered to since they explain the relationship between international agreements and municipal law.

The success of the AfCFTA depends on the effective implementation of all the obligations agreed upon and will be the responsibility of the State Parties; the AfCFTA Agreement does not provide for supra-national institutions with powers to enforce the AfCFTA commitments and does not create a new international organisation. It is a flagship project of the African Union (AU) and a member-driven arrangement.²

¹ As permitted under Art 8(3) and Art 23 of the AfCFTA Agreement

² Art 5(a) AfCFTA Agreement.

One of the implications is that the Council of Ministers (composed of the Ministers of Trade of the State Parties or their representatives)³ will be responsible for monitoring and steering the AfCFTA's implementation on domestic, regional, and continental levels. Its decisions are taken by consensus.⁴ Compromises will take time and will often be necessary; the AfCFTA membership consists of 54 countries at different levels of economic development. Thirty-three of them are least-developed countries (LDCs). Many are land-locked and depend on effective corridor regimes and border management.

The implementation of international legal instruments such as those forming part of the AfCFTA Agreement depends on **legal certainty**. Are, for example, all the relevant legal instruments in force on the **inter-State level**, and are the necessary **domestic** arrangements (laws, regulations, and institutions) in place for the State Parties to give effect to their obligations? As implementation unfolds, new policies will become necessary and specific decisions should be taken by the Council of Ministers to advance and expand the AfCFTA agenda. It will be assisted by the Committee of Senior Trade Officials and the Secretariat but there should be opportunities for private sector stakeholders too to ensure that all relevant matters are on the agendas of the AfCFTA institutions. The Protocols and their Annexes establish sub-committees responsible for specific disciplines such as customs administration, dealing with Non-Tariff Barriers, Trade Remedies and safeguards, harmonisation of domestic regulations etc. Private stakeholders should become involved in the work of these structures.

The AfCFTA is a vast and growing enterprise and implementation will be a challenge for many of the State Parties. Uneven and fragmented outcomes and compliance failures will undermine and delegitimise the AfCFTA and should be prevented. This will be, to a major extent, the responsibility of the AfCFTA institutions established as “The institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the AfCFTA”.⁵ They consist of the AU Assembly, the Council of Ministers, the Committee of Senior Trade Officials, and the Secretariat.

The AfCFTA “Agreement” is defined as the Agreement establishing the AfCFTA (we refer to it as the founding Agreement) and its Protocols, Annexes and Appendices.⁶ They are an integral part of the AfCFTA Agreement and form part of a “single undertaking, subject to entry into force”.⁷ This has an important implication; the AfCFTA State Parties are bound by all the obligations agreed upon. No reservations are permitted.⁸ The

³ Art 11 AfCFTA Agreement.

⁴ Art 14 AfCFTA Agreement.

⁵ Art 9 AfCFTA Agreement.

⁶ Art 1(b) AfCFTA Agreement.

⁷ Art 8(2) AfCFTA Agreement.

⁸ Art 25 AfCFTA Agreement.

“State Parties” are those AU member states that have ratified or acceded to the AfCFTA Agreement and for which the Agreement is in force.⁹

It is important to note that in a Free Trade Area (FTA) the State Parties retain jurisdiction over subsequent trade policy issues and national development initiatives. The legal texts of the AfCFTA confirm this important feature.¹⁰ They also endorse the “right of State Parties to regulate in pursuit of national policy objectives”.¹¹ The retained policy space of the State Parties must obviously be exercised in a manner which will not undermine the integrity of the AfCFTA regime. The best way for striking this balance is to ensure that the AfCFTA will function as a **rules-based** enterprise. It should have an effective oversight dimension and there must be adherence to transparency and notification obligations. A preparedness to use the AfCFTA Dispute Settlement Mechanism will be vital, to ensure that the conditions in exception clauses and the due process requirements in trade remedy and safeguard measures are complied with. However, African governments never litigate against each other over trade related disputes, not in the World Trade Organisation (WTO), nor in the Regional Economic Communities (RECs). The AfCFTA Dispute Settlement Mechanism is built on the Dispute Settlement Understanding of the WTO. Only State Parties have standing to lodge disputes against other State Parties.

It will come as a major surprise if the AfCFTA State Parties become active users of the AfCFTA Dispute Settlement Mechanism. The implication is that the **oversight** dimension of the AfCFTA design, its **transparency** and **notification** provisions, and the dissemination of information to all relevant stakeholders, will be vital for securing the objectives inherent in the AfCFTA scheme of things. The Secretariat, which is the only full-time AfCFTA institution, appears to be a crucial cog in this part of the AfCFTA machinery. It will have to implement the required capacity building programs. At national level the implementation of the AfCFTA Agreement requires the necessary political will but also the technical and **governance ability** to comply with obligations often involving sensitive domestic policy issues.

⁹ Art 1(v) AfCFTA Agreement.

¹⁰ Art 4 Protocol on Trade in Goods, for example, confirms the right to conclude preferential trade agreements with third parties.

¹¹ Preamble, Protocol on Trade in Services.

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