



The AfCFTA: from Negotiations to a complete legal Compact

The entry into force of the African Continental Free Trade Area (AfCFTA) Agreement and its Protocols happens in terms of a formula in the AfCFTA's founding Agreement. This is an important matter because **legal certainty** is central to the implementation of legal instruments adopted through international negotiations, not in national parliaments. States are bound by international agreements once they have given their consent (typically through ratification or accession) and if the agreement in question has entered into force for them. National constitutions must be respected for these procedures.

This Note discusses the ratification and entry into force provisions of the AfCFTA Agreement, which are Articles 22 to 24 of the AfCFTA Agreement. The AfCFTA Agreement is defined as the "Agreement Establishing the African Continental Free Trade Area and its Protocols, Annexes and Appendices which shall form an integral part thereof"¹.

Article 22 deals with 'Adoption, Signature, Ratification and Accession'. It provides that the AfCFTA Agreement "shall be adopted by the Assembly... [and] shall be open for signature and ratification or accession by the [African Union] Member States, in accordance with their respective constitutional procedures."

The texts of international agreements are typically the product of negotiations among the participating States, which in this instance are the African Union (AU) Member States. There comes, during successful negotiations, a point when the participating States, represented by designated officials, have reached agreement on a final outcome. The ensuing text must be **adopted**. For the AfCFTA the final result of the negotiations must be tabled at the AU Assembly and be adopted by it. The "Assembly" is the Assembly of Heads of State and Government of the AU.² This requirement also applies to the AfCFTA Protocols on Invest-

¹ Art 1(b) AfCFTA Agreement.

² These definitions are listed in Art 1 of the AfCFTA Agreement.

ment, Competition, and Intellectual Property Rights and other subsequent instruments.

Adoption and signature do not signify a binding agreement. An adopted and signed text becomes a binding agreement once it has entered into force in terms of the applicable procedure agreed upon as part of the negotiations. Article 23 deals with entry into force of the AfCFTA and its subsequent Protocols. It is discussed below.

Article 22 further states that subsequent to adoption by the AU Assembly, the AU Member States intending to become AfCFTA State Parties must sign and ratify the adopted text. They do so “in accordance with their respective constitutional procedures”. It is standard practice for the constitutions of States to explain the relationship between international and municipal (national) law. They typically provide that the executive branch of government will negotiate and ratify international agreements (treaties). There is a growing trend also to require approval of treaties by Parliament before ratification by the executive branch of government is undertaken.³

International agreements such as the AfCFTA are not self-executing. Their provisions which require domestic action (such as levying lower tariffs on goods qualifying in terms of the applicable rules of origin) require a domestic legal basis. Provisions in International agreements must, as a rule, be made part of the law of the land before they can be given domestic effect, unless the country follows a monist tradition and considers treaties to be part of the domestic legal system once binding upon the state in question. Even then there will be norms to ensure that international and domestic law are compatible. The incorporation of treaty provisions will normally entail a legislative element, either through an Act of Parliament or through the promulgation of regulations permitted by an enabling Act.

National constitutions have to be complied with for the simple reason that they are normally supreme law. Non-compliance will lead to constitutional invalidity of the relevant executive actions, which may include trade-related measures. However, a State Party may not invoke the provisions of its internal law (including its constitution) as justification for its failure to perform a treaty.⁴ The relevant ministry should make sure that domestic implementation of new agreement will not cause inconsistencies or uncertainty.

³ See, for example, Section 231 of the South African Constitution.

⁴ Art 27 Vienna Convention on the Law of Treaties.

Article 23 of the AfCFTA Agreement deals with ‘Entry into Force’. It provides that the AfCFTA Agreement and the Protocols on Trade in Goods, Trade in Services, and the Settlement of Disputes shall enter into force 30 days after the deposit of the 22nd instrument of ratification.⁵

Ratification is a formal statement by a State signifying consent to be bound by a specific international agreement. It is usually communicated to the relevant depositary in terms of formal diplomatic procedures. “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.⁶ The Chairperson of the AU Commission is the Depositary of the AfCFTA Agreement.⁷

Article 23 states that the Protocols on Investment, Intellectual Property Rights, Competition Policy, and any other Instrument deemed necessary, shall enter into force in terms of their own ratification or accession by State Parties. They will enter into force 30 days after the deposit of the 22nd instrument of ratification or on the date of the deposit of an instrument of accession. This has important implications for the implementation of the AfCFTA as a **single legal compact**. Those State Parties that do not ratify or accede to the Phase 2 Protocols, will not be bound by them.

tralac gratefully acknowledges the support of its Development Partners



⁵ See tralac’s Status of AfCFTA Ratification infographic: <https://www.tralac.org/resources/infographics/13795-status-of-afcfta-ratification.html>

⁶ [What is the difference between signing, ratification and accession of UN treaties?](#)

⁷ Art 24 AfCFTA Agreement.