Does the AfCFTA protect the rights of private parties?

To answer the question posed above, certain basic features of the African Continental Free Trade Area (AfCFTA) legal regime need to be stated. The AfCFTA is designed to be a member driven Free Trade Area (FTA) for liberalising trade in goods and services, and to implement additional disciplines.[1] It has no supra-national institutions. When the AfCFTA legal instruments are finally agreed and properly implemented, preferential trade will become possible across the African continent. The REC FTAs will be part of this arrangement.

The AfCFTA is not a customs union. The State Parties retain policy space over trade relations with third parties and the use of the import tariff for the purpose of implementing national policies. The AfCFTA legal instruments also emphasise the “right to regulate” services and service providers.[2] These features are embodied in the AfCFTA legal instruments and confirm that state action will be the central focus when it comes to the implementation of the AfCFTA. The AfCFTA Agreement is not self-executing.

If a violation of an obligation in an AfCFTA legal instrument does occur (e.g. when a border is closed and goods from other State Parties are blocked in a manner not permitted by the AfCFTA rules, or intellectual property rights are infringed) the relevant State Party can lodge a complaint under the AfCFTA Protocol on Dispute Settlement or invoke the dispute settlement mechanism of the applicable trade agreement. Should the State Parties do so, the rights of private parties will be more secure. They will then engage in cross-border transactions in the knowledge that their government of nationality will act on their behalf and actively pursue respect for the provisions of the relevant trade agreement.

However, African governments do not litigate against each other over compliance with obligations in trade agreements. It is unlikely that they will do so in respect of the AfCFTA Agreement. They prefer to find “solutions” through discussions in political structures. Protectionist measures are often justified by invoking national needs and policies, which appear to be tolerated when taken by other governments too. These practices are not compatible with the legal requirements underpinning regional
integration arrangements. There are several examples of border closures and of rules of origin being applied in regional trade arrangements professing to be customs unions and being based on community law. Africa's regional integration regimes are not rules-based in their practical application. Regional tribunals face the fact that their rulings may not be respected,[3] or that they may even be abolished.[4]

Private parties (importers, exporters, service providers, etc.) have no standing under the AfCFTA's Dispute Settlement Protocol and cannot lodge complaints. The AfCFTA Agreement (which includes all its Protocols, Annexes, and Appendices) is a standard trade liberalisation pact about rights and obligations of the State Parties. In many ways it replicates WTO features, for example, in respect of dispute settlement, Trade Remedies and Safeguards. It does not provide rights for private parties to enforce obligations in the AfCFTA Agreement against any of the State Parties.

Trade remedy and safeguard measures will be useful to domestic industries but depend on national institutions for investigating complaints about dumping, subsidised imports, or harmful surges in imports. Only three African States presently have domestic investigating authorities.[5] They follow WTO rules and procedures.

Private parties are, as a rule, the traders and investors who will venture into commercial transactions to import and export goods and provide services under the AfCFTA and the REC Free Trade Area regimes. It will be private transactions and investment that could make the AfCFTA the gamechanger which it is promised to become. But private interests are at stake when trade agreements and national trade policies are implemented. How will the AfCFTA Agreement promote and protect the rights and interests of private entrepreneurs, if at all?

It is typical of member-driven trade agreements not to provide for the protection of the interests of private traders. (Protocols on Investment promotion and protection is an exception.) The best guarantees are provided via good governance, respect for the rule of law and transparency. These required legal principles appear in the texts of the AfCFTA legal instruments (and in national constitutions). Good trade governance at home is to everyone's advantage.

Private parties must be able to rely on legal certainty and transparency when the State Parties implement the AfCFTA Protocols and their Annexes. The texts AfCFTA Agreement suggest that the rule of law will be respected, and that trade governance will be transparent and fair. The AfCFTA Agreement notes non-discrimination, transparency, and disclosure of information as its founding principles.[6] Each State Party “shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, transparent and impartial manner”. [7] The AfCFTA Agreement also says that the State Parties shall act in a non-discriminatory manner. Imported and locally-produced goods should be treated equally. The State Parties “shall accord to products imported from other State Parties treatment no less favourable than that accorded to like domestic products of national origin, after the imported products have been cleared by customs.”[8]
Private parties can approach the local courts to protect rights that they may enjoy under the national constitution or the law of the land. This has an implication for how certain trade related rights can be enforced via domestic courts. National constitutions and public law disciplines typically prohibit discrimination and provide for a right to administrative justice. It means everyone (including foreign firms domestically incorporated) has the right to administrative action that is lawful, reasonable, and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons when, for example, an import or export permit is refused.

If these rights are violated through national executive measures dealing with trade governance, affected private parties can approach domestic courts to review such measures and to set them aside if justified. But domestic litigation is not always an attractive option; it is expensive and can be time consuming. Often urgent remedial action is required.

Small and medium enterprises cannot, as a rule, afford litigation. But they are vital for achieving the objectives of the AfCFTA. Big firms and foreign enterprises are likely to enjoy direct access to senior officials and politicians and can afford litigation. The better option would be to implement the AfCFTA so as to improve trade governance. The AfCFTA is an ambitious and necessary endeavour but will not achieve its potential if its rules, procedures, and obligations are not respected, and if SMEs are not supported through access to reliable information and assistance in respect of compliance with procedural requirements. The AfCFTA should be marketed as the facilitator of trade via good governance.


[4] The SADC Tribunal was abolished in 2011 after it ruled against the land expropriation practices of Zimbabwe. All the SADC Member States supported that drastic step. SADC is still without a Tribunal.


[6] Art 5, Agreement Establishing the AfCFTA.


[8] Art 5 AfCFTA Protocol on Trade in Goods. This is an example where national treatment is specifically mentioned.
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