

# tralac Newsletter

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## States, Member States, State Parties, Non-State Parties, and Third Parties:

### What do these terms mean in the context of the AfCFTA?

We are often asked to clarify certain terms in the text of the African Continental Free Trade Area (AfCFTA) Agreement<sup>1</sup>. The word “**State**” appears in different settings in the legal instruments of the AfCFTA. In this Newsletter, we discuss the meaning of this term, and of some related ones, within the contexts in which they are used. We also describe how the AfCFTA Agreement has come into existence. We start by explaining basic features of international agreements as inter-state legal instruments.

#### International agreements and governance<sup>2</sup>

States need legal instruments to facilitate and regulate their interaction with each other. In the absence of an international legislature, international agreements (treaties) are the instruments used for establishing the required legal arrangements and institutions. International trade is an obvious example of an area where international agreements are necessary.

Every state possesses capacity to conclude treaties.<sup>3</sup> International agreements are also used to establish international organisations and to define the powers which they (or their organs) may exercise.<sup>4</sup> An international agreement must, of course, be in force for its provisions to be binding. They will be binding

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<sup>1</sup> The consolidated text of the AfCFTA Agreement is available here: <https://www.tralac.org/documents/resources/african-union/1964-agreement-establishing-the-afcfta-consolidated-text-signed-21-march-2018-1/file.html>

<sup>2</sup> See also [International Trade Explainer: Trade terms and concepts – A tralac guide](#)

<sup>3</sup> Art 6 Vienna Convention on the Law of Treaties (VCLT).

<sup>4</sup> Art 5 VCLT.

for those states which have become parties to the particular agreement in terms of the applicable entry into force provision.

States are sovereign.<sup>5</sup> This means a state has exclusive jurisdiction over its own territory, enjoys sovereign equality, and cannot be bound by treaties unless it has given its consent. How sovereignty is exercised within a state is a different matter; in modern democracies, the constitution is usually the supreme law of the land.

International agreements are typically negotiated, adopted, signed, and ratified in order to become binding on those states that have decided to become parties to them. According to the [Vienna Convention on the Law of Treaties \(VCLT\)](#), “ratification”, “acceptance”, “approval” and “accession” mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty.<sup>6</sup> Accession is the act whereby a state becomes a party to an agreement which has already entered into force. Bilateral agreements are easier to conclude. They often enter into force once signed by both parties.

The text of an international agreement must explain how and when it will enter into force. In the case of the AfCFTA Agreement, that answer is provided in Article 23 of the Agreement establishing the AfCFTA:

This Agreement and the Protocols on Trade in Goods, Trade in Services, and Protocol on Rules and Procedures on the Settlement of Disputes shall enter into force thirty [30] days after the deposit of the twenty second [22<sup>nd</sup>] instrument of ratification.

### **What is the AfCFTA and where does it stand?**

The AfCFTA is an initiative and a flagship project of the African Union (AU). Technically, it consists of a continent-wide trade and economic integration arrangement based on an International Agreement to which certain **Protocols**, **Annexes** and **Appendices** have been added. Together they form one single legal instrument called the **AfCFTA Agreement**. They allow the AfCFTA to function as a member-driven Free Trade Area (FTA) for trade in goods and in services. The Phase I AfCFTA Protocols cover trade in

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<sup>5</sup> See further <https://plato.stanford.edu/entries/sovereignty/>

<sup>6</sup> Art 2(b) VCLT.

goods, trade in services, and dispute settlement. Phase II Protocols have subsequently been adopted, on investment,<sup>7</sup> competition policy, and intellectual property rights<sup>8</sup>.

The AfCFTA Agreement entered into force on 30 May 2019, before all the negotiations were completed. Officially, AfCFTA trading (on the basis of legally implementable and reciprocal tariff schedules with agreed rules of origin) began on 1 January 2021.<sup>9</sup> However, actual trade under AfCFTA rules has not yet happened. Some State Parties have not yet submitted their schedules of tariff concessions, and the rules of origin for certain textile and clothing products, and for automotive products (Annex 2 to the Protocol on Trade in Goods), must still be agreed.<sup>10</sup>

The Protocol on Trade in Services also has some outstanding issues. Some State Parties have not yet submitted their schedules of specific commitments for the 5 priority services sectors, or they have not yet been verified as compliant with the negotiation modalities. This work is expected to be completed by the end of 2023. Once the schedules of commitments have been adopted by the AU Assembly, they have to be gazetted in accordance with the Ministerial Directive on the Implementation of the Schedules of Specific Commitments. Frameworks for regulatory cooperation are also on the agenda. So far, the work programme has focused on regulatory frameworks for financial and communication services.

The [Guided Trade Initiative \(GTI\) was launched on 7 October 2022](#) and involves a small number of AfCFTA State Parties and a limited number of products. It seeks to allow commercially meaningful AfCFTA-based trading, while testing the operational, institutional, legal and trade policy environment under the AfCFTA. A [Phase 2](#), which is expected to include 29 State Parties and to cover more than the 96 Phase 1 products, is planned to be launched before the end of 2023. A [GTI for services](#) is also expected to begin soon.

## **The AfCFTA as a legal pact**

Article I of the Agreement establishing the AfCFTA contains the following important definition:

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<sup>7</sup> Two Articles in the Protocol on Investment have been referred back to the Council of Ministers for approval. An Annex on Dispute Settlement is also still to be agreed.

<sup>8</sup> Eight Annexes are still to be negotiated and adopted.

<sup>9</sup> As per a decision by the 13th Extra-ordinary Session of the AU Assembly on 5 December 2020.

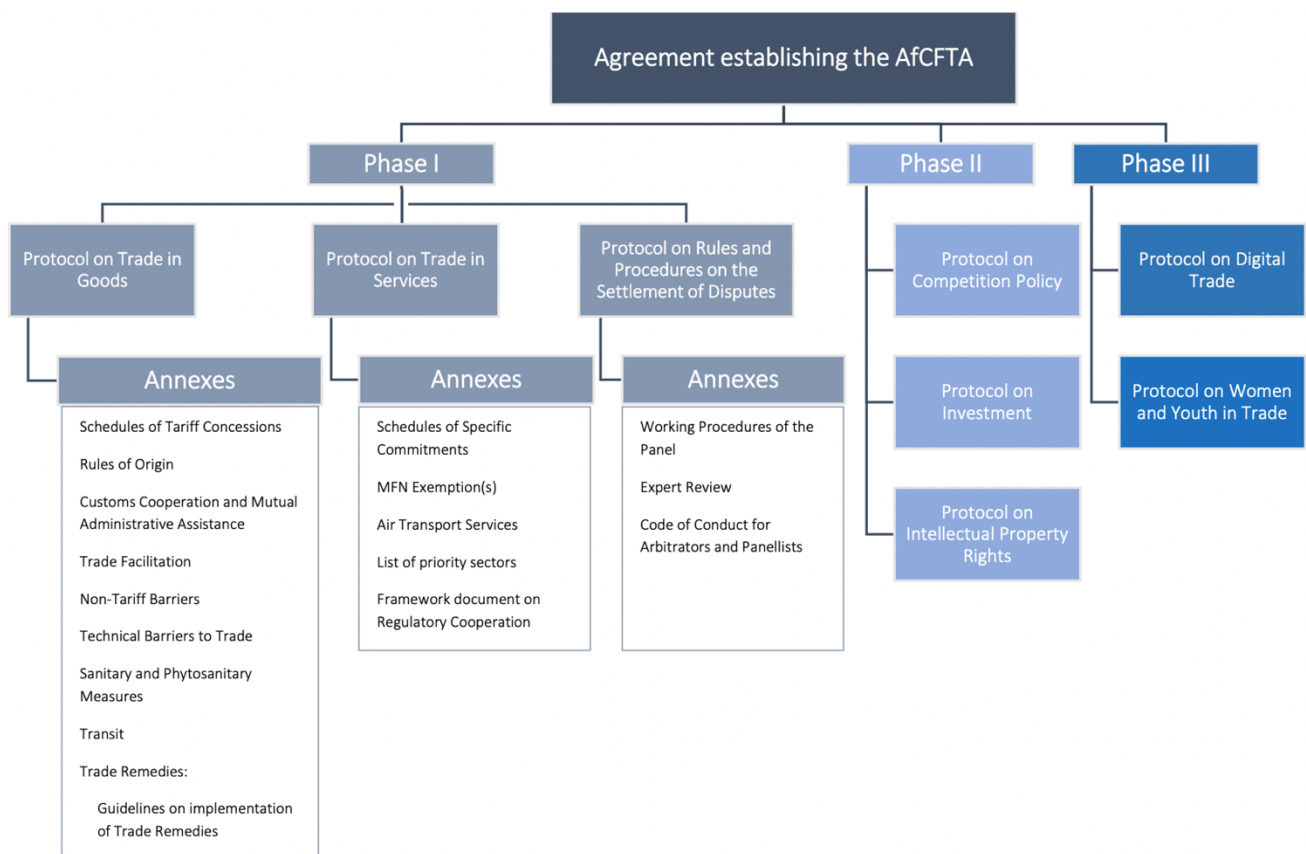
<https://www.tralac.org/documents/resources/cfta/4247-au-assembly-thirteenth-extraordinary-session-on-the-afcfta-decision-and-declaration-5-december-2020/file.html>

<sup>10</sup> Ibid.

**“Agreement”** means [in the legal instruments of the AfCFTA] this Agreement Establishing the African Continental Free Trade Area and its Protocols, Annexes and Appendices which shall form an integral part thereof. (Emphasis added.)

One should distinguish between the different legal instruments of the AfCFTA Agreement. The first is *“this Agreement Establishing the African Continental Free Trade Area”*. The others are the AfCFTA Protocols, which have their own Annexes and Appendices. (For Annex 9 to the Protocol on Trade in Goods, there are also *Guidelines on Implementation of Trade Remedies*.) The Protocols are detailed and have their own definition clauses.

The architecture of the AfCFTA as a collection of legal instruments looks as follows:



The Protocols listed here as *Phase II Protocols* deal with intellectual property rights, investment, and competition policy and are mentioned in Article 7 of the Agreement Establishing the AfCFTA. Subsequently, two additional protocols have been added through decisions of the Council of Ministers, namely on digital trade (initially covering e-commerce) and women and youth in trade. The latter were designated Phase III Protocols, but are often now included under Phase II of the AfCFTA negotiations.

It has to be noted that under the AfCFTA, existing trade arrangements, such as the Regional Economic Community (REC) Free Trade Areas, will continue with their own trade and integration agendas.<sup>11</sup>

### Interpreting international agreements

The *General Rule* for interpreting international agreements says a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective(s) and purpose. The context for the purpose of the interpretation of a treaty includes the text, its preamble and annexes, and any agreement relating to the treaty which was made between the parties.<sup>12</sup>

International agreements typically contain, at the beginning of the text, an Article on **definitions**. They explain the meaning of frequently used terms or those words that are essential for the understanding of subsequent provisions. The definition clause in an international agreement is actually the first port of call when the meaning of a term has to be determined.

To determine the nature and scope of the various obligations accepted by the State Parties under the AfCFTA legal instruments, one has to read the individual provisions **in their context** and pay attention to the language used. By way of example: Article 7(1) of the AfCFTA Protocol on Trade in Goods says that—

State Parties **shall** progressively eliminate import duties or charges having equivalent effect on goods originating from the territory of any other State Party in accordance with their Schedules of Tariff Concessions contained in Annex 1 to this Protocol. (Emphasis added.)

The meaning is clear, and the wording makes the national *Schedules of Tariff Concessions* in Annex 1 an additional source for explaining how trade in goods will be liberalised under the AfCFTA Agreement.

This provision has important implications: the AfCFTA is an FTA, not a customs Union (CU). The difference between the two is important: in an FTA, the Parties (the states belonging to the FTA in question) retain freedom over the use of the import tariff as a tool for domestic industrialisation, as well as over the conclusion of trade agreements with third parties (outsiders). In a CU, this is not the

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<sup>11</sup> The preservation of the *acquis* is one of the AfCFTA Principles mentioned in Art 5, AfCFTA founding Agreement. See also Art 19(2) AfCFTA founding Agreement and Art 8(2) of the AfCFTA Protocol on Trade in Goods.

<sup>12</sup> Art 31 VCLT.

case; the member states must act jointly in respect of the Common External Tariff (CET) and must respect the single customs territory of the CU in question.<sup>13</sup>

An example of where the AfCFTA Agreement uses very different language is Article 8(1) of the Protocol on Rules and Procedures on the Settlement of Disputes: *State Parties to a dispute **may** at any time voluntarily undertake good offices, conciliation, or mediation.* (Emphasis added.) The choice of wording is deliberate. Sovereign States are the parties to international agreements, and they are bound only by those obligations clearly accepted.

### **How did the AfCFTA Agreement come about and how did it enter into force?**

The 18th Ordinary Session of the Assembly of Heads of State and Government of the AU, which took place in Ethiopia in 2012, endorsed an action plan to boost Intra-African Trade (BIAT). It thus agreed on a way forward to establish the AfCFTA. At the [25th Ordinary Session of the Assembly of the AU](#) (which took place from 14-15 June 2015 in Johannesburg), a decision was taken [to launch the negotiations](#) for the establishment of the Continental Free Trade Area, as it was then called.

The first rounds of negotiations took place under the auspices of, and with support from, the AU Commission. Draft documents were prepared in order for representatives from the AU Member States to discuss them at formal meetings, to make offers, propose changes and additions, and eventually to agree on the texts of the instruments constituting the AfCFTA Agreement, which were subsequently tabled in Kigali in March 2018.<sup>14</sup>

Article 22 of the AfCFTA founding Agreement says the AfCFTA legal instruments must, once the negotiations are completed and a final text is available, be adopted by the Assembly of the AU. It adds: *This Agreement shall be open for signature and ratification or accession by the Member States, in accordance with their respective constitutional procedures.*

At the 10th Extraordinary Summit of the AU Assembly of Heads of State and Government held on 21 March 2018 in Kigali, Rwanda, 44 AU Member States signed the AfCFTA Agreement, the Kigali

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<sup>13</sup> For a definition of these 2 concepts see Art XXIV(8) GATT: *For the purposes of this Agreement: (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce ....are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and, (ii).... substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union; (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce... are eliminated on substantially all the trade between the constituent territories in products originating in such territories.*

<sup>14</sup> The legally scrubbed versions of the Agreement are available here: <https://www.tralac.org/resources/by-region/cfta.html#texts>

Declaration, and the Free Movement Protocol.<sup>15</sup> The latter two instruments do not form part of the AfCFTA Agreement. Since then, 54 AU Member States have signed the AfCFTA Agreement and [47 have already deposited their instruments of ratification](#) with the Chairperson of the African Union Commission, who is the depositary of the AfCFTA Agreement.<sup>16</sup>

### Who is bound by the AfCFTA legal instruments?

The parties to the AfCFTA Agreement are called the **State Parties**. They have rights and obligations under this Agreement and are members of AfCFTA institutions such as the Council of Ministers<sup>17</sup> and the Committee of Senior Trade Officials.<sup>18</sup> The relevant definition in the AfCFTA Agreement reads: *“State Party” means a Member State that has ratified or acceded to this Agreement and for which the Agreement is in force.*<sup>19</sup>

Only African States, Member States of the AU, can become AfCFTA State Parties. This flows from the fact that the term *Member State* is also defined: *When the term “Member States” is used in any of the AfCFTA legal instruments, it means the Member States of the AU.*<sup>20</sup> The AU has 55 Member States and all of them (except Eritrea) have been participating in these negotiations, which were launched in 2015.

No reservations shall be made to the AfCFTA Agreement.<sup>21</sup> It constitutes a “single undertaking” as defined in Article 8(2) of the AfCFTA founding Agreement:

The Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, Competition Policy, Rules and Procedures on the Settlement of Disputes and their associated Annexes and Appendices shall form part of the single undertaking, subject to entry into force.

All the State Parties are bound by these legal instruments. The expectation is, of course, that all 55 AU Member States will become AfCFTA State Parties and that trade on the whole continent (including island Member States) will be covered by the legal trade regime provided for in the AfCFTA Agreement.

Article 23(2) of the AfCFTA founding Agreement also adds that—

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<sup>15</sup> Further details on the launch of the AfCFTA are available at: <https://www.tralac.org/resources/by-region/cfta.html#legal-texts> and [AfCFTA: Towards the finalization of modalities on goods – Toolkit \(UNECA\)](#)

<sup>16</sup> Art 24 AfCFTA founding Agreement.

<sup>17</sup> Art 11 AfCFTA founding Agreement.

<sup>18</sup> Art 12 AfCFTA founding Agreement.

<sup>19</sup> Art 1(v) AfCFTA founding Agreement.

<sup>20</sup> Art 1(q) AfCFTA Agreement.

<sup>21</sup> Art 25 AfCFTA founding Agreement.

The Protocols on Investment, Intellectual Property Rights, Competition Policy and any other Instrument within the scope of this Agreement deemed necessary, shall enter into force thirty days after the deposit of the twenty second instrument of ratification.

The single undertaking feature apparently does not include subsequent AfCFTA Protocols.

*“Third Party” means a State(s) that is not a party to the AfCFTA Agreement, except as otherwise defined in this Agreement.*<sup>22</sup> Note, however, that in the Protocol on Rules and Procedures on the Settlement of Disputes, the term “Third Party” means “a State Party with a substantial interest in a dispute”.<sup>23</sup>

For some time, the term **Non-State Party** has been used in the context of the ongoing AfCFTA negotiations. This term does not appear in the AfCFTA legal instruments. It was coined in order to enable AU Member States which had not yet ratified the AfCFTA Agreement to participate in the ongoing negotiations, discussions, and meetings to finalise the outstanding work. Once the remaining work is completed (and as more ratifications are deposited), this term will become obsolete.

### **Where do private parties, firms and investors fit in?**

Private parties, firms, importers, exporters, and investors are not parties to the AfCFTA legal instruments. The State Parties are entitled to protect the interests of their nationals and may litigate and take up cases on their behalf.

Note, however, that investors have certain entitlements in terms of the AfCFTA Investment Protocol. Its Annex on dispute settlement, does, for example, grant investors a certain degree of standing in disputes with host countries. This Protocol (negotiations of which have been adopted<sup>24</sup>) has its own definition clause, where additional terms such as **“Home State”** and **“Host State”** are defined. The former means, in the case of a natural person, the State Party of nationality or citizenship of the investor. For legal persons, it will be the State Party of incorporation or registration of the investor. The latter means the State Party where the investment is made, undertaken, or located.

This Protocol defines “State Party” slightly differently, to mean a Member State of the AU that has ratified or acceded to this Protocol and for which it is in force. This is necessary because Article 23(2) of

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<sup>22</sup> Art 1(w) AfCFTA founding Agreement.

<sup>23</sup> Art 1(j) [AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes](#).

<sup>24</sup> Two Articles have been referred back to the Council of Ministers and are expected to be adopted by the AU Assembly before the end of the year.



the AfCFTA founding Agreement says that Phase II Protocols shall enter into force through their own procedure, thirty days after the deposit of the twenty-second instrument of ratification.

**Trade Remedies and safeguards** are a specialised area of trade governance and involve domestic Investigating Authorities. The national courts may hear applications to review their decisions.

Private entities do enjoy standing under the legal instruments of ECOWAS, COMESA and the EAC and may lodge complaints in the Courts of Justice of these three RECs. The [Protocol of the SADC Tribunal allowed the same, until it was abolished in 2011](#) after a ruling against Zimbabwe in a matter involving the expropriation of private land without compensation. Cases involving domestic trade governance issues may be decided by States' national courts and tribunals if they have the required jurisdiction.

We can conclude this discussion by observing that the AfCFTA legal regime is comprehensive, detailed, and designed for the needs of the State Parties while preserving existing trade arrangements. It provides a platform for boosting intra-African trade and economic integration, and enhancing Africa's global trade. The benefits to be had will depend on the State Parties' domestic and regional trade governance reforms and how they implement this Agreement. It is not self-executing.