

The Obligations to be implemented by the AfCFTA State Parties

Factsheet

The immediate objective of the African Continental Free Trade area (AfCFTA) is to liberalise trade in goods and in selected services sectors among those Member States of the African Union (AU) that have joined this arrangement. A member-driven Free Trade Area (FTA), not a Customs Union (CU), has been established for this purpose. The long-term objectives to deepen the economic integration of the African continent and to contribute to the movement of capital and natural persons,¹ will take time and will require further negotiations and agreements by the State Parties.

In order to achieve the objectives that are now part of the AfCFTA, the obligations already agreed upon, and written up in the AfCFTA's founding Agreement and its Phase I Protocols², must be implemented by the State Parties. Only they have rights and obligations under this Agreement. At present (early August 2021) 37 of the AU's 55 Member States have ratified the AfCFTA Agreement, which is in force since 30 May 2019. However, preferential trade under AfCFTA rules can only begin once all the outstanding matters (tariff schedules, rules of origin and the conditions for trade in five priority services areas³) have been finalized. It is expected that the remaining negotiations will be completed by the end of 2021.

Trade in goods in an FTA takes place in terms of each Party's **tariff schedules** and the concomitant **rules of origin**. The latter identifies the goods entitled to preferential treatment in a specific FTA. Since the AfCFTA will co-exist with African FTAs in specific Regional Economic Communities (RECs), there will be different preferential tariff regimes with their own rules of origin on the continent. Private firms will do well to study and comp-

¹ Art 3 AfCFTA Agreement.

² On Trade in Goods, Trade in Services and Dispute Settlement.

³ Transport, communication, financial, tourism and business services.

are the exact scope of preferences and of rules of origin under existing REC FTAs and those to be provided for in the AfCFTA Agreement.

Trade liberalisation requires that the obstacles that block freer trade must be removed by the Governments of the State Parties in the manner and within the timeframes agreed upon. Obstacles to trade come in the form of protectionist national policies, high tariffs, non-tariff barriers, unreliable and cumbersome customs procedures, lack of transparency, bureaucratic obstacles, the cost of doing business, uncertainty about the rights of firms, service providers and investors etc. The AfCFTA has Annexes on Trade Facilitation, transit, cooperation in Customs Administration and the removal of NTBs. They spell out the more detailed tasks that are required and how the State Parties, through their responsible Ministries and organs, must work together to achieve better border governance and improve trade facilitation.

The AfCFTA strives to provide for a comprehensive regime. Its disciplines also allow for exceptions and the freedom of State Parties to restrict or regulate trade in goods and services, as per the agreed rules. Regulatory freedoms (for example, sanitary and phytosanitary needs and in respect of services) and the specific exceptions,⁴ are conditional and justiciable. They do not create open-ended discretions.

In an FTA, which the AfCFTA establishes, the Parties retain policy space over matters such as the conclusion of preferential trade agreements with third parties, as long as they will not impede or frustrate the objectives of the AfCFTA.⁵ This is standard practice and fully understandable; less than 20% of the goods produced in Africa are sold in other African markets. The AfCFTA wants to boost intra-African trade and increase this low level of trade on the continent. This will obviously require many additional actions, policies, and resources to boost industrialisation, to become more competitive and to improve Africa's infrastructure. Agreements do not create trade. If properly implemented, they create new enabling conditions to make it easier and more lucrative to do business across borders.

Once trade under the AfCFTA begins the State Parties must 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. For products subject to liberalisation, they shall not impose any new import duties or charges having equivalent effect on goods originating from the territory of any other State Party.⁶

⁴ See Arts 26 – 28 AfCFTA Protocol on Trade in Goods.

⁵ See, for example, Art 4 AfCFTA Protocol on Trade in Goods.

⁶ Art 7 AfCFTA Protocol on Trade in Goods.

Rules of origin are central to the functioning of an FTA. Under AfCFTA rules goods shall be eligible for preferential treatment if they are originating in any of the State Parties in accordance with the criteria and conditions set out in Annex 2 on Rules of Origin, and in accordance with the relevant Appendix.⁷ The AfCFTA rules of origin must still be finalized.

The State Parties shall not impose quantitative restrictions on imports from or exports to other State Parties except as otherwise provided.⁸ Export duties are permissible under certain conditions.⁹ Non-tariff barriers (NTBs) must be removed as per the more detailed obligations listed in Annex 5 of the AfCFTA Protocol on Trade in Goods.¹⁰

Trade governance and implementation are about **what** the Parties must do and **how** they must fulfil their obligations. In this regard the AfCFTA Protocol on Trade in Services is a good example. Trade in services will take place in accordance with the four modes of supply also found in the General Agreements on Trade in Services (GATS) of the WTO. They explain how the supply of services can take place from the territory of one State Party into the territory of another State Party; in the territory of one State Party to the service consumer of any other State Party; by a service supplier of one State Party, through commercial presence in the territory of any other State Party; and by a service supplier of one State Party, through presence of natural persons of a State Party in the territory of any other State Party.¹¹

The regulation of trade in services involves the regulation, by special **regulatory bodies** or institutions such as the national Central Bank, of specific services sectors and services suppliers. Services are regulatory intensive. However, national and foreign service suppliers are entitled to fair and non-discriminatory treatment. Non-discriminatory treatment is mandatory. Each State Party shall accord services and service suppliers of any other State Party treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule of Specific Commitments.¹²

Treaty obligations apply, in the first instance, on the inter-state level. In order to implement the various commitments in such Agreements and to give effect to obligations about liberalizing trade, domestic follow-up measures are required. The national tariff book must be updated, procedures be put in place to issue all the necessary certificates, regulations must be promulgated where permits, quotas or export

⁷ Art 13 AfCFTA Protocol on Trade in Goods.

⁸ Art 9 AfCFTA Protocol on Trade in Goods.

⁹ Art 10 AfCFTA Protocol on Trade in Goods.

¹⁰ Art 12 AfCFTA Protocol on Trade in Goods.

¹¹ Art 1(p) AfCFTA Protocol on Trade in Services.

¹² Art 19(1) AfCFTA Protocol on Trade in Services.

taxes are at stake, testing for compliance with standards is necessary, the intellectual property rights of foreigners must be protected in the same manner as those of domestic IP owners etc.

Different Ministries will be responsible for these tasks. The implementation of trade related policies and the compliance with obligations in trade agreements is a specialized task which requires policy coherence and special effort to prevent fragmentation and to remove blockages in the communication with private sector stakeholders.

The day-to-day administration of trade involves respect for the rule of law, transparency,¹³ and due process (administrative justice). When officials exercise their discretions and perform their tasks, they must respect basic standards of fairness reasonableness and justice. Article 9 of the Protocol on Trade in Services for example states that *“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”*. They shall also *“maintain or institute, as soon as practicable, judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the State Party shall ensure that the procedures in fact provide for an objective and impartial review”*.

Joint institutions play an important role in the implementation of Trade Agreements. Article 31 of the AfCFTA Protocol on Trade in Goods contains a general provision on *Implementation, Monitoring and Evaluation*. The Council of Ministers must establish the **Committee on Trade in Goods**, which shall carry out such functions as may be assigned to it by the Council of Ministers to facilitate the operation of this Protocol. The Committee may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions. Representatives of all State Parties will participate in its functions. There will also be a **Committee on Trade in Services**.¹⁴ It will function along similar lines.

What happens when these international obligations are violated? In a rules-based trade regime a dispute can be declared. This process starts with consultations. The aim is to ensure that the offending Party will bring its law and practice into conformity with its obligations. If it fails to do so within a reasonable period of time, the complainant may obtain authorisation to suspend concessions at a level equivalent to the consequences of the violation.

¹³ See Art 5 AfCFTA Agreement on Trade in Services.

¹⁴ Art 26 AfCFTA Protocol on Trade in Services.

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