How will the AfCFTA protect the Rights of Private Parties?

Factsheet

The African Continental Free Trade Area (AfCFTA) is designed as an inter-State arrangement. Private parties engaged in trade and commerce across the borders of the State Parties, being involved as exporters, importers, or service suppliers, do not have rights under this regime. The protection and accommodation of their rights and interests will, in principle, depend on how the States where they are incorporated or are doing business, will treat them.

Should they fall under the ambit of the AfCFTA Protocol on Investment (still to be negotiated and adopted) they may enjoy rights and obligations as provided by that legal instrument, but indications are that the AfCFTA foresees this to be a **cooperation** arrangement.[1] The host states will have the final say over investors and investments.

The AfCFTA will also co-exist with the Regional economic Communities (RECs) operating as Free Trade Areas (FTAs).[2] Private firms and exporters of goods manufactured in a particular member state of a REC FTA face different rules of origin regimes when goods are exported to other African destinations. The AfCFTA recognises this challenge. One of its general objectives is to "*resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes*".[3] How this will be done is not yet clear, in particular since it is also stated (in the Protocol on Trade in Goods) that "*State Parties that are members of other RECs, which have attained among themselves higher levels of elimination of customs duties and trade barriers than those provided for in this Pro-*

[1] Art 4(c) AfCFTA Agreement.
[2] Art 19(2) AfCFTA agreement and Art 8(2) AfCFTA Protocol on trade in Goods.
[3] Art 3 (h) AfCFTA Agreement.

tocol, ***shall maintain****, and where possible improve upon, those higher levels of trade liberalisation among themselves*".[4] (Emphasis added.)

Against this background it is necessary to look at how private party rights will be affected and protected when the AfCFTA is operational. The decisions of firms to invest in new continental deals and to pursue the commercial prospects promised by the AfCFTA regime, will quite directly impact on its implementation and how successful the AfCFTA will be in boosting intra-African trade in goods and services.

Security and predictability are essential features of a rules-based trading arrangement. To ensure rules-based outcomes, compliance should be monitored, and violations of obligations be adjudicated. Dispute settlement by an independent and impartial adjudicating system is a central element in providing security and predictability. However, private parties will not have direct access to the dispute settlement mechanism of the AfCFTA; only State Parties can litigate thereunder. Nor can they rely on rights granted by the AfCFTA Agreement and Protocols, as they lack direct effect. There might be national constitutions in some African states allowing for international agreements to be part of the law of the land, but this does not mean the rights of private parties can enforced when they complain about violations by foreign governments. Domestic Courts do not have jurisdiction over foreign States.

In the WTO context, private parties can, and often do, exert influence or even pressure on the government of a WTO Member with respect to the triggering of a dispute under the DSU. Several WTO Members have formally adopted internal legislation under which private parties can petition their governments to bring a WTO dispute.[5] This possibility does not figure in African States, but in the Courts of Justice of the EAC, COMESA and ECOWAS private parties do have standing to bring claims (under certain conditions) when REC legal instruments have been violated. Very few such cases concern the violation of trade agreements or protocols.[6] Most such private applications involve human rights violations. This may change as private litigators in the RECs begin to explore additional dispute settlement avenues.

Private parties will have to look at other forms of dispute settlement; where they could, as a consequence of how the AfCFTA will be implemented, be litigants. Examples are the proceedings to be followed in respect of trade remedy and safeguard investigations and when private parties (such as service providers)

[4] Art 8(2) AfCFTA Protocol on Trade in Goods.

[5] WTO n.d. Introduction to the WTO dispute settlement system: 1.4 Participants in the dispute settlement system

[6] The best-known example of a REC case about the violation of a trade related obligation is the *Polytol* judgment of the COMESA Court of Justice. For a discussion of the case, see https://www.tralac.org/publications/article/7604-the-polytol-judgment-of-the-comesa-court-of-justice-implications-for-rules-based-regional-integration.html

invoke due process (administrative justice) rights under the constitution or the municipal law of a particular State Party. The identity of the parties to a dispute, the nature of the issues to be decided, and the identity of the forum dealing with the matter are relevant factors. Trade remedies and safeguards are *sui generis*. Multilateral Trade Agreements allow for anti-dumping, countervailing and safeguard measures. The relevant investigations can be triggered by private complaints. Investigations are to be conducted in terms of due process rules. Due process is the key. Judicial review in local courts must be provided for. However, only a very small number of African States have the domestic laws and institutions in place to conduct trade remedy and safeguard investigations and even fewer use them regularly. The AfCFTA Protocol on Trade in Goods has a detailed Annex on Trade Remedies and Safeguards (based on WTO principles). Hopefully there will be concerted efforts to improve this important area of trade governance.

The domestic regulation of trade and commerce involves a wide spectrum of public powers exercised under specific policies and legal instruments. They involve matters such as permits, quotas and regulatory restrictions on trade in goods and services. If such powers are exercised in an ultra vires manner or are abused, rights are violated, and welfare gains are affected. Affected private parties can apply to domestic courts for suitable due process (administrative justice) remedies. Areas where this should be pursued more vigorously, are customs administration and trade facilitation. Non-compliance with trade facilitation requirements (for example, in the form of pervasive Non-Tariff Barriers) are extremely costly.

The AfCFTA Protocol on Trade in Services contains detailed provisions on transparency and the notification (to other state Parties and via the Secretariat).[7] However, these are couched as rights and responsibilities of the State Parties. They will only benefit private parties if incorporated into municipal law and if duly published. The AfCFTA Secretariat can make a major contribution to transparency under the AfCFTA ensuring that State Parties comply with this obligation and by publishing such notifications on its website. If private parties can obtain the required information in this manner, they will find it much easier to pursue domestic remedies and even to invoke national constitutional remedies.[8]

Judicial review must also be provided for:

> *In sectors where specific commitments are undertaken, 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 [and] shall maintain or institute, as soon as*

[7] Art 5 AfCFTA Protocol on Trade in Services.

[8] There are examples of court rulings to the effect that the obligations accepted under treaties must be complied with domestically. See *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19.

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.[9]

Judicial Review of administrative action is at the heart of administrative law and vital for compliance with the rule of law. Aspects of administrative acts that may be scrutinised by the judicial process are the competence of a public authority, the extent of its legal powers, the fairness of procedures, the evidence considered in arriving at administrative decisions, the motives underlying decisions, and the nature and scope of the discretionary power. An administrative act/decision can be invalidated on any of these grounds if the reviewing court has jurisdiction and the applicant has locus standi. Locally incorporated firms will have standing before domestic courts.

Public procurement decisions should also be justiciable. States needs to spend to deliver services. The public procurement processes by which governments purchase goods and services should involve a transparent bidding process, subject to specific rules, procedures, and policies. Where available, national public finance legislation normally applies, and corruption should be tackled more strenuously. Courts can overturn tender-related decisions by state organs. Access to information is, however, often a challenge.

Investment related disputes fall in a special category. Under Bilateral Investment Treaties (BITs) it has become possible for private investors and funds to sue host states directly, usually via international arbitration. This has become a highly controversial matter, also in developed countries. Governments' space to act in the public interest is said to be affected adversely. This picture is changing. New generation trade agreements provide for special forums to adjudicate investment related disputes. In other cases, recourse to domestic courts has become the rule. It is expected that the AfCFTA Investment Protocol will follow the same approach.

The AfCFTA is a State-driven regime, despite promises about future legal *certainty and predictability. Article 4 of the Protocol on Rules* and Procedures on the Settlement of Disputes states that the dispute settlement mechanism of the AfCFTA "*is a central element in providing security and predictability to the regional trading system*". However, the AfCFTA dispute settlement mechanism shall only "*preserve the rights and obligations of State Parties under the Agreement and clarify the existing provisions of the*

[9] Art 9 AfCFTA Protocol on Trade in Services.

Agreement in accordance with customary rules of interpretation of public international law". This rather old-fashioned approach needs to be brought in line with the needs of the times and provide for suitable private remedies. Legal certainty and predictability in trade and integration regimes are about much more than the traditional rights of states. There will be substantial gains if the proper accommodation of private party rights and interests is appraised as part and parcel of rules-based trade.

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