CDH Insights on the African Continental Free Trade Area

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FOREWORD

BY JACKWELL FERIS AND NJERI WAGACHA

What is the African Continental Free Trade Area?

Signed on 21 March 2018 by 44 of Africa's 55 states, the agreement establishing the African Continental Free Trade Area (AfCFTA Agreement) came into force, after reaching the required level of ratifications, on 30 May 2019. The AfCFTA Agreement has ushered in the world's largest trade area (by the number of participating states) with a population of about 1,3 billion people and a combined GDP of U$3,4 trillion.

Today, 54 out of 55 African states have signed the AfCFTA Agreement, with Eritrea being the sole non-signatory. The AfCFTA launched its operational phase in July 2019 and trade under the AfCFTA Agreement commenced on 1 January 2021. Of the 55 African states, 37 have ratified the AfCFTA Agreement to date - with the last state to have done so (at the time of publication) being Burundi on 6 July 2021.

The World Bank estimates that the effective implementation of the AfCFTA Agreement will, among others, increase the volume of intra-Africa trade by 81% by 2035, and increase total African exports by 29%. That in turn implies an increase of GDP by $450 billion or 7% per annum, lifting at least 30 million people out of extreme poverty by 2035.

What are the main objects of the AfCFTA Agreement?

To create a single market for the trade goods and services on the continent, facilitated by the free movement of business persons and investments.

To significantly increase economic growth and development on the continent through an integrated single market for goods and services.

The AfCFTA Agreement creates a legal framework covering the following critical areas:

- Trade in goods.
- Trade in services.
- Investment.
- Intellectual property.
- Competition policy.

In parallel with the adoption of the AfCFTA Agreement, the Protocol to the Abuja Treaty was opened for signature at the 2018 African Union (AU) Summit in Kigali. Yet to come into force, the Protocol acts as a catalyst to the African economic community, championing the free movement of persons, right of residence and right of establishment within Africa. Its provisions include the intention to abolish visa requirements and the introduction of the African Passport. The Treaty also obliges State Parties to mutually recognise academic, professional and technical qualifications.

The Pillars of the AfCFTA Agreement

The implementation of AfCFTA will occur in phases. Phase I covers Trade in Goods, Trade in Services and the Rules and Procedure on the Settlement of Disputes.

Effective 1 January 2021, the integral instruments that regulate trade in AfCFTA are (with ongoing negotiations on several annexures):

THE PROTOCOL ON TRADE IN GOODS

Annexures:

- Schedule of Tariff Concessions.
- Rules of Origin.
- Customs Cooperation and Mutual Administrative Assistance.
- Trade Facilitation.
- Non-Tariff Barriers.
- Technical Barriers to Trade.
- Sanitary and Phytosanitary Measures.
- Transit.
- Trade Remedies.

THE PROTOCOL ON TRADE IN SERVICES

Annexures:

- Schedule of Specific Commitments.
- Most Favoured Nation Exemptions(s).
- Air Transport Services.
- List of Priority sectors.
- Framework of Regulatory Co-Operation.

THE PROTOCOL ON THE RULES AND PROCEDURE ON THE SETTLEMENT OF DISPUTES

Annexures:

- Working Procedure of the Panel.
- Expert Review.
- Code of Conduct for Arbitrators and Panellists.

As part of Phase II, the Protocol on Investment, Protocol on Competition Policy and Intellectual Property Rights is still being negotiated. There is also discussion on a Protocol on E-Commerce – which will either be under Phase II or Phase III negotiations.

The successful Implementation of the AfCFTA has the following benefits for African businesses

THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)

HOW CAN AfCFTA BENEFIT AFRICAN BUSINESSES?

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REDUCTION OR NO TARIFFS ON GOODS

The gradual phase out of tariffs by member states depending on the developmental status of each member state.

ACCESS TO THE MARKET

- Removal of non-tariff barriers.
- Service suppliers will have access to the markets of all African countries on terms no less favourable than domestic suppliers.
- The progressive elimination of unjustifiable technical barriers to trade (i.e. technical standard, technical regulations).

A CONTINENTAL FRAMEWORK FOR TRADE

- Establishment of a continental framework for trade in goods and services.

TRADE REMEDIES AND DISPUTE SETTLEMENT MECHANISM

- Recourse to trade remedies to ensure that domestic industries are safeguarded, if necessary.
- A rule-based avenue for the resolution of any disputes that may arise between State Parties in the application of the agreement.

REGIONAL VALUE CHAINS AND IN-COUNTRY VALUE ADDITION

- Regional value chains in which inputs are sourced from different African countries to add value for either intra-African trading or exporting from Africa.

FREE MOVEMENT OF CAPITAL AND BUSINESS TRAVELLERS

- The free transfer of funds within AfCFTA.
- The free movement of businesses travellers within AfCFTA .

LIBERALISED POLICIES AND HARMONISATION OF REGULATORY FRAMEWORK

- Harmonisation of trade-related policies and regulation.
- Liberalised policies on competition, intellectual property, e-commerce.
- Mutual recognition of standards, licensing and certification of service suppliers will make it easier for businesses and individuals to satisfy the regulatory requirements of operating in each other's markets.

INVESTMENT PROTECTION UNDER THE PROPOSED PROTOCOL ON INVESTMENT (NEGOTIATED UNDER PHASE II)

- Critical for decision-making for investment in trade-related infrastructure and investments in regions on the continent considered as high-risk investment jurisdictions.

BENEFITS FOR AFRICAN BUSINESSES INCORPORATED WITHIN A MEMBER STATE OF THE AfCFTA

What will be the benefits for business players in africa?

- Reduction or no tariffs on goods [gradual phase out of tariffs by member states depending on developmental status of each member state].
- Removal of non-tariff barriers to access the market.
- The progressive elimination of unnecessary and unjustifiable technical barriers (i.e. technical standard, technical regulations) to trade.
- Establishment of a continental framework for trade in goods and services.
- Employees of businesses will have free movement within AfCFTA.
- Free movement of capital (transfer of funds).
- Investment protection under the Protocol on Investment.
- Liberalised policies on competition and intellectual property, e-commerce.
- Service suppliers will have access to the markets of all African countries on terms no less favourable than domestic suppliers.
- Mutual recognition of standards, licensing and certification of service suppliers will make it easier for businesses and individuals to satisfy the regulatory requirements of operating in each other's markets.
- The creation of regional value chains in which inputs are sourced from different African countries to add value before exporting.
- Recourse to trade remedies to ensure that domestic industries are safeguarded, if necessary.
- A dispute settlement mechanism provides a rule-based avenue for the resolution of any disputes that may arise between State Parties in the application of the agreement.

Who can access the benefits under AfCFTA?

African businesses incorporated within a member state of the AfCFTA.

How can you access the benefits?

African businesses planning to export/import goods intra-Africa under the AfCFTA will need to ensure the goods comply with the requirements set out in several of the annexures to the AfCFTA Agreement (as domesticated by each State). Of particular importance will be the import requirement under Annex: Rules of Origin – aspects of which is still being negotiated by member states. Compliance by businesses with, amongst others, the "*Rules of Origin*" requirements for the import/export of goods intra-Africa is critical to derive benefits under the AfCFTA. The "*Rules of Origin*" are essentially "*local content requirements*" to ensure that foreign goods (i.e. Chinese, American etc) do not derive the benefits under the AfCFTA. This encourages foreign manufacturers and producers of goods to establish manufacturing/production hubs on the continent to benefit from the preferential trade regime under the AfCFTA Agreement. In turn this contributes to the industrialisation of the continent's economy to realise the AfCFTA's objectives.

For the purpose of establishing new enterprises for regional manufacturing and production hubs, there may well be a requirement for investors (whether African or foreign) to assess whether a new or restructured enterprise qualifies for protection under instruments such as the Investment Protocol (being negotiated under phase II) of the AfCFTA Agreement. The Protocol on Investment will have separate ratification requirements to the AfCFTA Agreement for each signatory State. The Protocol on Investment will be of particular importance to Intra-Africa investors (or investors structured as such) as it intends to provide investors protection for investments and related guarantees such as:

- Expropriation and Compensation: Guarantees against unlawful expropriation.
- National Treatment.
- Most-Favoured Nation Treatment.
- Full protection and security.
- Fair and Equitable Treatment or Minimum Standard of Treatment Requirements (to the extent included, due to its controversial nature).
- Investor-State Dispute Resolution (either direct recourse to international arbitration by investors against state or an African Investment Court or restriction to domestic court system).
- Transfer of Funds.

The Protocol on Investment is expected to align to the Draft Pan-African Investment Code, December 2016 which has as its objective to promote, facilitate and protect investments that foster the sustainable development of African States and in particular, the state where the investment is located.

How do business players access the benefits under AfCFTA:

- Understanding the Rules and related domestic legislation (Domestication of Rules): customs and non-customs requirements.
- Ensuring businesses conform to specific rules to derive benefits.
- Structure business to the extent necessary – taking into account existing bilateral or multilateral investment agreements, domestic legislation of each host State and eventually the Protocol on Investment.

Enforcing the AfCFTA Benefits:

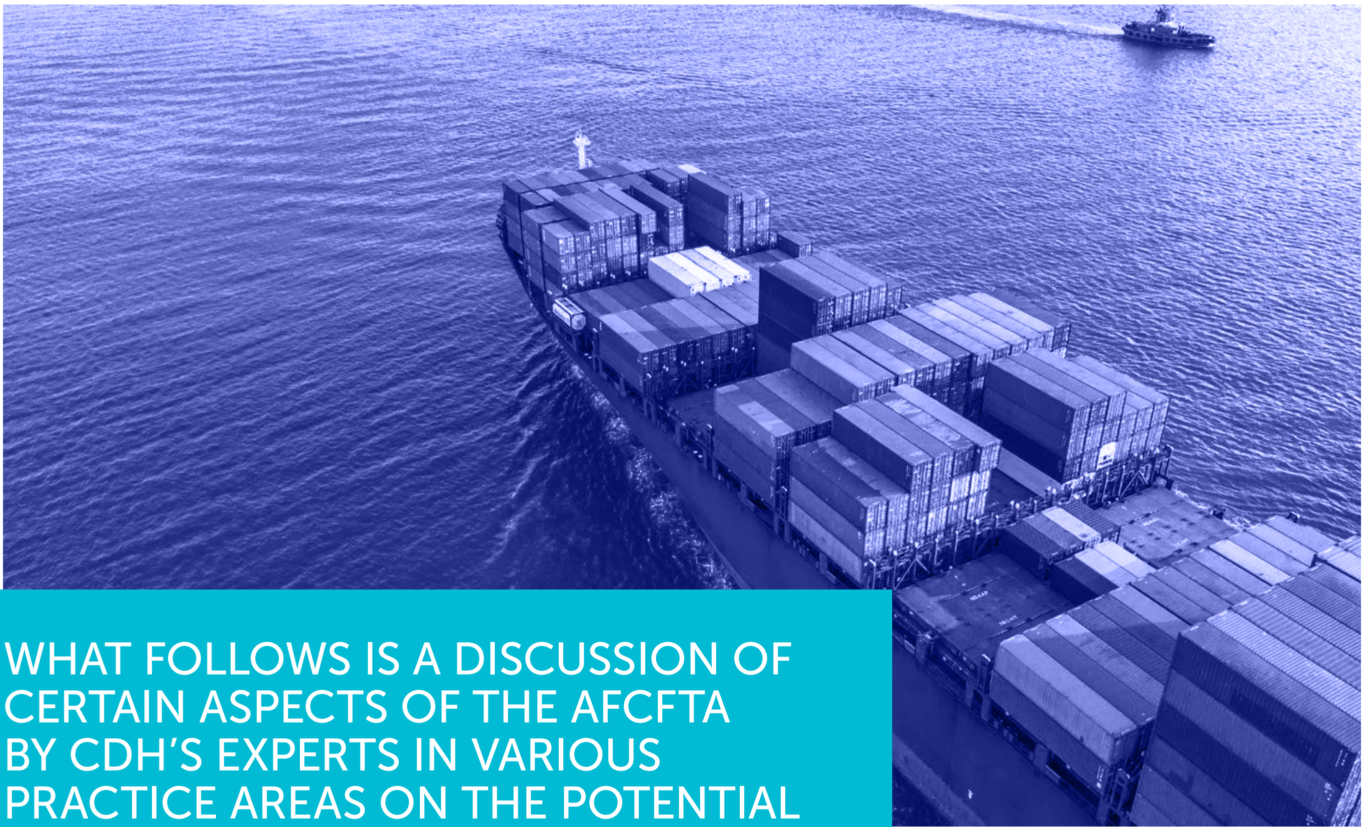
- Report non-compliance by State Parties of Rules under the AfCFTA Agreement and related instruments.
- The ability to lodge complaints with the state from which you derive nationality against the non-compliance by member states your business is conducting trade or has an new established business.
- Ability to put pressure on state of your nationality to initiate disputes under the Dispute Settlement Protocol.

Why is the AfCFTA necessary at this moment in time?

African businesses must be the driving force to realise the objectives of AfCFTA. Whether you are a producer, supplier, distributor or retailer of goods or a services provider (banking & financial services, telecommunications, professional services etc) there is tremendous scope for growth and development on the continent.

What opportunities does the AfCFTA present to African businesses?

- Expansion of revenue streams by opening up markets that were previously difficult to access.
- Connecting businesses with trading partners on the continent.
- Establishing new trade routes.
- Establishes new manufacturing/assembly hubs or service centres.
- Domestication of Rules and harmonisation of regulation.



WHAT FOLLOWS IS A DISCUSSION OF CERTAIN ASPECTS OF THE AFCFTA BY CDH'S EXPERTS IN VARIOUS PRACTICE AREAS ON THE POTENTIAL OF THE AfCFTA FOR AFRICA

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Investment Protocol: critical for the success of the AfCFTA

BY JACKWELL FERIS

The African Continental Free Trade Area (AfCFTA) is the continent's most ambitious economic project yet. The realisation of the AfCFTA's objectives would significantly contribute to the growth and development of African economies over the next few years. However, there remain several hurdles that African states must overcome in the short to medium term in order to effectively implement and realise the objectives of the AfCFTA. The biggest of these challenges will be dealing with the poor state of roads, railways, port facilities and telecommunications infrastructure. There is thus a need for significant investment in trade-related infrastructure through initiatives such as the African Union's (AU) Programme for Infrastructure Development.

The Protocol on Investment (Protocol) is a critical AfCFTA instrument to foster intra-Africa investments. Its terms are, however, still being negotiated as part of Phase II of the AfCFTA negotiations. The Protocol is important because it will provide investors with additional legal protection to mitigate against investment risk on the continent. Such protections are expected to include several protection standards typically found in new generation investment treaties on the continent and to reflect the policy position of African states on investment protection as espoused in the Draft Pan African Code on Investment of 2015 (Draft Investment Code).

The Draft Investment Code sets out the policy position of African states on the fundamental investment protection standards required on the continent and is generally viewed as the foundation for any future investment protection instruments on the continent. It is therefore expected that Protocol will reflect, to a large extent, the fundamental aspects of the Draft Investment Code.

The standards of protection that can be expected in the Protocol are:

- expropriation and compensation;
- the Most Favoured Nation Treatment standard;
- National Treatment standard; and
- free transfer of funds.

Save for the standards listed above, it is unclear whether the Protocol will contain provisions such as the Fair and Equitable Treatment (FET) Standard or, at the very least, the Minimum Standard of Protection, standard found under customary international law, and whether intra-African investors will have recourse through investor-state arbitration or a pan-African investment court, or whether investors will be limited to domestic courts.

The Draft Investment Code appears to suggest that the Protocol will omit the FET Standard entirely and that access to investor-state arbitration will be subject to the policy position of a particular host government. It is not clear what role investor-state arbitration will ultimately play under the Protocol as a direct enforcement mechanism for investors of guarantees or commitment by host states. The current position expressed by African states in the Draft Investment Code is that investment disputes between investors and African states "*may be resolved through arbitration, subject to the applicable laws of the host state and/or the mutual agreement of the disputing parties, and subject to exhaustion of local remedies*". And so, it would seem that the Protocol will not, by default, introduce consent to arbitration by African states. The result being that there will be no automatic right by any intra-African investor to enforce the guarantees under the Protocol, watering down the guarantees and commitment to investors.

AfCFTA member states must fast-track the negotiation of the Protocol as it will play a critical role in driving private sector investment in trade-related infrastructure. There is also a need for more transparency by the AU on the status of various critical instruments of the AfCFTA, including the Protocol. Such transparency will ensure that the private sector can actively participate in providing the input and support necessary to ensure the AfCFTA's success.

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