

CDH Insights on the African Continental Free Trade Area



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 US\$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)



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.



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.

HOW CAN AfCFTA BENEFIT AFRICAN BUSINESSES?



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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.



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.



FREE MOVEMENT OF CAPITAL AND BUSINESS TRAVELLERS

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

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.



Currently only 37 States have deposited their respective instruments of ratification with the Secretariat.



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 a 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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Successful implementation of the AfCFTA will be a catalyst for strong M&A activity

BY NJERI WAGACHA

Mergers and acquisitions (M&A) activity in Africa has been slowly declining since 2016. Africa's huge reliance on foreign direct investment has meant that international and regional factors such as the US's political landscape, the UK's decision to leave the European Union, and political instability on the continent affecting investor confidence have contributed to this slow decline. To make the situation more dire, the economic impact of COVID-19 in Africa has been severe. Due to the uncertainty of the effect of the virus, M&A activity in 2020 dropped significantly, with investors choosing not to complete deals and enforcing implementation delays as some contractual obligations were impossible to perform. Now, governments and investors are learning to live with and circumvent the virus. As a result, M&A activity is gradually picking up again and there is no doubt that the African Continental Free Trade Area (AfCFTA), if successfully implemented, could be a significant catalyst for M&A growth on the continent.

For Africa to achieve the laudable objectives of economic growth and development under the AfCFTA there will need to be significant investment by African and foreign investors to establish regional and continental value chains. These value chains will be necessary to ensure efficient supply and distribution of goods on the continent. The biggest driving forces for M&A will be regional value addition that is incentivised by the six key mechanisms outlined below.

1. Elimination of tariffs and non-tariff barriers for trade in goods

Article 7 of the Protocol of Trade in Goods (Protocol) requires member states to eliminate import duties or charges and prohibits member states from imposing new import duties. Under Articles 8 and 12, the Protocol also provides for member states to eliminate non-tariff barriers but allows them to apply preferential tariffs to imports for other member states. However, member states that are members of regional economic communities, such as the East African Community, that have attained a higher level of elimination of customs duties shall maintain the agreed rates and are even encouraged to negotiate better rates.

2. Co-operation on investment measures

Article 20 of the Protocol encourages member states to co-operate on trade remedies, especially in the areas relating to anti-dumping, countervailing and safeguarding investigations.

3. Standardisation of goods

The Protocol, under Articles 21 and 22, also provides for technical and sanitary standardisation for products being imported and exported in accordance with the technical barriers to trade and sanitary and phytosanitary measures annexed to the Protocol.

4. Co-operation on customs matters and the implementation of trade facilitation measures

The Protocol promotes administrative co-operation by eliminating quantitative restrictions on the imports of goods (Article 9) and encouraging co-operation with respect to mutual administrative custom assistance.

5. Promotion of collaboration in all trade-related areas

The Protocol encourages member states, regional economic communities, partners and the secretariat to co-ordinate and provide technical assistance and capacity building in trade and trade-related areas to enhance co-operation for the implementation of the Protocol.

6. Establishment and maintenance of an institutional framework for the implementation and administration of the AfCFTA

Articles 30 and 31 establish a committee on the trade in goods to implement, monitor and evaluate the success of the Protocol.

Through the establishment of regional value chains and the successful implementation of the incentives under the AfCFTA, we anticipate a significant increase in M&A activities on the continent in industrials, manufacturing, agriculture, the financial sector, technology, infrastructure and urbanisation.

Successful implementation of the AfCFTA will be a catalyst for strong M&A activity

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It is hoped that the AfCFTA will enhance competitiveness within the manufacturing industry through the exploitation of opportunities for large-scale production, continental market access and better allocation of resources. The Protocol will enhance diversification and regional value chain development. In essence, a local or foreign investor looking to set up shop in Rwanda, for instance, will have the ability to supply their manufactured product to other member states, such as the Democratic Republic of Congo. Manufacturers will also be looking to take advantage of the supply chains within different member states by collaborating with suppliers and local and regional manufacturers within member states. We echo the World Economic Forum's view that *"there is no sector that creates jobs, deepens local value chains, encourages the growth of a service economy and embeds intellectual property quite like manufacturing."*

Additionally, the agricultural sector in Africa is expected to boom with the elimination of import duties. The agricultural industry has huge potential for growth as 60% of the world's uncultivated land is in Africa. With the AfCFTA agreement placing specific focus on intra-Africa trade, it is expected that the importation of food from outside sources will drastically decrease as member states look to each other to trade in food items.

Further, there is no doubt that infrastructure investment and urbanisation will increase as governments and entrepreneurs look to capitalise on the infrastructure gap in Africa and cater for the free movement of persons and investments that the AfCFTA will cultivate on the continent. We expect to see increased development of roads, affordable housing and entertainment facilities.

Funding and the financial sector

With the industrial and infrastructure opportunities brought about by the AfCFTA agreement, Africa's financial sector will be relied on to provide the funds, credit and support for these key industries to progress across the continent. As indicated by the World Trade Organization and the International Monetary Fund the financial services sector will play an important role in providing the major tools necessary to implement robust trade agreements by allocating capital funds, mobilising savings and providing credit.



We foresee unprecedented collaborations in the financial sector in Africa towards enhancing the value chains created by the AfCFTA. Consequentially, we also expect technology to develop exponentially in the coming years to cater for the connectivity demand that will be needed to administer the free trade area.

The AfCFTA agreement is an ambitious undertaking that has enormous potential for African economies. The economic gains that will emanate from the establishment and successful implementation of regional and continental value chains will be enormous. Our sentiments on the M&A activities that will flow from the AfCFTA agreement are endorsed by many. One report by the World Economic Forum in conjunction with Deloitte envisions that the AfCFTA agreement will attract a GDP growth of 1–3%, employment growth of 1.2%, intra-African trade growth of 33%, and a 50% decline in Africa's trade deficit. This is a key milestone for the continent, and we expect significant reform and development to take place in Africa as investors look to make the most of the benefits created by the AfCFTA.

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.

Competition Law Review and Policy Approach

BY SUSAN MEYER, PREANKA GOUNDEN, AND SIMONE NEL

Competition Law Review & Policy Approach that may inform the AfCFTA Protocol on Competition Policy This portion of the publication addresses certain competition law aspects of the African Continental Free Trade Area (AfCFTA), commencing with a discussion on the likely impact given the existing regional approach to competition law in the:

- East African Community (EAC).
- Southern African Development Community (SADC).
- Economic Community of West African States (ECOWAS).
- Common Market for Eastern and Southern Africa (COMESA).

Next, we offer some insights into what is likely to find its way into the proposed Protocol on Competition Policy (Protocol). Lastly, we consider the importance of a uniform competition law framework in Africa for the successful implementation of the AfCFTA.

State of play: Existing regional approach

The AfCFTA Phase II negotiations are currently underway. The development of the Protocol, anticipated to be concluded by 31 December 2021, forms part of these negotiations.

While the establishment of a continental competition regulator provides a strong incentive for trading countries to engage in fair practices, the current existence of multiple regional economic communities (RECs) such as SADC, EAC, ECOWAS and COMESA, may present several challenges.

As anti-competitive conduct surpassed national borders, countries were compelled to start co-operating on the enforcement of cross-border competition concerns. Africa is currently characterised by several regional competition authorities (in addition to national authorities). The AfCFTA, in its preamble, undertakes to resolve the “challenge of multiple and overlapping trade regimes to achieve policy coherence” in Africa.

An inherent conflict exists between maintaining RECs as the building blocks of the AfCFTA and resolving the challenge of multiple overlaps. An important principle of the AfCFTA is the “preservation of the *acquis*”, meaning that overlapping memberships of RECs will not be addressed in the AfCFTA, despite one of AfCFTA’s objectives being to resolve this conundrum.

Currently there are several discrepancies among the approaches of REC competition regulators, for example:

- eagerness to implement competition legislation;
- institutional arrangements (such as binding regional laws, regulations or guidelines that only promote voluntary adherence); and
- approaches to co-operation with national competition authorities.

COMESA, EAC and ECOWAS have adopted mandatory competition regimes which require member states to enforce the regional competition law. This is achieved by national competition authorities co-operating with the regional competition regimes in the investigation and decision-making processes.

By way of example, COMESA and the EAC face certain obstacles in that member states like Kenya, Rwanda, Uganda and Burundi are members of both. SADC, on the other hand, has adopted a voluntary competition regime, which has similarly attracted criticism, but on the basis that it is ineffective in addressing cross-border competition concerns.

To this end, it has been argued that “*preservation of the acquis*” risks putting the status quo above constructive forward-looking change.

There has been some attempt by existing RECs to deal with overlapping membership and conflicts related to inter-REC jurisdiction. For example, a tripartite agreement has been concluded between the EAC, COMESA and SADC, consisting of certain competition provisions which may be used as guidance in developing the Protocol. Similarly, with the appropriate modification, direction may also be sought from international treaties, such as the Comprehensive and Progressive Agreement of Trans-Pacific Partnership, which includes a framework for co-operation on competition.

The proposed competition law Protocol

AfCFTA is not prescriptive as to the contents of the Protocol. Broadly, it has been suggested that the negotiations on the Protocol will result in two potential structures, namely: (i) a continental competition authority or (ii) a co-operation framework:

- a continental competition authority would be similar to RECs but with wider jurisdictional scope; whereas
- a co-operation framework would have no explicit mandate to deal directly with cross-border competition cases, but would, for example, be able to make guiding recommendations based on access to limited non-confidential information.

The Protocol must be designed in a way that accommodates the high levels of diversity among countries. It is important that the inputs of all member states are considered to facilitate ease of implementation of the Protocol.

Competition Law Review and Policy Approach

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Research conducted by the United Nations Conference on Trade and Development posited that the Protocol should, at a minimum, deal with the following issues:

- (i) **Model approach:** The AfCFTA may be inclined to adopt a soft approach model to continental competition policy, at least at the outset. It has been argued that recommendations for a hard law approach which seeks to, for example, adopt a mandatory merger control regime at continental level, may be overly ambitious when considering the existing African competition law landscape.
- (ii) **Institutional framework:** In order to be able to enforce the Protocol, the member states should consider establishing an enforcement agency. If the states agree on co-operation on competition policy based on the soft law approach, then a working group or a committee on competition policy based at the AfCFTA secretariat would be the most suitable institutional framework.
- (iii) **Prohibited conduct:** Member states must engage on what constitutes anti-competitive conduct to be regulated under the Protocol. It must be clear whether horizontal and vertical anti-competitive agreements are prohibited as well as abuses of dominance. The Protocol should set clear boundaries on permissible actions of state monopolies.
- (iv) **Merger control:** Any mandatory merger control regime must not duplicate either national or regional notification obligations. Careful consideration must be given to the far-reaching and long-term implications of the Protocol in introducing another regulatory layer above existing regional and national merger regimes, especially with regards to the effect on investment on the continent.
- (v) **Obligation to promote competition:** The responsibility of member states to create mechanisms that will not hinder the effective enforcement of competition policy and law at both national and regional levels.
- (vi) **Areas of co-operation and co-ordination on competition policy:** The majority of countries who are member states of RECs with competition regimes have concluded memorandums of understanding with the relevant regional regulatory authority stipulating areas of co-operation. These precedents may serve as guidance for the Protocol. For example, where competition transactions include commercially sensitive information or trade secrets, sharing of such confidential information ought to be limited unless allowed under the respective co-operation agreements.
- (vii) **RECs relationship with AfCFTA:** The RECs and AfCFTA need to reach agreement as to how the AfCFTA will operate in relation to the RECs. Overlapping memberships may affect individual member state obligations arising from different RECs, a problem which the Protocol could address by, for example, advocating for REC reform.

Importance of a uniform competition law framework in Africa

A continental approach to competition policy has the potential to create growth opportunities for African markets. The Protocol, if structured and implemented in an efficient manner, will create an opportunity to better deal with, for example, cross-border cartels and abuses of dominance, and may assist with various challenges experienced by the region's regulators, such as a lack of capacity, strained financial resources or the absence of domestic competition laws. African competition regimes are seeking to use competition law and policy as a tool to drive significant public benefits, for example, reduce poverty, provide small businesses with opportunities to compete, enhance efficiency, address historical injustices, promote employment and lower costs for consumers. The AfCFTA is an opportunity to enhance this progress. To avoid futile duplication of resources, member states must co-ordinate their industrial policies and implementation efforts. Existing RECs have already developed many of the mechanisms needed for the consolidation of a continental market.

An institutional framework which is entirely voluntary may not be a realistic solution to achieve continental integration and may ultimately resemble that of the SADC, as opposed to the active enforcement framework achieved by, for example, COMESA. That said, it remains possible for member states to negotiate to adopt binding commitments on certain key aspects of competition regulation, as opposed to all competition regulation.

In negotiating the Protocol, member states must be cognisant of the African context and the overall aims of competition policy and law in Africa. African markets are often affected by economic and political agendas and high levels of inequality. While global free trade areas with competition provisions are a useful guide for developing the AfCFTA, they must not be rigidly imposed, but rather modified to address African-specific challenges.

The success of the Protocol will largely depend on the overall function of the AfCFTA and its uniform application. The co-operation of member states is necessary to leverage national and regional regulators in developing a continental framework and, in turn, an effective and functional continental regulator which is positioned to address the unique challenges faced in the African market.

“Made in Africa”: The key to the success of the AfCFTA

BY JACKWELL FERIS AND IMRAAN ABDULLAH

The success of the AfCFTA hinges on African states collectively ensuring that more goods are manufactured in Africa, traded amongst Africans, and proactively taking steps to establish or ramp-up manufacturing capacity in sectors (such as electric vehicles and the related downstream components) in strategic jurisdictions to emerge as new manufacturing nodes.

Without a drive for “Made in Africa” goods, and the development of related service sectors to support this, Africa will not achieve its economic objectives on the scale required to lift millions of Africans out of poverty. The World Economic Forum has highlighted that building an industrial-driven economy does not come about through a simple switch. It is a complex process requiring infrastructural foundations to be overlaid with pragmatic pro-business policies. For African countries, industrial policies need to be re-aligned with the policy imperatives under the AfCFTA to ensure we have an integrated market for goods and services.

A key part of the “Made in Africa” approach must be to finalise the negotiations relating to Rules of Origin under the Protocol on the Trade of Goods. The Rules of Origin are critical for the proper functioning of the AfCFTA, as they essentially determine whether goods can derive preference under the AfCFTA. As such, the Rules of Origin are the backbone for the successful implementation of the AfCFTA by member states. They will set out the technical criteria that African producers and traders must comply with in specifying, amongst other things, how much value addition or processing must take place within a country in order for a product to be considered to have originated in that country. This also applies to instances where components, materials and services from several other countries have been used along the production value chain for the final product. In the absence of Rules of Origin, producers in non-AfCFTA countries would simply be able to channel their goods through the AfCFTA member states to obtain better market access and all the preferences (such as reduced tariffs) that the AfCFTA provides.

Value adding in manufacturing

Despite trading effectively commencing on 1 January 2021 under the AfCFTA, there are still several substantive issues that must be agreed to or included in the Annex on the Rules of Origin by AfCFTA member states. These issues range from substantive issues such as what constitutes “value added” for the purposes of goods manufactured in a member state, how goods manufactured in special economic zones should be treated, and

what the value tolerance for goods is (i.e. goods made up of some imported products). Other issues that need to be considered include product or industry-specific rules of origin provisions in industries such as textiles, certain agricultural products and automotive manufacturing. The negotiations around these issues for the Rules of Origin have been sluggish and tensions exist between different national industrial policies and how to marry these into a continental framework. Once these aspects are finalised, progress can be made in implementing the Rules of Origin requirements through domestic legislation in member states. It is important to point out that although negotiations are still being finalised on several technical provisions, the Annex on Rules of Origin contains general technical provisions for some trade to have commenced.

Once negotiations have been completed, trade will be able to commence in earnest. Despite the lag in some of the technical negotiations, this is the ideal time for investors to assess the vast opportunities the African market holds and to establish or expand production and distribution hubs. The creation of regional value chains for the production and distribution of products will enable producers and traders to tap into the massive African market (with a population of nearly 1.3 billion people) that under the AfCFTA will ultimately have uniform rules for goods and services originating on the continent.

Minerals and Electric Mobility in Africa

With the industrial and economic policies of African states being geared toward ensuring value addition of minerals and natural resources on the continent (or in particular countries), producers and traders need to be incentivised to establish product value chains within particular regions on the continent. The AfCFTA creates such incentives but will require governments in each regional economic community to work together to achieve a collective benefit for all. There are several sectors that could be developed into leading industries and in which states could establish new manufacturing nodes for global trade, supported by Africa’s access to the input minerals (such as cobalt, platinum group metals, manganese) required for the automotive industry and related sectors. Countries such as the Democratic Republic of Congo, South Africa, Zimbabwe and Zambia have access to significant reserves of the strategic minerals required for the production of lithium-ion batteries, hydrogen fuel cells and other related components. This should encourage investment in value chains in the automotive industry on the continent, ensuring that

"Made in Africa": The key to the success of the AfCFTA

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The AfCFTA provides the platform for investors to take advantage of the potential on the continent and establish and expand opportunities in existing and future industries.

Africa continues to play an important part in this sector in the future. South Africa, one of the largest producers of automobiles in Africa, published a green paper on 18 May 2021 titled *"Auto Green Paper: On the Advancement of New Vehicles in South Africa"* which emphasised the need for a gradual conversion of the industry from internal combustion engine vehicles to electric (battery powered) vehicles.

The importance of the conversion to electric vehicle production for South Africa is to ensure the sustainability of its automobile manufacturing sector, which is largely dependent on exports to Europe. The changed regulatory environment in Europe towards electric vehicles has made investments in electric vehicle production in Africa imperative.

There are several critical elements required to achieve the conversion to electric vehicle production, including the establishment of factories and assembly facilities for the manufacturing of batteries and fuel cells. The AfCFTA could make the production of batteries cost effective in Africa through access

to minerals, processing and related services, and preferences on tariffs, trade facilitation measures and the elimination of technical barriers. For manufacturers this creates a platform for establishing regional value chains. The development of automotive subsectors in Southern Africa will create immense opportunities for other regions on the continent, such as Ethiopia, Kenya, Ghana, Egypt and Nigeria, to also convert their automobile industries to electric vehicle production at a lower cost and allows for the development of other regional value chains.

By focusing on developing strong industries that produce components or assemble entire production units on the continent, and where several countries tap into their competitive advantages and participate in the production process, a *"Made in Africa"* final product will be good for economic integration, development and enhancing people's well-being on the continent. The AfCFTA provides the platform for investors to take advantage of the potential on the continent and establish and expand opportunities in existing and future industries.

Labour mobility in Africa: Crucial for unlocking the benefits of the AfCFTA

BY AADIL PATEL AND NJERI WAGACHA

The goal at the heart of the AfCFTA is to successfully achieve the economic objectives of a single continental market for goods and services for Africa. Article 3(a) of the agreement establishing the AfCFTA unambiguously recognises that its economic objectives can only be achieved if facilitated by the free movement of persons. The mobility of people on the continent will deepen and promote economic integration in accordance with the Pan-African vision of “An integrated, prosperous and peaceful Africa” enshrined in the African Union’s (AU) Agenda 2063. A critical part of achieving this is mobility for employees working for African businesses in the day-to-day trade of goods and services.

In that regard, African leaders and the AU have highlighted the urgent need to accelerate the ratification process of the AU’s Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right to Residence and Right to Establishment (Protocol). In showing their support, these stakeholders make it clear that the full potential of free movement of goods can only be achieved with the freer movement of people and that the latter will make African labour markets more efficient.

President of the African Development Bank, Akinwumi Adesina, recently stated that “*the free movement of people, and especially labour mobility, are crucial for promoting investments.*”

Parallel policy spaces

Both the AfCFTA and the Protocol are important flagship projects of the AU’s Agenda 2063. At present, negotiations on achieving economic integration and mobility occur within two parallel policy spaces. Ministries of trade are negotiating the rules towards the free movement of goods and services, while ministries of interior or foreign affairs are heading discussions on the free movement of people. There remains a need to link these parallel policy spaces to heighten the profile of the Protocol.

Even though the link between free movement of persons and free movement of goods and services is recognised under the AfCFTA’s general objectives, not enough appears to be being done to fast-track the labour mobility that is critical to facilitate trade in goods and services. The focus has largely been on the broad implementation the AfCFTA, with little reference being made to the Protocol. Additionally, linking the two would help build momentum towards signing, ratifying and implementing the

Protocol. Thus far, 33 states have signed the Protocol and only a few states have ratified it (Rwanda, Niger, Mali, and São Tomé and Príncipe). Fifteen ratifications are required to ensure that the Protocol comes into force.

It appears that for varying reasons, and in light of their particular contextual realities, some countries are resistant to freedom of movement on the continent. State dynamics such as political and socio-economic differences, labour market needs, security concerns, demographic trends, ethnic tensions and xenophobia influence countries’ positions on the Protocol. These national dynamics also impact individual countries’ positions on ratifying the Protocol. Some countries unwillingly engage in the free movement of persons in their regional economic communities. Against this backdrop, some countries are willing to remove restrictions on the movement of certain categories of employees (for example truck drivers or businesspersons). On a continental level, some countries prefer to engage only in negotiations on free trade, avoiding concessions on free movement. Thus, African policymakers need to be more overt about the socio-economic benefits of free movement of persons in order to fully realise the benefits of the AfCFTA.

It cannot be over emphasised that free movement is important because it facilitates intra-regional trade and investment, sustains growth and has a positive impact on employment, income and poverty alleviation. We broadly unpack what the Protocol envisages.

Rights under the Protocol

The Protocol envisions three specific rights: right of entry; right of establishment and the right of residence, which can be summarised as follows:

Right of entry: Nationals of member states will have the right to enter, stay, move freely and exit the territory of another member state in accordance with the laws, regulations and procedures of the host member state.

African nationals will be granted visa-free entry and thus permitted to move freely or stay for a maximum period of 90 days from the date of entry or such further period determined by member states, or through bilateral or regional arrangements. A national of a member state who desires to stay beyond the period provided will be required to seek an extension of stay in accordance with the procedures established by the host member state.

Labour mobility in Africa: Crucial for unlocking the benefits of the AfCFTA

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Right of residence: Nationals of a member state will have the right of residence in the territory of any member state in accordance with the laws of the host member state.

Right of establishment: Nationals of a member state will have the right of establishment within the territory of another member state pursuant to the laws and policies of that host member state. The right of establishment includes the right to set up in the territory of the host member state: (i) a business, trade, profession and vocation; or (ii) an economic activity as a self-employed person.

The Protocol also provides that states which have ratified or accepted the Protocol *"shall, individually or through bilateral, multilateral or regional arrangements, mutually recognise academic, professional and technical qualifications of their nationals, and establish a continental qualifications framework"*.

Furthermore, in accordance with Article 9, states are to adopt a travel document called an *"African Passport"*. Participating states will be required to issue residence permits, work permits or other appropriate permits and passes required by the host member state (Article 15).

The Protocol provides that nationals of a member state shall have the right to seek and accept employment (without discrimination) in any other member state, and that they may be accompanied by their spouse and dependants (Article 14).

There are clear benefits to member states that ratify the Protocol. For employees, the ability to provide their skills where there is an economic need will increase competition, refine the talent pool and ensure that nationals are able to remain on the African continent rather than relocating to the US or Europe. In addition, the ability for member states to increase manufacturing, diversify their offering and take advantage of the huge market provided by the AfCFTA, is premised on the mobility of the talent and skills available on the continent, and the Protocol will facilitate this.

The Protocol has the increased advantage of benefiting marginalised groups such as women and the youth. Women make up a large part of the workforce and their inclusion in the economic and trade systems will foster cross-border trade and economic growth, and will decrease unemployment and poverty rates. Women could benefit from a clearer legal framework, helping them to move towards becoming traders.

It is important to caution, however, that it is in its implementation that the Protocol may fall short of its ambitions. As mentioned, in-country scepticism has already been identified as one of the reasons the Protocol is yet to be ratified. Ensuring the buy-in of all stakeholders to the Protocol will be additionally important. Trade unions, civil society organisations and communities that will be directly affected are yet to have their interests represented. They argue that this exclusion is against the people-centred and transparent approach of the African Charter on Human and People's Rights, and fair-trade principles that promote partnerships based on dialogue, transparency and mutual respect.

They further argue that most of the documents signed so far: the agreement establishing the AfCFTA, the Kigali Declaration, and the Protocol should include employees' rights and decent work as protected by International Labour Organization conventions, especially Convention 87 (the freedom of association and the right to organise) and Convention 98 (on the right to organise and collective bargaining). Most African countries have ratified and domesticated these conventions into their national labour laws.

Conclusion

Labour mobility is critical for the successful implementation of the AfCFTA. The AfCFTA represents a breakthrough for African unity and offers excellent opportunities for African countries to increase intra-continental trade and to reinforce their positions within the international trading system. The successful implementation of the AfCFTA requires African states to give equal consideration to the Protocol and its ratification, and in so doing consider the view of all stakeholders to realise the aims of the AfCFTA. This potential will only be fully actualised with the ratification of the Protocol to provide the labour for the economic development that the AfCFTA seeks. As the old African proverb says, a stream cannot rise above its source.

Dispute settlement under the AfCFTA

BY DESMOND ODHIAMBO AND JACKWELL FERIS

Member states of the AfCFTA are cognisant of the fact that, as part of the growing pains of the AfCFTA, there will inevitably be disputes (triggered by private sector players) which will result in disagreement on the interpretation and application of, amongst others, the Protocol on Trade in Goods and the Protocol on Trade in Services and the terms set out in the respective annexes to these Protocols. As such, Article 20 of the AfCFTA agreement provides for the establishment of an AfCFTA dispute settlement mechanism and gives effect to it with the inclusion of the Protocol on Rules and Procedures on the Settlement of Disputes (DS Protocol). The DS Protocol is considered an integral part of the AfCFTA agreement and specifically establishes the AfCFTA Dispute Settlement Body (DSB).

The DSB held its inaugural meeting on 26 April 2021 on the implementation of the DS Protocol. The DSB is comprised of representatives from all member states who monitor and evaluate the functions of the dispute settlement mechanism.

Dispute settlement is recognised as a central element in providing security and predictability to the regional trading system under the AfCFTA. A key feature of the dispute settlement process is that, similar to the World Trade Organization's (WTO) approach, recourse is only available to member states, as opposed to citizens or nationals of member states. It is thus only member states that will be able to initiate a dispute against another member state. However, it will be the private sector participants that will be the catalyst for such disputes, similar to the current WTO system where industry players need to approach their local trade administration office to lodge complaints of non-compliance with the AfCFTA instruments by member states.

Composition of the Dispute Resolution Body

The Dispute Resolution Body consists of a DSB and an Appellate Body. At the first instance disputes are adjudicated by trusted and competent panellists chosen from a list of candidates nominated by the member states, ensuring balance between party control and independent expertise.

Any appeals against the panel reports are then heard by the permanent Appellate Body, which is comprised of seven members. The Appellate Body reviews panel decisions and ensures the soundness and fairness that comes from a two-tier system. In summary, the DSB establishes panels, adopts panel and Appellate Body reports, and maintains surveillance of the implementation of rulings and recommendations.

What is the procedure?

The following dispute settlement process is contemplated where a dispute arises between or among state parties. Firstly, recourse shall be had to consultations with a view of finding an amicable resolution to the dispute. Article 7 of the DS Protocol sets out the consultation rules for states to amicably resolve disputes.

An important part of the consultation process is that the settlement discussions between member states in relation to a dispute that arose out of the interpretation or application of the AfCFTA agreement will be regarded as confidential and without prejudice to the rights of any party in any further proceedings. So, it provides insulation to the member states involved in the consultation process during the negotiation process as they attempt to find an amicable solution. The intention appears to be to ensure that parties are able to engage in an honest and frank discussion about the issues under complaint in order to find a workable solution.

Should the dispute not be resolved during the consultation process, the member states to the dispute are barred from using any of the information, exchanges or concessions that have been made during the consultation process in the other disputed resolution processes contemplated under the DS Protocol.

Where state parties to a dispute fail to settle a dispute through consultation within 60 days of the date of receipt of the request for consultations, the complaining party may refer the matter to the DSB for the establishment of a panel. Unless the parties to a dispute agreed to continue or suspend consultations, consultation shall be deemed to be concluded within 60 days.

Secondly, where amicable resolution is not achieved, any party to the dispute shall, after notifying the other party, refer the matter to the chairperson of the DSB, and request the establishment of a dispute settlement panel for purposes of settling the dispute. Once the panel is appointed, it must set in motion the process of a formal resolution of the dispute. Once the dispute settlement process by the panel is concluded, it must submit a report to the DSB for adoption and, in accordance with Article 6(5), the DSB shall make its determination of the matter and its decision shall be final and binding on the parties.

In addition to the consultation process or the appointment of a panel, state parties, in accordance with Article 6(6), are entitled to have recourse to arbitration as the first avenue for dispute settlement, in accordance with the provisions of Article 27 of the Protocol.

Dispute settlement under the AfCFTA

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Under Article 7(9) there is an emergency dispute settlement process in the form of a consultation with reduced timelines for the resolution of a dispute. The emergency dispute settlement consultation process is, however, only available in respect of perishable goods.

The DS Protocol also makes provision for the appeal of a panel report. The Appellate Body's report becomes binding once adopted by the DSB and unconditionally accepted by the parties within 30 days of its circulation to the parties.

Save for the recourse to arbitration, the features of the DS Protocol mirror those of the WTO dispute settlement process with respect to the principle of "negative" or "reverse" consensus. This principle prevents member states from blocking the initiation of formal dispute settlement proceedings or the adoption of binding judgments. At each stage of the dispute settlement process, the DSB must automatically decide to take the action ahead unless there is a consensus not to do so. This provides certainty and security on the efficiency, speed and cost effectiveness of the dispute resolution mechanism under the AfCFTA.

What remedies are available?

Article 23 of the DS Protocol provides that where the panel or Appellate Body concludes that a measure is inconsistent with the AfCFTA agreement, it shall recommend that the party concerned bring the measure into conformity with the agreement.

In addition to its recommendations, the panel or the Appellate Body may suggest ways in which the party concerned could implement the recommendations. Member states must fully implement the recommendations and rulings of the DSB.

If a member state fails to implement the recommendations, the aggrieved party can apply for compensation and the suspension of concessions or other obligations as temporary measures pending the implementation of the recommendations and rulings of the DSB.

The secretariat of the AfCFTA is tasked with assisting the panels and must keep the DSB informed of the status of the implementation of the decisions made under the Protocol.



Who can bring a dispute?

As highlighted, the AfCFTA dispute mechanism deals with disputes between member states. Industry players do not have direct access to this dispute resolution mechanism. However, disputes between member states will be triggered by private sector participants as a consequence of the use of the AfCFTA trade system and such perceived or alleged violations of the AfCFTA instruments by a particular state. The trade dispute settlement system must, however, be distinguished from any future investment state dispute settlement systems that are contemplated under the proposed Investment Protocol. The fate of investor-state dispute settlements under the AfCFTA is somewhat still unclear as negotiations are yet to be concluded.

Conclusion

It is anticipated that the AfCFTA will change the attitude of member states towards the resolution of international and regional trade disputes and make a real contribution to better trade governance in Africa. The impact of a speedy, efficient, and cost-effective dispute resolution process is profound and of great importance, as also recognised by the Agreement establishing the AfCFTA.

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

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