

The African Continental Free Trade Agreement (AfCFTA): Legal Overview

By Abdessalam Jaldi

Summary

Regional integration in Africa is seen as a priority by many of the continent's policymakers and economic stakeholders. With all Africa now signed up to the African Continental Free Trade Agreement (AfCFTA), the challenge now is to implement a continental market for goods and services and establish the foundations of a continental customs union. Many on the continent see the AfCFTA as an investment, economic-diversification, and job-creation blueprint that will shape the future of Africa, help meet by 2030 the targets of the Sustainable Development Goals (SDG), consolidate progress toward the African Union's Agenda 2063, and facilitate an AU – EU free-trade area in long term. With a combined GDP of over \$2.3 trillion and a population of 1.2 billion, of whom most are below the age of 30, African countries stand to gain substantially from intra-regional trade. In this article, we analyse the legal aspects of AfCFTA.

Legal Evolution of AfCFTA

Regional Integration in Africa is seen as a priority by many of the continent's policymakers and by African elites. This is most loftily expressed in the African Union's stated goal of achieving a continental economic integration scheme, the African Economic Community, by 2028. The African Continental Free Trade Agreement marks a significant milestone in the economic integration of Africa. Opened for adoption at the African Union Summit in Kigali in March 2018, the Agreement establishing the African

treaty has been signed by 54 of the 55 AU member's states, and ratified by the start of 2021 by 34¹, including major economies such as Morocco, Egypt, South Africa and Nigeria. The AfCFTA entered into force in May 2020, a month after the needed 22 states deposited their instruments of ratification with the Chairperson of the AU Commission (satisfying the minimum requirement for the

1. Fatma Bendhaou. ZLECAF: l'accord de libre-échange interafricain entre en vigueur. Anadolu Agency. 1er janvier 2021. <https://www.aa.com.tr/fr/afrique/zlecaf-laccord-de-libre-%C3%A9change-interafricain-entre-en-vigueur/2095666>

Agreement's entry into force). Because of the pandemic, however, AfCFTA became operational on January 1, 2021, instead of the originally scheduled date of July 1, 2020².

AfCFTA is the culmination of an ambitious project announced in the 1980 Lagos Plan of Action, to enhance Africa's economic self-reliance and reduce its dependence on trade and aid from overseas. This was further articulated in the Organization of African Unity's (OAU) 1991 Abuja Treaty, which set out a strategy to utilize regional integration as an interim step in creating an African Economic Community by 2028. After the AU's succeeded the OAU, eight Regional Economic Communities (REC) were formally recognized as the building blocks of the AU. More recently, the most significant step taken in pursuance of these goals was the beginning of formal negotiations on AfCFTA.

AfCFTA aims progressively to remove barriers to the free movement of people, capital, goods, and services throughout the African continent, creating a common market akin to that established by the European Economic Community's (subsequently the European Union) foundational Treaty of Rome of 1957, which is based on the sanctity of these four freedoms. The European Commission has estimated that this added 2.2% to GDP growth and created 2.75 million jobs in the EU between 1992 and 2006³. There are, however, challenges which will need to be addressed in order to replicate of the benefits enjoyed by the EU, namely the African regional integration paradigm or the weakness of African intercontinental trade.

AfCFTA's General Objectives

In a bid to fulfil AfCFTA's potential, member states have undertaken to liberalize 90% of tariff lines on goods within five to fifteen years through successive rounds of trade negotiations. The remaining 10% of tariff lines comprise sensitive products for which member states are afforded more time to liberalize, and excluded products which are completely exempt from liberalization. Efforts

aimed at the reduction of tariffs will also be accompanied by the progressive elimination of non-tariff barriers, the liberalization of trade in services and the enhancement of trade facilitation and customs efficiencies.

The AfCFTA Protocol on trade in services, which has been signed as part of the consolidated text of the AfCFTA agreement in order to liberalize intra-African trade in services, is the most relevant in this regard. It requires member states to accord to services or service suppliers from another state no less favorable treatment than it accords to domestic services or service suppliers: "The State Parties shall progressively trade in services across the African continent on the basis of equity, balance and mutual benefit, by eliminating barriers to trade in services⁴". However, and for several states, it involves deeper governance reforms that typically associated with trade in goods. This is because the extent of public ownership and the degree of domestic regulatory intervention has traditionally been higher in the services sector than in the goods sector⁵. As pointed out in the 2019 World Trade Report from the World Trade Organization (WTO): "many of the barriers to trade in services consequently lie in regulatory regimes, not only at borders, but deep behind borders, in a myriad of domestic regulations than constrain the manner in which commercial services business is conducted⁶". In the same vein, the implementation of the AfCFTA Protocol on trade in services faces the absence in some countries of rules-based national regulatory regimes: "Services has been considered non-tradable and therefore outside the scope of trade policy-making until quite recently⁷".

On the other hand, and although the negotiations are based on the WTO's multilateral General Agreement on Trade in Services, including the national treatment principle as well as the non-discrimination principle, Africa's existing regional economic communities (RECs) have to date pursued different approaches and accrued different experiences as far as liberalization of services is

2. Kingsley Ighobor. AfCFTA: Africa reading for free trade come January 2021. United-Nations. 30 November 2020. <https://www.un.org/africarenewal/magazine/november-december-2020/afcfta-africa-reading-free-trade-come-january-2021#:~:text=The%20AfCFTA%20Secretariat%20officially%20opened,date%20of%201%20July%202020>.
3. EU single market: Boosting growth and jobs in the EU. European Parliament - European Parliamentary Research Service. November 2017. Page 2. https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/611009/EPRS_BRI%282017%29611009_EN.pdf

4. AfCFTA. Part III: Objectives – Article 3.2 (e). https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_.en.pdf

5. Gerhard Erasmus. What is the AfCFTA Approach to the Regulation of Trade in Services? Tralac Trade Law Center. 26 October 2019. https://www.tralac.org/blog/article/14289-what-is-the-afcfta-approach-to-the-regulation-of-trade-in-services.html#_ftn2

6. Jane Drake-Brockman. Why regulatory cooperation matters for business. World Trade Report. 2019. Page 189.

7. Hildeunn Kyvik Nordas. Domestic regulation: what are the costs and benefits for international trade in services? WTO Domestic and Services Trade. Cambridge University Press. 2014. Page 47.

concerned⁸. The current impact of AfCFTA in the sphere of services is simply that a common goal has been agreed⁹. As experience at the regional level demonstrates, discussing and putting this into practice will require time. In the Southern Development Community (SADC), for example, the discussion about internal market opening for six service sectors continued for six years¹⁰.

Arrangements on freedom of movement strive for extensive mobility and the abolition of visas. However, and given that any country may impose any type of restriction under Article 34, the real value of the agreement remains to be seen. The three largest African economies (South Africa, Nigeria, and Egypt) have already refused to sign the AU Protocol on the Movement of Persons, opened for signature on the same day as the AfCFTA agreement. This protocol requires its signatories to grant other Africans rights of entry, residence, and establishment (or business or trade), as well as protection against arbitrary expulsion and expropriation.

Progress on the finalization of AfCFTA Phase I negotiations, namely, the establishment of the schedules of concession in trade in goods, rules of origin, and specific commitments for trade in services, is encouraging. However, Africa will need to do more than just increase trade in existing commodities to benefit fully from AfCFTA. Indeed, though intra-African trade has been increasing slightly, it remains substantially below optimal levels, and intracontinental trade is still very low compared to the rest of the world. The share of intra-African exports as a percentage of total African exports increased from about 10% in 1995 to around 17% in 2017, but remains low compared to levels in Europe (69%), Asia (59%), and North America (31%)¹¹.

This underlines the importance of beginning Phase II of negotiations on investment, competition policy, and intellectual property rights¹². In particular, with an increasingly digitized economy and a store of innovative youth, working on intellectual property registration and

protection will be key to harnessing the full potential of AfCFTA and securing Africa's future¹³.

The AfCFTA Institutional framework

In order to administer the various aspects of AfCFTA, the agreement sets out the institutional structure and dispute settlement mechanism that will govern its operations. This structure includes various organs, such as the AU Assembly, which will provide oversight and strategic guidance to AfCFTA, the Council of Ministers, which can make binding decisions in accordance with the AfCFTA agreement, the Committee of Senior Trade Officials, which implements the decisions of the Council of Ministers, and the AfCFTA Secretariat which serves an administrative function.

Disputes between member states under the AfCFTA agreement will be resolved by a Dispute Settlement Body (DSB) and an Appellate Body based on the model of the WTO's dispute settlement mechanism. The relevant protocol provides that provides that parties must first consult with a view to reaching an amicable resolution of the dispute, failing which they may refer the matter to the DSB or, indeed, to arbitration.

An additional component of the dispute settlement mechanism is the rule of reserve consensus which, similar to its equivalent in the WTO, provides that certain decisions by the DSB (such as the decision to adopt a panel or Appellate Body report) must be approved, unless there is consensus within the DSB not to do so. For example, Article 19(4) of the Protocol on Rules and Procedures on the Settlement of Disputes provides that, within sixty days following the date on which the final panel report is circulated, the report shall be adopted at a meeting of the DSB unless a party to the dispute notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt the report. The reason for including such a mechanism is to prevent paralysis of the decision-making process. The adoption of reports becomes almost automatic given the high threshold of consensus required to block them.

8. Evita Schmiege. The African Free Trade Continental Zone: Perspectives for Africa German, policy choice for Europe. Institute of International and Security Affairs (SWP). 10 March 2020. Page 2. https://www.swp-berlin.org/fileadmin/contents/products/comments/2020C10_Africa_FTA.pdf

9. Ibid.

10. Ibid.

11. United Nations Economic Commission for Africa, Assessing regional Integration in Africa IX: New steps for the African Continental Free Trade Area. 2019.

12. Vera Songwe. Africa must take a lead role in the data economy. Financial Times. October 14, 2019. <https://www.ft.com/content/cbef0cb8-ee5f-11e9-a55a-30afa498db1b>

13. Vera Songwe. In Bolstering Africa's role in the global economy: A continental strategy for economic diversification through the AfCFTA and intellectual property rights. Brookings. Wednesday, January 8, 2020. <https://www.brookings.edu/research/a-continental-strategy-for-economic-diversification-through-the-afcfta-and-intellectual-property-rights/>

Despite having established such institutional compromises, in many ways the AfCFTA agreement is only an agreement to agree, a framework for concrete commitments still to be made under six pending protocols on trade in goods, trade in services, competition, investment, intellectual property, and dispute settlement. Member states will still have to determine to what extent they are prepared to cede their economic sovereignty, and expose their workers and industries to cross-border competition¹⁴.

Rethinking the future of AfCFTA

If AfCFTA is to succeed, African states will need to move away from the European regional integration paradigm, and establishment an African model that responds to the economic and political reality of the African continent. Indeed, the European regional integration paradigm was developed in the context of the aim to avoid a rerun of the world wars, and the role of strong states, France and Germany, was essential to the EU's success. This gave rise to the theory of hegemonic stability which posits that a hegemon is central to maintaining adherence to liberal international economic regimes, and by extension liberal peace, by underwriting the costs of maintaining the regime rather than by deploying coercion¹⁵. However, the liberal peace paradigm is a very challenging proposition for African states¹⁶. The current character of many post-colonial African states does not obviously lend itself to a liberal peace construct, and many of them are governed by former liberation movements or single party governments. In the same vein, governance throughout the continent, remains characterized by institutional frailties. So, building viable national states, never-mind intra or inter-regional organizations, is a challenging proposition.

Nevertheless, African states are increasingly concerned about security risks generated by their neighbors arise from poor governance and cause cross-border instability. Therefore, regional security communities in Africa

14. Peter Leon, Ernst Muller and Natasha Rachwal. The African continental free trade agreement: a new pathway for Africa? Herbert Smith Freehills. November 28, 2019. <https://hsfnotes.com/africa/2019/11/28/the-african-continental-free-trade-agreement-a-new-pathway-for-africa/#page=1>

15. Robert Gilpin. *Global Political Economy: understanding the International Economic Order*. Princeton University Press. 2000.

16. Christopher Clapham. The Changing World of Regional Integration in Africa. in C Clapham, G Mills, A Morner, and E Sidiropoulos, *Regional Integration in Southern Africa: Comparative International Perspectives*, South African Institute of International Affairs. 2001.

are increasingly willing to replace “hard sovereignty” that expressly forbids interference in other member states’ affairs, with regimes that allow for some foreign intervention in defined circumstances¹⁷. Hence, there is a case for regional security structures designed to manage complex security problems. These problems highlight that regional economic integration ought to be primarily inter-governmental with a minimum of supra-national aspirations. On the other hand, while AfCFTA could yield net benefits, it is not likely to drive economic development in the manner of east Asian economic growth¹⁸. Indeed, the political fragmentation of states in Africa, increasing inequality in the distribution of natural advantage, costs arising from the loss of scale economies in production, and loss of public goods as the scale of political cooperation is reduced¹⁹, impede the ability of South-South economic integration to resolve all the problems of Africa. Furthermore, proponents of New Economic Geography advance strong arguments against promoting south-south economic integration, by predicting that while all countries in such schemes have a comparative disadvantage in manufacturing relative to the global economy, there will be one with less of a disadvantage to which industrial activity will tend to relocate²⁰.

Indeed, the theory of New Economic Geography affirms that this effect will be aggravated by agglomeration economics, whereby industrial concentration in the relatively advantaged country, such as South Africa or Kenya in Southern and Eastern Africa, will be promoted at the expense of its neighbors²¹. Moreover, as tariff levels decline overall within the regional economic community (REC), those countries suffering from industrial relocation will also experience trade diversion effects, importing relatively expensive goods from the growing industrial

17. Anne Hammerstad. *People, States and Regions: Building a Collaborative Security regime in Southern Africa*. South African Institute of International Affairs. 2005.

18. Peter Dreper. *Rethinking the European Foundations of Sub-Saharan African Regional Economic Integration: A Political Economy Essay*. OECD Development Center. Working Paper number 293. 2021. Page 19. <https://www.oecd.org/dev/46013902.pdf>

19. Paul Collier and Terry Venables. *Trade and Economic Performance: does Africa's fragmentation matter?* Annual World Bank Conference on development Economics. Annual World Bank Conference on development Economics. 2008.

20. World Bank. *Trade Blocs*. Policy Research Report. Oxford University Press. 2000.

21. Peter Dreper. *Rethinking the European Foundations of Sub-Saharan African Regional Economic Integration: A Political Economy Essay*. OECD Development Center. Working Paper number 293. 2021. Page 18. <https://www.oecd.org/dev/46013902.pdf>

center rather than from more efficient global producers, thereby lowering overall welfare²².

These challenges suggest that a new approach is needed, and expanded African economic integration with northern partners remains essential in order to capture the dynamic gains from increased openness. From this perspective, and as the theory of stability suggests, the North-South economic integration, embodied by slow-moving project of AU-EU continent-to-continent free trade in the framework of the Post-Cotonou treaty, which plays to each region's comparative advantages, can promote income convergence, and, over time, should also promote knowledge transfers from developed to developing countries. As Bauer said: "it is arguably

through trade and commercial contact with dynamic regions of the world that developing countries grow and diversify their economies²³". Indeed, the EU remains Africa's biggest donor, and the World Trade-Organization compatible trade arrangements, the Economic Partnership Agreements (EPAs), constitute the principle instruments promoting trade between Africa and the EU. However, the negotiation of these agreements, which started in 2002, has proved more difficult than expected. Consequently, and according to both the European Commission and the African Union Commission, the next AU-EU Summit postponed from October 2020 to possibly spring 2021²⁴, will be dedicated to defining a new comprehensive EU strategy with Africa, which will replace the existing Joint Africa-EU strategy.

22. Ibid.

23. Bauer. From Subsistence to Exchange and other essays. Princeton University Press. 2000

24. Rok Kozelj. Fact Sheets on the European Union: Africa. European Parliament. October 2020. <https://www.europarl.europa.eu/factsheets/en/sheet/180/africa>

About the author, Abdessalam Jaldi

Abdessalam Jaldi is an International Relations Specialist, with a focus on International Law and International Relations. He is currently working in the Policy Center for the New South as a core member of an analytical study examining the Maghreb mutations, the Euro-African relations, the new tendencies of international law and the influence of India and Africa. Ph.D Doctor in Law from France in 2018, he has four years of experience working in non-profit, social research and electoral observations.

About Policy Center for the New South

Policy Center for the New South, formerly OCP Policy Center, is a Moroccan policy-oriented think tank based in Rabat, Morocco, striving to promote knowledge sharing and to contribute to an enriched reflection on key economic and international relations issues. By offering a southern perspective on major regional and global strategic challenges facing developing and emerging countries, the Policy Center for the New South aims to provide a meaningful policy-making contribution through its four research programs: Agriculture, Environment and Food Security, Economic and Social Development, Commodity Economics and Finance, Geopolitics and International Relations.

[Read more](#)

The views expressed in this publication are the views of the author.



Policy Center for the New South

Suncity Complex, Building C, Av. Addolb, Albortokal Street,
Hay Riad, Rabat, Maroc.

Email : contact@policycenter.ma

Phone : +212 (0) 537 54 04 04 / Fax : +212 (0) 537 71 31 54

Website : www.policycenter.ma