

THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT: A NEW PATHWAY FOR AFRICA?

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Legal Briefings - By **Peter Leon, Ernst Muller and Natasha Rachwal**

EVOLUTION OF THE AfCFTA

A significant milestone has been reached in the economic integration of Africa, with the creation of the African Continental Free Trade Area (“**AfCFTA**”). Opened for adoption at the African Union (“**AU**”) Summit in Kigali in March 2018, the Agreement establishing the AfCFTA (“**AfCFTA Agreement**”) has been signed by 54 of the 55 AU member states (tiny Eritrea being the lone exception), and ratified by 28, including major economies such as Egypt, Ghana, Kenya and South Africa, but not Nigeria. AfCFTA entered into force in May 2019, a month after the requisite 22 states deposited their instruments of ratification with the Chairperson of the AU Commission (satisfying the minimum requirement for the Agreement’s entry into force). The AfCFTA Agreement entered into force in May 2019, a month after the requisite 22 states deposited their instruments of ratification with the Chairperson of the AU Commission (satisfying the minimum requirement for the Agreement’s entry into force). For trading purposes, however, the AfCFTA only becomes operational on 1 July 2020.

The 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 (much of which came with conditions dictated by Cold War politics). This was further articulated in the Organisation for African Unity’s (“**OAU**”) 1991 Abuja Treaty which detailed a strategy to utilise regional integration as an interim step in creating an African Economic Community by 2028. Following the AU’s succession to the OAU, as many as eight Regional Economic Communities (“**RECs**”) were formally recognised as the building blocks of the AU. More recently, the most significant step taken in pursuance of these goals was the commencement of formal negotiations on the AfCFTA.

The AfCFTA aims progressively to remove barriers to the free movement of people, capital, goods and services throughout Africa, creating a common market akin to that in the European Union's ("EU"s) foundational 1957 Treaty of Rome - which is based on the sanctity of these four freedoms. The European Commission has estimated that this added 2.2 per cent to GDP growth and created 2.75 million jobs in the EU between 1992 and 2006. There are, however, challenges which will need to be addressed in order to replicate some of the benefits enjoyed by the EU, not least the threats of economic nationalism and trade protectionism in Africa.

KEY FEATURES OF THE AFCFTA

General objectives

In a bid to fulfil the AfCFTA's potential, member states have undertaken to liberalise ninety per cent of tariff lines on goods within five to fifteen years through successive rounds of trade negotiations. The remaining ten per cent of tariff lines comprise sensitive products for which member states are afforded more time to liberalise, and excluded products which are completely exempt from liberalisation. Efforts aimed at the reduction of tariffs will also be accompanied by the progressive elimination of non-tariff barriers, the liberalisation of trade in services and the enhancement of trade facilitation and customs efficiencies.

Institutional framework

In order to administer the various aspects of the AfCFTA, the AfCFTA Agreement sets out the institutional structure and dispute settlement mechanism to govern its operations. This structure includes various organs such as the AU Assembly which will provide oversight of and strategic guidance to the 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**") as well as an Appellate Body based on the model of the World Trade Organisation's ("**WTO**") dispute settlement mechanism. The relevant protocol provides that parties will first need to 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 reverse 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 by 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 motivation 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 it.

Despite having established such institutional arrangements, 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 competition.

OPPORTUNITIES FOR GROWTH AND INVESTMENT

Anticipated gains as a result of trade liberalisation under the AfCFTA

The AfCFTA is expected to unlock the potential of Africa’s 1.2 billion people and African business by providing continent-wide market access, better (and cheaper) infrastructure, opportunities for scale production, and more efficient resource allocation. The United Nations Economic Commission for Africa estimates that tariff reductions under the AfCFTA will boost intra-African trade by over fifty per cent by 2022 (or by as much as 100 per cent if non-tariff barriers are similarly reduced).

By progressively eliminating barriers to intra-African trade, the AfCFTA is expected to contribute significantly towards the development of regional value chains, the sharing of information and technology, the promotion of socio-economic development and structural economic transformation as well as the facilitation of investment. This presents an important opportunity for businesses to restructure their operations in compliance with the AfCFTA’s rules of origin and integrate with cross-border value chains in order to benefit from preferential tariff treatment under the AfCFTA.

It is further anticipated that the AfCFTA will change the manner in which member states trade internationally by harmonising trade practices, creating additional efficiencies, accessing global value chains and systematising the manner in which Africa trades with the rest of the world. As the African Growth and Opportunity Act (“**AGOA**”) is set to expire in 2025, this poses an opportunity for the United States and AfCFTA member states to rework the AGOA framework in a manner which aligns with the implementation of the AfCFTA - not least because the United States is unlikely to continue to maintain a unilateral trade agreement.

South Africa’s eligibility review in respect of the US Generalised System of Preferences

The recent announcement by the Office of the United States Trade Representative (“**USTR**”) that it is reviewing South Africa’s eligibility under the US Generalised System of Preferences (“**GSP**”) is somewhat concerning in this context.¹ Following its acceptance of a petition from the International Intellectual Property Alliance (“**IIPA**”), the USTR indicated that it was concerned about “South Africa’s compliance with the GSP IP criterion, in the area of copyright protection and enforcement.”²

In order to access trade preferences under the GSP, potential beneficiaries need to exhibit compliance with the relevant eligibility criteria which include providing internationally-recognised workers' rights, affording satisfactory protection for intellectual property rights and providing reasonable market access. What is most significant in this context is that access to AGOA is predicated on beneficiary countries remaining eligible under the GSP scheme³. As such, should South Africa be found ineligible in the forthcoming review, it will by extension lose its benefits enjoyed under AGOA. Unless South Africa addresses US concerns about its intellectual property regime, it risks losing access not just to the GSP but also to AGOA which would be detrimental to the automotive and agricultural sectors of the economy.⁴

In this regard, there have been calls from some members of Parliament, most notably Shadow Minister of Trade and Industry, Dean Macpherson, for President Ramaphosa to refer the contentious Copyright Amendment Bill back to Parliament in order to address the concerns which underlie the GSP review.⁵ Members of the business community, such as business organisation Sakeliga, have raised similar concerns about the risk of losing preferential tariff treatment under both the GSP and AGOA. Sakeliga reiterated that the Copyright Amendment Bill and Performer's Protection Bill should be referred back to Parliament for reconsideration, failing which, they have urged the President to delay the enactment of the Bills so as to afford Parliament sufficient time to reconsider the proposed legislation.⁶

OBSTACLES TO ECONOMIC INTEGRATION

What is clear is that there is still a great deal of work to be done. As Rwandan President Paul Kagame said, when opening the Agreement for signature last year, "the last mile of a race is often the most arduous." The most daunting hurdle in this "last mile" of African economic integration is undoubtedly the spectre of resurgent economic nationalism. The establishment of the AfCFTA flies in the face of a trend that has taken root in some of the world's largest economies. The United Kingdom is still struggling to exit the EU, while the United States continues to tighten immigration controls and impose protectionist trade measures not only with China but also with the EU and others.

Africa's economic powerhouses are not immune to this proclivity to protect narrow national interests from perceived foreign threats. One of the last nations to sign, but not ratify, the AfCFTA Agreement was Nigeria, the continent's most populous country (with 200 million people) and largest economy (with a nominal GDP of US\$376 billion, around seventeen per cent of Africa's GDP)⁷. Explaining this reluctance last year, President Muhammadu Buhari said: "We will not agree to anything that will undermine local manufacturers and entrepreneurs, or that may lead to Nigeria becoming a dumping ground for finished goods."

Indeed, even in the most integrated regional market, the East African Community ("**EAC**"), there have been on-going trade tensions between Kenya, Tanzania and Uganda over the Kenyan government's response to the 2017 sugar shortage in which it began importing sugar at zero tariff rates from outside of the EAC. In response, Tanzania and Uganda imposed heavy tariffs on sugar and confectionary products imported from within the EAC to protect domestic markets.

It is discouraging, too, that Africa's three largest economies – Nigeria, Egypt and South Africa – have all declined to sign the AU Protocol on the Free 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 (of business or trade), as well as protection against arbitrary expulsion and expropriation.

It is unclear when, or whether, South Africa intends to sign up to this Protocol. The current government has yet to make any decisive departure from the economic nationalism of the Zuma administration, and has likewise failed effectively to confront the xenophobic attitudes prevailing among many South Africans, which erupted into a spate of deadly attacks on African immigrants in September.

In this regard, it is concerning that the Department of Small Business Development is drafting legislation to exclude foreign nationals from operating businesses in certain sectors. Measures such as these are wholly incompatible not only with the Protocol on the Free Movement of Persons (which South Africa has not signed), but also with the spirit and purpose of the AfCFTA (which it has).

The AfCFTA Protocol on Trade in Services, which has been signed as part of the consolidated text of the AfCFTA Agreement (but whose supporting sector-specific commitments are still the subject of negotiations), is the most relevant in this regard. It requires member states to accord to services or service suppliers of another state no less favourable treatment than it accords to similar domestic services or service suppliers.

This principle is echoed in many of South Africa's existing international trade obligations, including the national treatment principle in the WTO's General Agreement on Trade in Services as well as the non-discrimination principle in the Treaty of the Southern African Development Community. It follows that the Minister of Small Business Development's proposals will not fly as a matter of international law.

Looking forward

If the AfCFTA is to succeed, African states – especially South Africa, Nigeria and Egypt – will need to move away from economic nationalism (and, in South Africa's case, xenophobia). This will require sustained efforts from governments, the private sector and civil society, to digest and disseminate information about the potential of the AfCFTA to generate jobs, improve infrastructure and boost economic growth.

The late Samora Machel, Mozambique's first president, addressing the need for national unity in a country wracked by poverty and civil war, said: "For the nation to live, the tribe must die." In a similar sense, for the AfCFTA to live, nationalism must die.

¹ 'USTR Announces GSP Enforcement Actions and Successes for Seven Countries' available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement>.

² Ibid. In its petition to the USTR, the IIPA cited the Copyright Amendment Bill (B13B-2017) and the Performer's Protection Bill (B24B-2016) as failing to comply with the GSP's eligibility criteria as well as with various international treaty obligations such as the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS Agreement**") as well as the World Intellectual Property Organization's ("**WIPO**") Performances and Phonograms Treaty and Copyright Treaty. In this regard, note the following articles: 'SA business organization asks President to delay enactment of two Bills to ensure continued US trade benefits' available at <https://agoa.info/news/article/15682-sa-business-organisation-asks-president-to-delay-enactment-of-two-bills-to-ensure-continued-us-trade-benefits.html> and 'IIPA petition leads USTR to review South Africa's GSP benefits' available at <http://infojustice.org/archives/41736>.

³ 'R35 billion in South African exports to the USA are at stake in a 'review' just triggered by SA's copyright reform efforts' available at <https://www.businessinsider.co.za/agoa-and-more-south-african-exports-threatened-by-us-gsp-review-2019-10>.

⁴ With regards to the automotive sector, South Africa is responsible for more than ninety-nine per cent of all automotive exports from AGOA beneficiaries to the United States. It is estimated that in 2017 approximately USD1,2 billion worth of South Africa's automotive exports to the United States benefitted from tariff preferences under the GSP and AGOA. In addition, agricultural exports from South Africa to the United States to the value of approximately USD270 million gained preferential tariff treatment under GSP and AGOA in 2017. Should South Africa lose access to tariff exemptions following the proposed review, these exports would be at risk of facing greater market access obstacles. The aforementioned statistics are available at <https://agoa.info/data/sector-data-automotive.html> and <https://agoa.info/data/sector-data-agriculture.html>.

⁵ Dean Macpherson MP conveyed a letter to President Ramaphosa dated 12 June 2019 outlining the Democratic Alliance's concerns in respect of the Copyright Amendment Bill. Available at: <https://press-admin.voteda.org/wp-content/uploads/2019/06/Letter-to-President-Ramaphosa.pdf>.

⁶ 'Sakeliga asks President to delay enactment of two Bills to ensure continued US trade benefits' available at <http://m.engineeringnews.co.za/article/sakeliga-asks-president-to-delay-enactment-of-two-bills-to-ensure-continued-us-trade-benefits-2019-10-28>.

⁷ President Muhammadu Buhari signed the AfCFTA Agreement at an Extraordinary Summit of the AU on 7 July 2019. However, it has not yet ratified the AfCFTA Agreement. In this regard, note the following article: 'AfCFTA: Could this be the time for Africa?' available at <https://intpolicydigest.org/2019/08/03/afcfta-could-this-be-the-time-for-africa/>.

KEY CONTACTS

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