

# AELEX

LEGAL PRACTITIONERS & ARBITRATORS

# Implementation of the AfCFTA

Cogs in the wheel, stumbling blocs and  
windows of opportunity



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# Introduction

The African Continental Free Trade Area Agreement (AfCFTA) is set to contribute in lifting 30million people from extreme poverty and 68 million people from moderate poverty by 2030 and increase real income gains by as much as 8%, if properly implemented.

The objectives of the AfCFTA includes elimination of tariffs and non-tariff barriers to exchange in goods; progressive liberalisation of trade in services; cooperation on investment measures, harmonisation of intellectual property rights and competition policies; cooperation on customs matters and implementation of trade facilitation measures; establishment and promotion of cooperation in all trade-related areas; and maintaining an institutional framework for the implementation and administration of the Continental Free Trade Area.

These objectives are feasible with proper implementation of the Agreement but there are significant issues that may pose a challenge in the implementation of the Agreement.

Proper implementation of the Agreement will require; first, the political will and capacity of the governments in each State Party to implement the AfCFTA, and second, the cooperation and capacity building of private actors to embrace the ideals of trading within Africa as envisaged under the Agreement.

In this article, we will analyse some of the most critical challenges experienced so far in the quest for proper implementation of the Agreement with a view to identifying workable solutions.

# *Challenges To The Actualisation Of The AfCFTA*

Although slowly increasing, intra-Africa trade remains low. In 2017, less than 20% of Africa's total exports and imports went to and from the rest of the continent. Several explanations have been offered to explain this state of affairs, including; the dependence of African economies on commodity production and exports, lack of diversification resulting in a mismatch between supply and demand, tariffs and non-tariff barriers, inefficient transport infrastructure, poor trade logistics and high security risks.

The common thread running through all these explanations is that the cost of trading in Africa is unattractive and prohibitive whether it is as a result of non-tariff barriers, trade bottlenecks created by infrastructural, policy and procedural constraints, complex clearance procedures, cumbersome documentation requirements or unpredictable trade policies. It is pertinent to note that challenges are not unexpected in the implementation of any trade agreement, and this holds truer for as ambitious an Agreement as the AfCFTA treaty is.

What is of interest, are the unique challenges which have significantly impacted implementation of the Agreement from a practical perspective. These challenges include;

## **Differential Development**

The concept of variable geometry is anticipated in Article 5 of the AfCFTA Treaty to accommodate different State Parties proceeding at their own pace in implementing the Agreement. However, because many of the signatories to the Agreement are developing and less-developed countries, the conditions for liberalising trade and the exchange supply infrastructure are simply inadequate. Without continent-wide infrastructure to support coastal, inland and air trade, commerce can simply not flourish under the AfCFTA.

Proper implementation of the Agreement requires all African countries to look beyond their immediate priorities and focus on the possibilities of the integrated market the agreement offers.

However, it would appear that only a few states have optimized to commence trading under the Agreement. Despite the relative speed achieved in ratification of the Agreement, trading has been slow to commence with only 8 countries opting into the pilot phase of trading under the Guided Trade Initiative.

Differential development is a significant challenge when the AfCFTA is compared to the successes of the European Union. Most African countries do not have the level of economic independence nor the infrastructural support that is available in most EU member states. These infrastructure and market information gaps are exacerbated by bureaucratic incompetence, human capital deficit, and financial incapacity.

The poverty rate in most countries on the continent is a major challenge for the implementation of the AfCFTA and efforts to address this challenge through the operationalisation of the AfCFTA Adjustment Facility are yet to come to fruition. It is not a coincidence that most of the successful Regional Economic Arrangements (REAs) like the North American Free Trade Agreement (NAFTA) and ASEAN Free Trade Area (AFTA) are made up of first world countries which is one reason implementation of the AfCFTA has been challenging with the ratio of third world countries in Africa.

## **Political Arrangements**

A related challenge to variable geometry is that the steps and efforts required for the proper implementation of the AfCFTA depends on the impetus and commitment of each Country which is often influenced greatly by political considerations. While it is not unexpected that Countries will pursue only actions that align with their political goals, it is hoped that they will not sacrifice the economic development and integration of the continent on the altar of their selfish political interests.

This challenge is prevalent in the implementation of other Regional Trade Agreements and is a complex hurdle to clear. This is because the loss of tariff revenue in the short term, capital commitment to building infrastructure and capacity building required for the implementation of the AfCFTA can significantly impact government revenue and is therefore not an easy political decision to make.

Measures required to eliminate non-tariff barriers<sup>8</sup> also require political will which some nations lack and this represents a significant challenge to the implementation of the AfCFTA.

Existing Regional Economic Communities  
The AfCFTA declares the RECs as the building blocs of the trade area<sup>9</sup> and makes special provisions for goods and services produced in these special economic zones. However, the reality is that these RECs are not all smoothly operating with the same rules and mechanisms and there is a need to align and harmonise the obligations, commitments, processes and procedure, standards, etc under these RECs with the AfCFTA to ensure a single coherent and harmonised market.

The harmonisation process takes time, effort and resources and has proved to be challenging to the implementation of the AfCFTA thus far. It is pertinent to note that the AfCFTA treaty legislates for phenomenon. For example, RECs would be permitted to maintain their integration arrangements where such arrangements specify commitments higher than those of the AfCFTA. This provision is laudable but insufficient in practice to address the convoluted situations that may arise where state parties are subject to different commitments under the AfCFTA and their national and regional commitments.

In any case, one of the general objectives of the agreement is to “resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes,” but the absence of a specific protocol on relations between the AfCFTA and existing RECs creates some uncertainty.

Additionally, some economic alliances /agreements such as the Indian Ocean Commission, Southern African Customs Union, and Mano River Unions are not specifically countenanced by the AfCFTA and their status with respect to the AfCFTA treaty remains uncertain.

### **Digital trade and Digitalization in the AfCFTA**

It is generally agreed that proper implementation of the AfCFTA in all sectors across finance, agriculture and education requires digitization particularly in the area of electronic records. Therefore, State parties must ensure that they take pre-emptive steps to promote e-commerce, digital trade and technological innovations as measures to facilitate the implementation of the AfCFTA.

As Africa is currently experiencing significant growth in the tech, digital, e-commerce industries and, other inter-related fields, the AfCFTA will need to provide the framework for tackling the rising challenges associated with digitization like data breaches which usually involve compromising or abusing digitally acquired data, digital scams and increased rate of fraud. Bridging the digital divide and democratising access to technology are pertinent challenges to the implementation of the AfCFTA.

Digitalisation for Africa is the clearest possible route to trade that is cheaper, faster, simpler and more sustainable. Digitalisation in the long run, will reduce costs and promote efficiency amongst state parties which will, in turn, boost economic development and growth.

However, available technology, access to digital products and solutions, poverty, illiteracy and archaic processes pose a significant challenge to leveraging digitalisation for trade in Africa. The biggest challenge to achieving this is the lack of a suitable legal framework. The framework applicable to trade records currently is archaic and in need of revamping. A possible solution is to adopt a similar framework to the UNCITRAL Model Law on Electronic Transferable Records (MLETR), which has been used successfully by a few jurisdictions.

## **Trade related Innovation**

Another challenge that must be addressed in the implementation of the AfCFTA is what has come across as a lack of imagination and innovation in developing Africa-first solutions from our attempts to implement the Agreement so far. For example, frontier technology like cryptocurrency and blockchain are missing in current conversations to innovate AfCFTA specific solutions to challenges such as cross-border payment issues, ridiculous transaction costs in the traditional banking system, complexity and slow pace of paper trade, etc .

Other areas that would benefit from innovation include, intellectual property rights protection, competition and rules of origin.

# *Opportunities*

Implementation of the AfCFTA requires individual state parties to align their domestic legislation with their obligations under the Agreement. This would require extensive review towards, repealing, amending or supplementing existing legislation, enacting new legislation or negotiating industry specific concessions. The whole process is technical and requires a coordinated effort from the government, sector regulators and the organized private sector. There is therefore a need for capacity building to upskill all the relevant stakeholders to play their respective roles effectively. Many DFIs have recognized this skill gap and are currently funding capacity building projects to enhance the implementation of the AfCFTA, thus creating opportunities for professionals.

Increased intra-Africa trade will significantly increase the demand for different means of transportation which will in turn attract investment in building supporting infrastructure. The maritime industry will be the biggest beneficiary with many opportunities becoming available.

The AfCFTA is an ambitious project and already bears the distinction of being one of the fastest free trade agreements to be concluded within a short timeframe. The teething challenges highlighted above are opportunities for research and experiential learning in developing best practices in the negotiation and implementation of Free Trade Agreements.

Many of the RECs in Africa have been underwhelming in achieving the level of regional integration and economic development that underpin their existence. Negotiations phase of implementing the AfCFTA therefore represents a renewed opportunity for the RECs to act on their regional integration goals and actually implement liberalization policies.

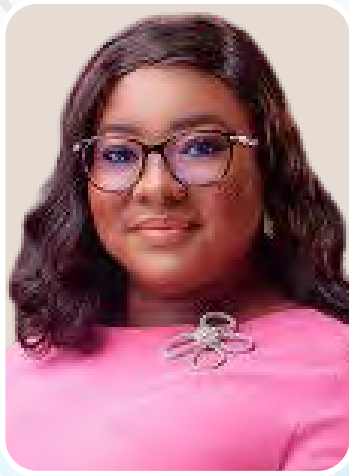
# Summary

The AfCFTA has the potential to build Africa's economy through trade liberalization and economic integration, and could create the largest and most efficient trade area in the world. Some objectives of the agreement such as creating a common currency and visa may be complex issues to achieve, but with the size of the continent and the horizon for trade, there is no gainsaying that the gains could be very significant.

However, there are daunting challenges that must be surmounted before any of these gains come to fruition and many state parties to the AfCFTA do not have the reputational track to suggest that the AfCFTA will be implemented properly and beneficially as designed. It is pertinent to note that a lot has been achieved already with the right number of signatories, an impressive secretariat, a highly skilled secretary-general in place to ensure the objectives of the agreement are met, but poor implementation will undo all of this progress if we do not look ahead and legislate for any obstacles that might impede optimal implementation of the AfCFTA.

The obstacles highlighted in this article are a good place to start to ensure that the AfCFTA does not become another principle existing only on paper but can be an agreement with effects that are felt all over Africa.





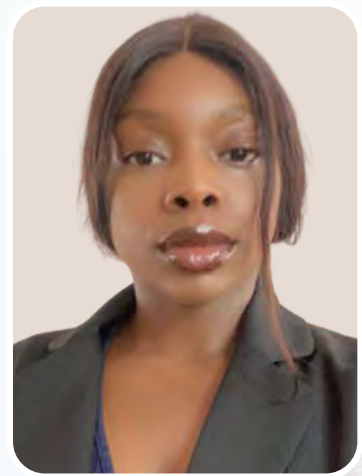
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