

African States launch the operational phase of the African Continental Free Trade Area Agreement, creating one of the largest common markets in the world

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During the African Union’s 12th Extraordinary Summit in early July, the signatory States of the Agreement Establishing the African Continental Free Trade Area (the “Agreement”), which entered into force on May 30, 2019, launched the Agreement’s operational phase.

The Agreement is pioneering as a truly pan-African agreement tackling barriers to intra-African trade, and creating one of the largest common markets in the world. It has been ratified by more than 25 African Union Member States, and a further 27 States have signed the Agreement and are expected to ratify, with Nigeria and Benin most recently signing the Agreement on July 7, 2019. Only one of the African Union Member States, Eritrea, has not signed up to the Agreement at all. Although the impact of the Agreement remains to be seen, projections are promising and many are optimistic that it will have a significant effect on boosting intra-African trade, encouraging investment from within and outside of Africa and enhancing overall the competitiveness of African States’ economies in the continent and in the global market. The Agreement overlays a complex web of existing regional and international trade agreements in Africa, and stakeholders (including investors) will need carefully to navigate the interactions between these regimes and the protections that may be available to them in the African Continental Free Trade Area going forward.

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The African Continental Free Trade Area – Background

The African Continental Free Trade Area (“AfCFTA”) Agreement was negotiated under the auspices of the African Union (“AU”) and entered into force on May 30, 2019 for all States that have ratified the Agreement.¹ The Agreement was first signed on March 21, 2018 in Kigali, Rwanda by a vast majority of African States.² Other States subsequently signed. Nigeria, Africa’s largest economy, was until recently perhaps the most notable absentee, but recently signed the Agreement during the AU Extraordinary Summit in Niamey, Nigeria, on July 7, 2019, together with Benin. Currently, only one of the AU Member States, Eritrea, is yet to sign the Agreement. During the AU’s Extraordinary Summit on July 7, 2019, the signatory States announced that the secretariat of the AfCFTA will be located in Ghana, and formally launched the operational phase of the Agreement. Trading under the Agreement will begin on July 1, 2020.

The Agreement creates one of the largest common markets in the world, given the African continent’s estimated combined annual GDP of over US\$ 2.45 trillion³ and combined population of more than 1.2 billion people.⁴

The Agreement’s main objective is to “*create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration*

of the African continent.”⁵ A further purpose of the Agreement is to “*resolv[e] the challenges of multiple and overlapping trade regimes to achieve policy coherence, including relations with third parties.*”⁶ The Agreement covers “*trade in goods, trade in services, investment, intellectual property rights and competition policy,*”⁷ and contains specific objectives which are intended to facilitate the fulfilment of the Agreement’s general objectives, including to: (i) progressively eliminate tariffs and non-tariff barriers to trade in goods; (ii) progressively liberalize trade in services; and (iii) cooperate on investment, intellectual property rights and competition policy.⁸

There are two Phases to the AfCFTA negotiations. Phase I includes the following, which together comprise the Agreement that entered into force on May 30, 2019:

- The **Agreement Establishing the AfCFTA**, which contains the framework and objectives, and establishes the governing bodies for the administration of the AfCFTA.
- The **Protocol on Trade in Goods**, which provides for a number of specific measures aimed at the liberalization of trade in goods, including most-favored nation treatment, national treatment after goods have cleared customs, progressive elimination of import duties (or equivalent charges), the identification and elimination of

¹ As at July 31, 2019, more than 25 States had ratified the Agreement. States that have signed but not ratified the Agreement will continue to participate in the continuing negotiations in relation to the AfCFTA, and are expected to ratify the Agreement in due course.

² The following States signed the AfCFTA Agreement on March 21, 2018 in Kigali: Algeria, Angola, Burkina Faso, Cameroon, Central African Republic, Cape Verde, Chad, Côte d’Ivoire, Comoros, Congo, Djibouti, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Kenya, Libya, Liberia, Madagascar, Mali, Malawi, Morocco, Mozambique, Mauritania, Mauritius, Niger, Rwanda, Senegal, Seychelles, Somalia, South Sudan, Sao Tome & Principe, Sudan, Eswatini, Tanzania, Togo, Tunisia, Uganda and Zimbabwe. Burundi, Lesotho, Namibia, Sierra Leone and South Africa signed the Agreement on July 2, 2018, during the 31st AU Summit. Botswana, Guinea-Bissau and Zambia signed the Agreement during the 32nd AU Summit in February 2019. Nigeria and Benin signed

the Agreement on July 7, 2019, during the 12th AU Extraordinary Summit. See AU, [List of Countries which have signed, ratified/acceded to the Agreement Establishing the African Continental Free Trade Area](#) (last updated July 16, 2019).

³ See International Monetary Fund, [DataMapper, World Economic Outlook \(April 2019\), GDP, current prices billions of US\\$](#) for Africa (region) (last accessed on July 31, 2019).

⁴ According to United Nations Population Division figures, the population for Africa as at 2018 stood at 1,275,920,972. See [United Nations Population Division, Standard Projections](#), Total Population (last accessed on July 31, 2019).

⁵ Agreement, Article 3(a). The English version text of the AfCFTA Agreement is available [here](#) (last accessed on July 31, 2019).

⁶ Agreement, Preamble.

⁷ Agreement, Article 6.

⁸ Agreement, Article 4.

non-tariff barriers, as well as customs cooperation provisions and trade remedies.

- The **Protocol on Trade in Services**, which sets out measures aimed at the progressive liberalization of trade in services, including provision for the agreement of mutual recognition of standards and criteria for licensing or certification of suppliers, and specific commitments on the protections that States agree to for particular service sectors.
- The **Protocol on Rules and Procedures on the Settlement of Disputes**, which contains mechanisms for the resolution of inter-State disputes arising in relation to the Agreement.

Left for Phase II of the negotiations, which are to be completed by June 2020, are intellectual property rights, investment and competition policy and commitments on trade in services for 7 non-priority service sectors (there are 5 priority service sectors included in Phase I).⁹

The Impact Of The AfCFTA Agreement On Trade

It is estimated that the AfCFTA may increase trade levels amongst African States by 52.3 percent by eliminating import duties alone (more if non-tariff barriers are also addressed).¹⁰ This should increase investment flows within Africa and thus support economic development. A number of other potential benefits have been identified, including access to markets (African and global) particularly for small and medium-sized companies, intra-African supply chain integration, job creation and an increase of sustainable exports.¹¹

Whether or not the AfCFTA achieves these benefits depends largely on its actual implementation, and “what happens next.”

During the AU Extraordinary Summit early July, the signatory States agreed on five operational instruments that will govern the Agreement: (i) the rules of origin determining which goods qualify for preferential market access under the AfCFTA; (ii) a unified digital payment system; (iii) an online negotiating forum for listing products and tariffs; (iv) a system for the monitoring and elimination of non-tariff barriers, and (v) an African Trade Observatory.¹² However, there are some key issues relating to trade in goods and services that are yet to be agreed, although a schedule for completion has been set by the AU. These include schedules of tariff concessions (which were to be submitted to the AU Assembly for adoption in July 2019) and the specific commitments for trade in services for the 5 priority service sectors included in Phase I, which are to be submitted to the AU Assembly for adoption in February 2020. There are then also the issues to be addressed during the Phase II negotiations.

Negotiations aside, implementing the AfCFTA Agreement across countries which differ significantly in terms of population, geography, economy, resources, and economic development may prove challenging. The very fact that the AfCFTA has entered into force in just over a year, however, is itself an indication of the commitment of African States to come to a collective agreement. Further proof is the US\$4.8 million grant to the African Union from the African Development Bank with the specific purpose to “*accelerate the momentum of the [AfCFTA].*”¹³ There have also been initiatives to engage with the private sector such as the AfCFTA Regional Trade

⁹ Agreement, Article 7; Note that although negotiations are scheduled to be completed by June 2020, the finalized legal texts are to be tabled for adoption by the AU Assembly in January 2021. See [Key Decisions of the 32nd Ordinary Session of the Assembly of the African Union](#), February 2019 (last accessed on July 31, 2019).

¹⁰ Estimation by the UN Economic Commission for Africa. See [African Continental Free Trade Area – Questions & Answers](#) (last accessed on July 31, 2019).

¹¹ See [African Continental Free Trade Area – Questions & Answers](#) (last accessed on July 31, 2019).

¹² See [AU Press Release, “Operational phase of the African Continental Free Trade Area is launched at Niger Summit of the African Union”](#) (July 7, 2019) (last accessed on July 31, 2019).

¹³ [African Development Bank Group News & Events, “African Development Bank Board approves \\$4.8 million grant to accelerate African free trade”](#) (April 10, 2019) (last accessed on July 31, 2019).

Forum, among other initiatives to generate momentum across the private sector.¹⁴

The AfCFTA And Investment Protection

The future conclusion and ratification of the Investment Protocol may be beneficial to the promotion and protection of foreign investment in Africa. Of particular interest to investors both within and outside the continent will be the scope of the substantive protections to be provided for in the Investment Protocol as well as the procedural remedies, in particular whether the Investment Protocol will provide for an investor-State dispute settlement mechanism.

The exact impact of the Investment Protocol will depend on the content of the Protocol, which remains to be determined.¹⁵ If the Protocol continues in the vein of the other recent intra-African agreements on investment signed or under negotiation, it will likely seek to adopt a balanced approach between the rights of the investor and the interests of the host State.

If the current draft of the Pan-African Investment Code (PAIC), under negotiation at the African Union,¹⁶ were to serve as a model, for example, the Investment Protocol may include certain substantive protections such as the protection against unlawful

expropriation, most-favored nation and national treatment,¹⁷ but not the fair and equitable treatment and full protection and security standards. Access to investor-State arbitration may also be conditioned on the exhaustion of local remedies.¹⁸

While one objective of the Agreement, as stated in its Preamble, is to achieve harmonization and coordination between the various inter-African trade liberalization instruments, the Agreement will not replace regional agreements. State Parties that are members of other regional communities, customs unions or trading arrangements, and which have attained higher levels of regional integration among themselves, will maintain such higher integration.¹⁹

In addition to the protection granted under domestic investment laws or under bilateral investment treaties to which African States are party, African investors investing in other African countries may therefore continue to benefit from one or more regional investment protection agreements, such as the Economic Community of West African States (ECOWAS) Supplementary Act on Investments,²⁰ the Southern African Development Community (SADC) Protocol on Finance and Investment,²¹ and the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement, provided it enters into force.²² Depending on what mechanisms

¹⁴ See [United Nations Economic Commission for Africa, "AfCFTA Regional Trade Forum – Horn of Africa, Concept Note"](#) (June 2019) (last accessed on July 31, 2019).

¹⁵ The AU Commission, the United Nations Conference on Trade and Development (UNCTAD) and the Economic Commission for Africa organized expert meetings in November 2018 and February 2019 to elaborate a first draft of the Investment Protocol of the AfCFTA, which is expected to be submitted to the signatory States in the second half of 2019. See [UNCTAD, Investment Policy Monitor, Issue 21](#) (March 2019), p. 9 (last accessed on July 31, 2019).

¹⁶ The African Union is indeed currently negotiating the Pan-African Investment Code (PAIC), which is meant to serve as a “comprehensive guiding instrument on investment for all African Union Member States.” See PAIC draft, December 2016, Preamble. The English version of the draft text is available [here](#).

¹⁷ See PAIC draft, December 2016, Articles 7, 9 and 11.

¹⁸ See PAIC draft, December 2016, Article 42(1)(c).

¹⁹ AfCFTA Agreement, Article 19(2): “Notwithstanding the provisions of Paragraph 1 of this Article, State Parties that are members of other regional economic communities,

regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves.”

²⁰ The ECOWAS Supplementary Act on Investments was signed on December 19, 2008 and entered into force on January 19, 2009. The ECOWAS Energy Protocol of January 31, 2003 also contains provisions on investment protection, which should apply provisionally. See ECOWAS Energy Protocol, Article 40.

²¹ The SADC Protocol on Finance and Investment was signed on August 18, 2006 and entered into force on April 16, 2010. An amendment to Annex I of this Protocol (on Co-Operation on Investment) was signed in 2016, and it is not entirely clear at this time whether it entered into force in August 2017.

²² The COMESA Investment Agreement was signed on May 23, 2007 but has not yet entered into force. Other African regional economic communities (“RECs”) that have concluded instruments containing provisions on investment protection, some of which are in force, include the Arab Maghreb Union (UMA), the Economic and Monetary Community of Central Africa (CEMAC), the East African Community (EAC) and the Economic

are provided for under the Investment Protocol, it will also be interesting to see whether investors can rely on existing regional mechanisms and arbitration rules to resolve investment related disputes arising in relation to the AfCFTA.²³

Whether the AfCFTA Investment Protocol will include an express provision aimed at resolving any potential conflicts between these various instruments is not known at this stage. Because the African regional investment agreements differ in many aspects,²⁴ including their scope of application, the substantive protections granted to investors, and the availability of investor-State dispute settlement mechanism (ISDS), it will be important to monitor whether the AfCFTA Investment Protocol provides additional protections and remedies to investors relative to other investment regimes that would otherwise be applicable to them.

Conclusion

The extent of the impact that the AfCFTA will ultimately have, and whether its full potential is realized, remains to be seen. That the AfCFTA Agreement has entered into force and its operational phase has been launched are in themselves significant steps, although much will depend on the negotiation of the remaining Phase I issues and of Phase II and, perhaps most importantly, the implementation in each State. Current and potential investors in Africa should carefully monitor Phase II of the negotiations to understand the scope of the protections and obligations that will be applicable in the post-AfCFTA Africa.

The interaction between the new protections, rights and obligations under the AfCFTA and existing regional and international regimes is likely to be

complex, as explained above. In the meantime, investors should carefully consider these issues and seek advice to ensure appropriate investment structuring at the outset of an investment to take advantage of available protections, and to ensure maximum clarity as to how and in what *fora* investment disputes may be resolved.

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Community of the Great Lakes Countries (CEPGL). The COMESA, SADC and EAC Member States are also currently negotiating the Tripartite Free Trade Area (TFTA), which is intended to cover the areas of services, competition policy and investment protection as well.

²³ See, e.g., OHADA Uniform Act on Arbitration of November 23, 2017.

²⁴ For example, the ECOWAS Supplementary Act only offers the possibility for an investor to bring investment claims either to a domestic court or to a relevant competent national authority (ECOWAS Supplementary Act on Investments, Article 33). The COMESA Investment Agreement allows investors to bring an investment dispute

either before a court of the host State, to the COMESA Court of Justice, or to international arbitration, including ICSID or UNCITRAL arbitration or under any other arbitration rules or arbitral institution. See COMESA Investment Agreement, Article 28. The recent amendment to the SADC Protocol on Investment has eliminated the possibility of investor-State arbitration for investment disputes. See SADC Protocol on Finance and Investment, Amended Version of 2016, Annex I, Article 26. The 2006 version of the SADC Protocol on Finance and Investment provided for investor-State arbitration after exhaustion of local remedies (Annex I, Article 28).