



Variation in appreciation of the rule of law across the continent & the general legal implications of the AfCFTA

**MR FIDELIS MANYUCHI & MR TAPIWA JOHN CHIVANGA
(SCANLEN & HOLDERNESS)**



SCANLEN & HOLDERNESS

SOLICITORS SINCE 1894

The current status in Africa

- ❑ There is a huge variation in appreciation of the role of the rule of law in Africa;
- ❑ The variance can be seen from country to country and also within country from one group of people to another.

Examples where lawlessness has been displayed:

1. the massive looting that occurred in South Africa in 2021;
2. the Islamic Insurgency in Northern Mozambique; and t
3. the Civil war in Ethiopia.

Instances where the rule of law was respected

1. The peaceful transfer of power in Zambia;
2. The election petition of Kenya;
3. The recent agreement by the Zimbabwean government to compensate farmers for improvements on acquired land.

The success of the agreement hinges on equal respect of the rule of law by all state parties

- Without the respect of the rule of law the agreement is bound to fail like the SADC Tribunal.
- The SADC Tribunal example.
- The SADC Tribunal was dismantled when it made a ruling against the government of Zimbabwe.
- Its legacy is a derelict building in Windhoek.

SOLUTION TO THIS PROBLEM

- ❑ Honest continent wide conversations on the current state of the rule of law.
- ❑ It must be agreed and understood that:
 1. Every state is below the law;
 2. Every state is equal before the law;
 3. The decisions of the dispute settlement body are binding and must be respected regardless of whether one agrees with the decision or not.

The Legal Implications of Successful Implementation

2. So what are the general legal implications of the African Continental Free Trade Agreement?

➤ The main objective of the agreement and its protocols is to liberalise trade in goods and services among AU members in pursuit of a deeper economic integration of the African continent. To do this, the agreement imposes varying legal principles the fundamental ones being:

- a. The Most-Favoured Nation Principle (Article);
- b. The National Treatment Principle;
- c. Special and Differential Treatment principle;
- d. Reciprocity;
- e. Transparency; and
- f. Single undertaking principle.

The question then is, what do the above legal principles entail? What are the general legal implications of the agreement?

The Legal Implications of Successful Implementation

- a. **Most Favored Nation Principle:** This principle provides that where a member state accords favorable treatment to the goods and services of another member state, it should accordingly provide the same favorable treatment to the like goods and services of other member state parties. It follows therefore, that a member state cannot, for example, reduce tariffs in respect of goods from Rwanda and fail to extend the same courtesy to another member state such as Egypt. Any subsequent laws (local and international laws) that a member state becomes bound by which extend favorable treatment to another state should accordingly extend similar treatment to every other state party.
- b. **National Treatment principle:** this essentially means that a country cannot provide treatment that is less favorable to the goods and services of another member state than it provides for its own local goods and services once those goods and services enter the state in question. Consequently, upon being cleared at customs, the internal measures, laws and regulations of a country should be discriminatory towards the goods and services of those from another member state.
- c. **Special and Differential Treatment:** in terms of this legal principle, member states may take into account the challenges that may be encountered by State Parties and may grant flexibilities such as transitional periods, within the framework of action plans, on a case by case basis, to accommodate special economic situations and development, trade and financial needs in implementing the Agreement and its Protocols. This means, a member state is free, subject to the Agreement, to grant special and differential treatment in certain circumstances to other member states that are not particularly in a position to observe the full extent of the agreement and its Protocols. In respect and to the extent that the S & D treatment is given, the specific member state will be exempted from enforcing the clauses/tenets of the Agreement to that extent provided and/or may also receive technical support and assistance in capacitating it in order for it to fully realize the principles espoused in the agreement.
- d. **Reciprocity:** This principle simply ties into the aforementioned principles. It provides that, where favourable treatment is granted to a member state, the member state in question should extend the same favourable treatment.
- e. **Transparency:** The Agreement and its various protocols also call upon state parties to publish and make easily accessible all domestic and international laws and regulations that the member states are already bound by as well as the ones they undertake to be bound by in the future. Effectively, all laws and regulations that a member state becomes bound by should be published immediately and made accessible to the public and other member states. This also enables the other countries as well as Council of Ministers to review the aforesaid laws for purposes of ascertaining whether or not they adhere to the provisions of the Agreement and its Protocols. Where such laws and regulations do not adhere, they are null and void to the extent of such inconsistency.
- f. **Single Undertaking Principle:** This agreement provides that, once a country accedes to the Agreement and its Protocols, the Agreement and the protocols shall be taken as an inseparable package practised in conjunction with one another. The legal implication of this is that, all multilateral agreements arising under the AfCFTA apply equally and are equally binding to all member states as they represent an inseparable package of rights and disciplines which have to be considered in conjunction to each other. A state can thus, not 'opt out' of a specific clause becomes it finds it particularly undesirable.

The Legal Implications of Successful Implementation

Other than the aforesaid legal principles, other pertinent issues relate to the:

i) Regional Trade Agreements & Customs Unions (legal implication of AfCFTA on RECs) – the agreement provides that these should be in coherence with the principles as stated in the agreement and its protocols. Where there is any inconsistency the agreement prevails to the extent of such inconsistencies. Nonetheless, this should not be taken as being adverse to regional trade facilitation because the agreement provides that if regional states have reached a higher level of economic integration they shall maintain such higher standards.

ii) Dispute Settlement Body;

-Overallly, the cumulative effect of these principles is that there will be widespread reduction of tariff and non-tariff barriers to trade across the continent in pursuit of greater economic integration across the country. Free movement of goods, services, capital and people will greatly enhance this, and will be a consequence of successful implementation of the principles.

- In addition, the AfCFTA and its various protocols have to be integrated and domesticated in the respective African countries that have ratified the agreement and its protocols. This is done through each state members respective constitutional procedures. This is pertinent as it avoids state countries relying on their own domestic laws to avert their international obligations.

-Inevitably, if the agreement and its protocols are successfully implemented and as has been mentioned prior, if the rule of law is observed to its fullest extent, the objectives espoused in the agreement will be achieved.

- In conclusion, Africa can create a single market for goods and services, and deepen the economic integration of the continent to the extent envisioned in the agreement provided it fully implements the Agreement and its protocols as well as any legal implications arising thereto.

//ENDS //



SCANLEN & HOLDERNESS

SOLICITORS SINCE 1894