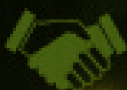
POLICY BRIEF

Understanding the Overlaps Between Trade and Investment Obligations and Tax Measures –

Setting a Foundation for Dialogue on the AfCFTA



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1. INTRODUCTION

Trading under the African Continental Free Trade Area (AfCFTA) officially began on 1 January 2021, marking the commencement of the largest free trade area in the world measured by the number of countries participating.[2] The AfCFTA is a product of many years of efforts to achieve regional integration that first emerged with the establishment of the Organization of African Unity (OAU) in 1963. Its full implementation and operationalization reflects a long-standing desire of post-colonial governments to realize self-reliance, shared prosperity and sustainable growth and development.[3] In this regard, the Agreement establishing the AfCFTA commits to oversee the creation of a single market for goods and services, facilitated by the free movement of persons, eliminate tariff and non-tariff barriers to trade and establish a continental customs union.[4]

By achieving these ambitious objectives, it is anticipated that the AfCFTA will not only boost trade and real income in the continent but will also significantly impact poverty, radically change Africa's position in the global value chain and lead to the development of African based value chains.[5] Indeed, the AfCFTA represents "a unique opportunity to promote inclusive growth and accelerate the achievement of the post-pandemic recovery, the 2030 Agenda for Sustainable Development and Agenda 2063 of the African Union".[6] In the period post the COVID-19 pandemic,as countries slowly recover from the resulting economic downturn, they will need to adopt effective policies that facilitate trade, diversification and inclusivity to maximise the AfCFTA's potential to deepen socioeconomic integration; improve cooperation; to enable trade, investment and the mobility of people; support industrialization; and facilitate the dynamic services sector.[7] This could lead to an increase in decent jobs, increased revenues and expansion of the tax base for domestic resource mobilization (DRM). This would be helpful to most African countries given that ATAF's African Tax Outlook (ATO) found that pandemic-containment measures significantly affected economic activity, causing a steep drop in year-on-year real GDP growth as well as in real total tax revenue.[8]

The extent to which the potential of the AfCFTA will be realized, will be dependent on the level of integration, the policies and the complementarity of interventions put in place that permit countries to efficiently exploit the opportunities arising from deeper integration.[9] Most importantly, consistency between countries' trade policy frameworks will be essential and they must now engage in establishing what this consistency means in the context of taxation measures and, in the future, efforts to combat illicit financial flows (IFFs).

This means that member countries must now begin to evaluate the potential challenges and inconsistencies in tax policy and administration that may impact the operationalization of the AfCFTA. For instance, State Parties have differing capacities to establish Customs procedures and differences in Customs infrastructure that may affect the transit of goods through borders.[10] In addition, some studies estimate that the AfCFTA could lead to a decrease in tariff revenue in the short term.[11] However, it is anticipated that this loss in revenue will be recovered in the medium term due to an overall increase in the volume of imports and a higher level of economic activity.[12] Even so, the distributional impact of the decrease in tariff revenue is not uniform with some projections anticipating a decrease of up to 10% in some countries.[13] Therefore, countries will need to consider policies that offset the impact of these expected short-term revenue losses.

[2] World Bank, *The African Continental Free Trade Are: Economic and Distributional Effects*, Washington, DC: World Bank. doi:10.1596/978-1-4648-1559-1. License: Creative Commons Attribution CC BY 3.0 IGO, pg. 1. Accessed on 25 February 2022 at https://openknowledge.worldbank.org/bitstream/handle/10986/34139/9781464815591.pdf

Only the Regional Comprehensive Economic Partnership (RCEP), an agreement between Australia, Brunei Darussalam, Cambodia, China, Japan, Lao PDR, New Zealand, Singapore, Thailand and Vietnam, rivals the AfCFTA. According to the World Bank, the RCEP will cover 2.3 billion people or 30% of the world's population accounting for 31% of global foreign direct investment flows. See: ASEAN, *RCEP Agreement Enters into Force,* ASEAN, 1 January 2022. Accessed on 1 March 2022 at: https://asean.org/rcep-agreement-enters-into-force/

[3] See the Monrovia Declaration of Commitment of the Heads of State and Government of the OAU, 1979, and the Lagos Plan of Action, 1980

[4] Article 3, AfCFTA Agreement

[5] The World Bank estimates that the AfCFTA has the potential to lift 30 million people from extreme poverty and 68 million people from moderate poverty. Real income gains are estimated to increase by 7% by 2035; intra-African trade is also expected to see a boost with exports projected to increase by almost 29%. Ibid

[6] UNCTAD, *Economic Development in Africa Report: Reaping the Potential Benefits of the African Continental Free Trade Area for Inclusive Growth,* UNCTAD, 2021, p.xii

[7] UNCTAD, (2021), n.6, p.19

[8] See, ATAF, *African Tax Outlook 2021,* ATAF, 2021, p.29

[9] UNCTAD (2021), n.6, p.21

[10] For more on this discussion see: The Brookings Institution Webinar, *The State of Africa's Free Trade Agreement and Strategies for Greater Integration – w. Hon. Wamkele Mene, Aloysius Uche Ordu & Landry Signe,* Brookings Institution, 29 November 2021

[11] Ibid

[12] Ibid

[13] Ibid

Generally, the provisions within the AfCFTA are similar to provisions in existing trade agreements such as the World Trade Organisation (WTO) Agreements and the European Union (EU) Agreements but with additional provisions applying to investments. These agreements have led to unique challenges for both domestic and cross-border taxation policies, which are similarly raised by the AfCFTA. Specifically, the Most favoured Nation (MFN) and National Treatment (NT) obligations have been relied upon to challenge tax policy measures introduced by countries. Therefore, tax policy experts need to consider the interaction between the trade obligations contained in the AfCFTA and their national tax policies.

The objective of this policy brief is to scope out the main tax-related issues arising in established regional and global trade communities that can be viewed as lessons ahead of the full operationalization of the AfCFTA. It is the first of a series of publications that will engage our membership in taking advantage of the early stages of implementation to set the necessary foundations for dialogue with trade policymakers and reform for compliance with trade obligations. It will also set out a framework of issues that ATAF will provide further research on to continue to build the knowledge, capacity and guidance for engagement between African trade and tax policymakers in the future.

This policy brief is structured as follows: section 2 provides an overview of the interaction between taxation and trade and identifies key issues arising at the WTO, European Unione (EU); section 3 analyses the relationship between taxation and investment agreements and includes an evaluation of some of the most controversial investor-state dispute settlement cases; finally, section 4 provides recommendations on the key issues that countries should pay attention to and some of the next steps that should be taken to address them by ATAF and its membership.

2. OVERVIEW OF THE INTERACTION BETWEEN TAXATION, TRADE, AND INVESTMENT AGREEMENTS

Although the frameworks for multilateral trade, international investment agreements (IIAs) and international taxation "have been developed in parallel and are naturally governed by different sets of rules and principles, in specific instances, the scope of these rules and principles overlap – that is, the facts governed by international tax law are also within the scope of EU law as well as international trade and investment law".[14] Indeed, due to the broad coverage of the rules of FTAs and IIAs, overlaps with domestic tax measures and tax agreements often arise.[15] These overlaps can give rise to breaches of the various obligations contained in FTAs and IIAs, and lead to often expensive and lengthy disputes either between countries or between investors and countries.[16] Where breaches of trade or investment provisions are found by the respective dispute panels, this can introduce constraints to the ability of a country to reform and enhance their tax regime.[17]For instance, "guarantees in favour of foreign investors in bilateral investment treaties (BITs) can create a presumption in favour of the status quo at the time the investment is made".[18] This can lead to "foreign investors [bringing] monetary claims against states subsequently changing the interpretation or enforcement of their tax policy".[19]As a result, the management of this overlap is important and State Parties to the AfCFTA need to understand the ways in which the impact on taxation measures may vary from one provision to another.[20] Whilst new IIAs contain provisions that try to address or provide guidance on these concerns, old generation IIAs, which in practice represent a vast majority, do not and in fact, present more of a risk.

FTAs, on the other hand, may contain some carve-outs for taxation measures and tax treaties intended to provide guidance on the limited circumstances under which the violation of a trade obligation may be found. However, these limitations have not always been successful in preventing breaches.

[14] Pedro Guilherme Lindenburg Schoueri, *Conflicts of International Legal Frameworks in the Area of Harmful Tax Competition,* IBFD, WU Institute for Austrian International Tax Law European and International Tax law Policy Series, Vol.14, ch.1.1

[15] Committee of Experts on International Cooperation in Tax Matters (United Nations Tax Committee - UNTC), *Secretariat Paper: The Interaction of Tax, Trade and Investment Agreements*, UN Tax Committee, 8 April 2019.

[16] Ibid, p.3

[17] Sonia E. Rolland, *The Impact of Trade and Investment Treaties on Fiscal Resources and Taxation in Developing Countries,* Chicago Journal of International Law, Vol. 21, June 2020, No. 1 (3), p.51.

[18] Ibid

[19] Ibid

[20] UNTC (2019), p.3

Box.1:
General Challenges in the interaction between taxation, trade, and investment agreements (UNTC)

- **Unawareness of tax officials of the potential impact of non-tax agreements on tax measures, including legislation, regulation, and administration.**
- **Unawareness of trade and investment negotiators of the potential overlap, including of the coverage of tax treaties.**
- **Challenges in achieving whole of government approaches to pre-empting problems, identifying them, and responding to them.**
- **Uncertainties about the scope of the overlap, especially because of the many undefined or broadly defined terms used in such treaties, variations from treaty to treaty and diverse "jurisprudence" approaches to their interpretation.**
- **Rules of supremacy chosen to address the overlap and their clarity or otherwise.**
- **Where disputes arise, determining who decides whether there is an overlap will be key as their decision making may be affected by their tax or non-tax knowledge and perspectives.**
- **The, often, stark differences between dispute resolution provisions in the agreements – with mandatory binding arbitration at the instance of the investor being the norm in trade and investment agreements (although this has become more controversial recently) – and most tax treaties, where the Mutual Agreement Procedure (MAP) is relied on and mandatory binding arbitration is rarely part of that process, especially for developing countries.**

Whether a tax measure breaches the provisions of a FTA or IIA will be dependent on the following key aspects highlighted by the United Nations Tax Committee (UNTC)[21]:

- The types of tax measures involved.
- The nature of the obligations entered into in the various IIAs, FTAs or even by way of investment chapters in trade agreements.
- The extent of any tax carve-outs[22] contained in the investment or trade agreements.
- The dispute settlement mechanisms available to countries and investors.

This section identifies some of the ways in which taxation measures have interacted with trade and investment using specific examples from the WTO, EU and selected IIAs in order to establish the basis for an analysis of the provisions of the AfCFTA. This foundational understanding is essential in providing the rationale for immediate action amongst State Parties and negotiators to address the treatment of tax and in determining the options available to resolve the following challenges already classified by the UNTC[23] contained in Box 1 above.

In addition to addressing the challenges identified in Box.1, there are noted pressures that the reforms introduced by the AfCFTA will have on fiscal resources that are crucial to financing sustainable development and will need to be urgently evaluated:

> *"Constraints on developing countries' fiscal resources resulting from trade and investment treaties are much more complex and nuanced than the mere loss of tariff revenue. For developing countries aiming to mobilize their fiscal resources more effectively, one crucial step is to fully understand the impact of their current trade*

[21] UNTC (2019), p.3

[22] These are provisions arising in IIAs or FTAs that provide either specific or general exceptions for selected tax measures that effectively limit the application of an obligation from being applied.

[23] UNTC (2019), p.3-4

and investment commitments on tax policy. They must also be able to evaluate the fiscal impact of future trade and investment negotiations. Both aspects are essential for developing countries' ability to exercise their fiscal sovereignty in a dynamic environment, where their domestic socio-economic needs change over time and the international framework also evolves with ongoing negotiations."[24]

Indeed, although lessons can be learned from other frameworks, ongoing analysis of these issues will be essential given the current transformation of all three disciplines. The ability to connect the experiences of other frameworks with the treatment of tax measures to the future implementation of the AfCFTA will be an advantage to dispute prevention, harmonization, and effective mobilization of resources.

2.1 The Treatment of Taxation in the WTO Agreements

The Agreement Establishing the WTO (WTO Agreement) and its Annexes primarily seek to eliminate barriers to trade liberalization, guarantee non-discrimination, prohibit the use of subsidies, and resolve trade-related disputes between countries. Article XVI:4 of the WTO Agreement requires that all Members ensure that their national laws, regulations, and administrative procedures conform with WTO Laws. However, WTO Law does not have direct effect and cannot, therefore, be invoked in national courts. Instead, the WTO Dispute Settlement Understanding (DSU) provides for a State-State dispute settlement mechanism, meaning that only WTO Members can access the Dispute Settlement Body (DSB), although this mechanism is currently under review. Although investors cannot directly access the WTO DSB, "in practice…almost all disputes are brought by a Member at the instigation of an affected industry or company".[25]

Whilst there are a number of WTO Annexes that also have relevance to this discussion, this analysis focuses on the General Agreement on Tariffs and Trade, 1994 (GATT), the General Agreement on Trade in Services (GATS) and the Subsidies and Countervailing Measures Agreement (SCM Agreement) to provide an initial overview of the most pertinent areas where taxation measures have been challenged at the DSB. The main objective is to identify some of the principal issues that tax and trade policymakers need to be aware of particularly considering that the AfCFTA bases a significant number of the provisions contained in the Protocols on Trade in Goods and Trade in Services on the WTO Agreements.

2.1.1. Non-tariff measures

Tax policies, taxation measures and tax administration as a whole can be viewed as non-tariff measures (NTMs) that could, following an evaluation, be treated as non-tariff barriers (NTBs). This is important because where a NTB is found, it must be reformed or eliminated altogether and this poses a risk to overall tax policymaking and administration. This section sets out to establish an overview of the common types of NTMs that are related either to tax policy or tax administration itself.

Non-tariff measures (NTMs) include "all policy measures other than tariffs and tariff-rate quotas that have a more or less direct impact on international trade".[26] NTMs often arise from "domestic regulations and aim to overcome or reduce the impact of market imperfections, such as those related to negative externalities (e.g. pollution), information asymmetries (e.g. the condition of a used car), and risks from human, animal or plant health".[27] They are typically divided into three categories[28]:

- NTMs on imports – including import quotas, prohibitions, licensing, customs procedures, and administration fees.
- NTMs on exports – including export taxes, subsidies, quotas, prohibitions, and voluntary export restraints.
- NTMs on the domestic economy – including domestic legislation on health, labour, technical or environmental standards; internal taxes or charges; and domestic subsidies.

The range of NTMs that can be considered barriers (whether explicitly designed to do so or not) is broad and identifying them can be complex.[29] A 2005 OECD survey of business concerns about NTMs highlighted what some businesses from the EU, Japan and US considered to be the main impediments to access to foreign markets.[30] The top three NTMs most frequently reported include technical measures, internal taxes or charges and customs rules and procedures.[31] For customs rules and procedures common concerns and issues raised in the COMESA region included:

- Administrative blocking at the borders caused by shorter working days
- Low efficiency
- Equipment breakdowns
- Shortage of special forms of documentation
- Documents requirements
- Transit charges
- Duplication of documentation

In Zimbabwe, 59% of businesses reported that "despite the intention of moving on to a common market, the average level of tariff in individual exports was reported to be about 20%"[32]. In evaluating the NTBs between developing countries, it was found that customs and administrative procedures were a key concern, and some of the key challenges included[33]:

- Lack of automation.
- Customs valuations not based on market prices.
- Long and complex customs clearance processes.
- Weak customs administration leading to increased opportunities for and incidences of smuggling.

Evidently, customs procedures and the related border protocols are a most immediate issue for businesses and this is an opportunity for African countries to evaluate current policies, their limitations and develop harmonized solutions to prevent any escalation to NTBs. In addition, businesses should be frequently surveyed to determine the NTMs affecting their ability to invest in or trade with foreign markets.

The importance of NTMs, "has grown significantly over the last two decades…with the successful conclusion of numerous [FTAs], customs tariffs barriers are gradually falling such that [NTMs] now constitute the main friction to trade".[34] An additional challenge is a lack of regulatory transparency or clarity regarding the way decisions are made. This is a critical issue especially relating to the granting of tax incentives, any form of special tax treatment and even the accessibility of tax authority services such as advanced pricing agreements (APAs). At the WTO, there has been recognition that the changing nature of trade (and the overall impact of globalization) has created new complexities for dealing with the problem of NTBs.[35] A majority of disputes concerning NTMs at the WTO have focused on determining whether they are legitimate or designed for protectionist purposes.[36] Those designed for protectionist reasons will be considered NTBs. The complexity of NTMs has, over time, necessitated cooperation and transparency between members of a free trade agreement (FTA) to regulate them. Indeed, according to the WTO, as of 2012, FTAs no longer simply focused on tariff liberalization, but also sought to address "behind-the-border measures".[37] In 2012, 88 agreements addressed customs, 65 on export taxes, and 2 on taxation.[38]

Although NTMs can be introduced to meet legitimate policy objectives, they have the potential to be used for protectionist purposes.[39]NTMs will become a concern where they are unclear or applied in a discriminatory manner; lacking in transparency; or exceed what is necessary to meet the intended objective.[40] To address NTMs as they emerge, FTAs will establish a notification and monitoring mechanism for member states and for traders. For instance, the WTO Committee on Market Access was established in 1995 to, amongst other duties, suprvise the implementation of concessions relating to NTMs and provide a forum for consultation on matters relating to NTMs. Where NTBs arise and countries do not reform or eliminate them, within the WTO context, they face the risk of concessions which can be expensive.

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[24] Rollan (2020), p.52

[25] Peter Van den Bossche & Denise Prevost, *Essentials of WTO Law (2nd ed.),* Cambridge University Press, 2021, p.35

[26] OECD Trade Policy Brief, *Non-tariff Measures*, OECD, February 2019.

[27] Ibid

[28] Robert W. Staiger, *Non-Tariff Measures and the WTO,* WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2012-01

[29] OECD Trade Policy Studies, *Looking Beyond Tariffs: The Role of Non-Tariff Barriers in World Trade, OECD, 2005.*

[30] OECD Trade Policy Statistics (2005), n.26, p.20

[31] OECD Trade Policy Statistics (2005), n.26, p.24

[32] OECD Trade Policy Statistics (2005), n.26, p.43

[33] OECD Trade Policy Statistics (2005), n.26, p.232

[34] A.I. Sanjuan Lopez, P. Gracia de Renteria, G. Philippidis & E. Ferrari, *JRC Technical Report: Non-Tariff Measures (NTMs) and Intra-African Trade,* European Commission, 2021, p.3

[35] WTO, *World Trade Report*, WTO, 2012, p.160

[36] Ibid

[37] WTO, *World Trade Report*, WTO, 2014, p.120

[38] Ibid

[39] WTO (2012), n.35

[40] Department of Foreign Affairs and Trade (DFAT), Australia, *Addressing non-tariff trade barriers,* DFAT Australia, available online at: https://www.dfat.gov.au/trade/for-australian-business/addressing-non-tariff-trade-barriers

The World Customs Organization (WCO) have identified the role that technology can play in trade facilitation.[41] In particular, where members of a FTA are required to publish government regulations and procedures that may affect international trade, the WCO recommends the use of ICT for efficiency purposes.[42] This is particularly important in monitoring NTMs and for countries to ensure that sufficient information is available regarding a NTM to ensure transparency and clarity for traders. This can go towards preventing the risk of treatment of the measure as potentially protectionist.

2.1.2 GATT

The GATT seeks to eliminate barriers to cross border trade in goods. Alongside providing for tariff concessions, the GATT provides rules that seek to ensure that internal taxes and other internal regulations which affect imported and domestic products do not discriminate against international trade.[43] The MFN obligation (Article I:1) prohibits discrimination between like goods of different foreign origin. For instance Country A may not grant more favourable treatment to televisions from Country B than it does to televisions from Country C. It requires that a Member provide equality of competitive opportunities for like imported products from all Members.[44] The NT Obligation (Article III:1) requires that Members treat imported products no less favourably than domestic products. The main purpose is to prevent the use of internal measures in such a way that affords protection to domestic production.[45] Like MFN, Members should provide equality of competitive conditions for imported products.

MFN and NT apply to internal taxes and internal regulations affecting the sale, distribution, and transport of products. Internal taxes have, traditionally, been interpreted as impacting only indirect taxes.[46]The rational for this has been that indirect taxes shift the burden to consumers, whilst producers bear the burden of direct taxes – even if this does not reflect the economic reality.[47] However, DTB case law has found that income taxes can qualify as internal regulation.[48] Therefore, "the non-discrimination principle of GATT…covers not only indirect taxes but also direct taxes to the extent they qualify as laws regulations and requirements affecting the internal sale of products, or their offering for sale, purchase, transportation, distribution or use".[49] These two principles of non-discrimination have a potentially broad scope that could result in tax measures and Double Taxation Treaty (DTT) provisions being found to be inconsistent with NT and MFN.[50] This is especially significant since unlike the NT and MFN provisions contained in GATS (as will be explained further below), there is no specific carve-out for tax measures and DTTs.

The potentially wide scope means that the possibility to challenge national tax decisions at the DSB remains available to countries, although there is a general understanding that tax treaty provisions are acceptable. Important examples of this have already arisen in WTO case law. For instance, the Brazil – Taxation (2019) case[51] involved a complaint raised by the EU with respect to specific taxation measures[52] and charges introduced by Brazil in the automotive sector, electronics and technology industry, goods produced in Free Trade Zones (FTZs), and tax advantages for exporters. The EU claimed that these measures were inconsistent with the non-discrimination obligations in GATT and the SCM Agreement. The tax measures introduced several exemptions and reductions of rates of specific direct and indirect taxes that were either enjoyed by members of the Southern Common Market (MERCOSUR) or locals. These measures were found to be inconsistent with NT and MFN.

2.1.3 Subsidies

Article XVI of GATT and the SCM Agreement provide the framework of WTO rules on subsidies. A subsidy exists if there is a financial contribution by a government or any public body within the territory of a Member where, amongst other aspects, government revenue

[41] WCO, *Use of the ICT – WTO Agreement on Trade Facilitation,* WCO, June 2018. Available online at: http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/wto-atf/use-of-ict-in-the-implementation-of-the-wto-tfa_en.pdf?db=web

[42] Ibid

[43] Michael Lang, Judith Herdin & Ines Hofbauer (ed.), *WTO and Direct Taxation,* EUCOTAX Series on European Taxation, Vol.10, Kluwer Law International, 2005

[44] European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (2014), Available online at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm

[45] Van den Bossche & Prevost (2021), p.67

[46] Servaas van Thiel, *General Report*, in Lang et al (2005), p.18

[47] J.C. Phillips, *Border Tax Adjustments in International Trade,* The University of Queensland Law Jounal, Vol. 9, No.2

[48] Servaas van Thiel, *General Report*, in Lang et al (2005), p.18 which references EC Complaint against US income tax credit and special depreciation for US capital goods, L/6153, C/M/208, C/M/209 & *United States – Tax treatment for Foreign Sales Corporations,* Panel Report, WTO/DS/108/RW of 8 October 1999

[49] Servaas van Thiel, *General Report*, in Lang et al (2005), 20

[50] Servaas van Thiel, General Report, in Lange et al (2005), p.21

[51] *Brazil – Certain Measures Concerning Taxation and Charges*, Panel Report, WTO/DS/472/R of 30 August 2017

[52] Tax treatment established under the Informatics Programme, the programme of Incentives for the Semiconductors Sector, the programme of Support for the Technological Development of the Industry of Digital TV Equipment, the programme for Digital Inclusion, the programme of Incentive to the Technological Innovation and Densification of the Automotive Supply Chain, the regime for predominantly exporting companies and the Special Regime for the Purchase of Capital Goods for Exporting Enterprises.

that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) and a benefit is thereby conferred.[53] Whilst subsidies are commonly used by countries to achieve legitimate objectives, they can have "adverse effects on the interests of other [WTO] Members whose industry may suffer from unfair competition from the subsidised products on its domestic or export markets".[54] As a result, Members must notify the WTO Committee on SCM about any subsidies they adopt.[55]

The SCM Agreement is concerned with specific subsidies – this means that it is specific to an enterprise or industry or group of enterprises or industries.[56] It distinguishes between prohibited subsidies and actionable subsidies – those that cause adverse effects to the interests of other Members through injury to the domestic industry, nullification or impairment of benefits accruing indirectly or directly or serious prejudice.[57] Prohibited subsidies are those conditional or dependent upon export performance or the use of domestic over imported goods.[58] Annex I of the SCM Agreement provides an illustrative list of export subsidies and includes "the full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises".[59] A footnote to this provision indicates that Members should apply the arm's length principle to transactions between related parties and where they do not or administrative or other practices contravene the principle resulting in a saving of direct taxes then Members should resolve such disputes by way of a DTT or other specific international mechanism. In addition, this provision does not limit a Member from taking measures to avoid double taxation of foreign-source income.

Export subsidies also include "the allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged".[60] As a result, capital-based incentives may also be found to be prohibited subsidies.

The treatment of national tax measures has and continues to be a greater concern in the area of prohibited subsidies since, where a prohibited subsidy is found by a DSB panel, a Member will be required to withdraw it without delay and if this is not done the complaining Member may take appropriate countermeasures by authorization of the DSB. Similar to GATT, this raises the potential for national tax incentives to be challenged at the DSB and important examples of this have already arisen. For instance, the United States Foreign Sales Corporations (U.S FSC) case[61] concerned a complaint raised by the European Community that special tax treatment for FSCs were inconsistent with the provision on subsidies. The special tax treatment involved a US tax exemption on a portion of the foreign trade income of the FSC. The measure was found to be a prohibited subsidy and, in response to a failure to withdraw, the European Community requested authorization to take appropriate countermeasures and suspend concessions in the form of a 100% ad valorem charge on imports of certain goods from the US amounting to USD 4043 million per year. This authorization was granted in 2003 and only ended in 2006 when the US passed legislation withdrawing the measure.

2.1.4 GATS

Like GATT, GATS also provides for the two non-discrimination principles, but applies to measures affecting trade in services. It generally applies to services in any sector except for services supplied in the exercise of government authority (like police services). The measure should affect like[62] services and service suppliers and they should be accorded treatment no less favourable than domestic services and service suppliers or those of any other country. The main objective of MFN "is to ensure all WTO Members equality of opportunity to supply services regardless of the origin or destination of the services or the nationality of the service suppliers".[63] WTO Members can exempt certain measures from the MFN obligations (these are listed in the Annex on Article II Exemptions). The NT obligation in GATS is significantly different from its operation in GATT – it only applies to the extent that a Member has committed to grant it in respect of a specific service sector under the Schedule of Specific Commitments.

[53] Article 1(a)(1)(ii), SCM Agreement

[54] Van den Bossche & Prevost (2021), p.159

[55] See *Notifications under the Agreement on Subsidies and Countervailing Measures,* available online at: https://www.wto.org/english/tratop_e/scm_e/notif_e.htm

[56] Article 1.2 and 2, SCM Agreement

[57] Article 5, SCM Agreement

[58] Article 3, SCM Agreement

[59] Paragraph (e), Annex I, SCM Agreement

[60] Paragraph (f), Annex I, SCM Agreement

[61] *United States – Tax treatment for Foreign Sales Corporations,* Panel Report, WTO/DS/108/RW of 8 October 1999

[62] The definition of 'likeness' has not been provided in GATS and there is limited case law on the matter. See for instance: *Argentina – Financial Services (2016), WTO/DS453/AB/R*

[63] Van den Bossche & Prevost (2021), p.60

In addition, unlike GATT, GATS has tried to limit the scope of its application to taxation measures and DTTs through the use of carve-outs from MFN and NT. Article XIV contains general exceptions and provides that as long as the application of a measure does not amount to arbitrary or unjustifiable discrimination or a disguised restriction on trade in services, nothing in GATS shall be construed to prevent its adoption or enforcement:

- With regards to NT, provided that the difference in treatment aims to ensure the equitable or effective imposition or collection of direct taxes.
- With regards to MFN, provided the difference in treatment is the result of a DTT or provisions designed to avoid double taxation in any other arrangement.

A footnote to the exception concerning NT defines the types of measures that could ensure equitable or effective imposition or collection of direct taxes including tax treatment that distinguished between residents and non-residents (i.e. higher rates for permanent establishments) or general anti-avoidance rules. Although these carve-outs seem broad in their coverage, in practice, they have not prevented some national tax measures from being challenged at the DSB. For instance, the Argentina – Financial Services (2016) case concerned sanctions (including tax measures) introduced by Argentina applicable to goods and services from non-cooperative (or blacklisted) jurisdictions which would not engage in tax transparency including Panama. At the time, Panama had refused to engage in exchange of tax information and overall international tax cooperation efforts and this refusal had been accompanied by the use of trade policy to "restrict attempts by other countries to curtail tax flight and financial crime".[64] Panama claimed that the measures applied by Argentina were inconsistent with the MFN and NT obligations in GATS and GATT.

The DSB Panel found that the sanctions were inconsistent with MFN by determining that the services and service suppliers from Panama were like those from other Member countries. However, the Appellate Body reversed this decision, finding that the distinction between cooperative and non-cooperative jurisdictions was not based exclusively on origin and that there was no evidence that Argentina did not confer treatment no less favourable. The likeness of services and service suppliers was at issue and the Appellate Body found that an analysis of treatment no less favourable would need to take into account regulatory aspects which, in this instance, concerned Argentina's access to tax information on foreign suppliers. The treatment of defensive tax measures can therefore also be subject to challenge at the WTO and, especially considering the current developments in international taxation including the introduction of the global minimum tax, countries should be paying careful attention to the trade implications. Furthermore, new technologies will make it increasingly difficult to distinguish between trade in goods and services (i.e. 3D printing or the purchase of items in the metaverse) and this will have an impact on the ability to impose tariffs and other taxes.

2.2 The Treatment of Taxation in the European Union[65]

Given that the ultimate objective of the AfCFTA is to establish a customs union and, gradually shift into a single market, key lessons may be learned from the European Union (EU). The process of European economic integration began in 1957 with the Treaty of Rome and the establishment of the European Economic Community that as of 1993 and the entry into force of the Treaty of Maastricht became the European Union. The EU currently consists of 27 Member States, with six founding Member States[66] and several waves of accession thereafter alongside one Member State – the UK, leaving the EU in 2020. Not only geographically, but also substantively the EU has been a project of gradual ever-increasing integration. Even though from the very beginning its political economy was built on the premise that liberalizing trade, having free mobility of production factors, and ensuring free and fair competition would increase the overall level of welfare and prosperity. The liberalization came about in stages. Barriers such as customs duties, quantitative restrictions, product requirements, ensuring mobility of capital, etc. were only gradually deconstructed. Completing the internal market took decades with direct tax measures being targetted at the beginning of the 1990s.

First, in terms of the territorial scope: becoming a Member State of the EU is dependent upon not only geographically being located in Europe[67] but also on meeting certain substantive standards that are established under the so-called 1993 Copenhagen criteria. According to these criteria, becoming an

Relevance for the AfCFTA:

The potential for Members of the WTO to challenge national tax policies and measures, as well as the use of incentives and defensive tax measures, should be considered in the context of the AfCFTA. Some initial issues to consider include:

- Whether tax carve-outs can sufficiently ensure that tax measures may not be challenged.
- With a growing number of disputes concerned with tax measures, whether there is a need to establish dialogue between the two disciplines.
- The expertise of the future dispute settlement system on taxation measures and their willingness to consult with tax experts.
- The potential for national tax measures to be limited by the obligations in the AfCFTA and the need to cooperate to prevent or limit this possibility.
- The potential for customs and tax policies and administration to be viewed as non-tariff barriers resulting in the requirement to remove or reform them or face concessions.
- The need for a harmonized approach to the treatment of tax incentives to prevent them potentially being considered as non-tariff barriers.
- Evaluate the treatment of subsidies under the AfCFTA to determine whether they will require regulation.
- Analyse the potential for defensive tax measures to be viewed as discriminatory.

EU Member State presupposes that a country has continuously established stable institutions that guarantee democracy, adheres to the rule of law, protects effectively human rights, including the rights of minorities, and has a functioning market economy that is stable and viable enough so that it can withstand competitive pressure and market forces within the EU. All of these are not vague expressions but objectively quantifiable conditions that are rigorously checked during the accession process (and in some instances also after the accession). The premise is that the EU can be only as strong as the institutions and economies of its Member States.

Second, as regards the material scope of EU integration: integration would not be achieved by reaching a political consensus outright but rather that first barriers to trade would be comprehensively removed which would practically necessitate common action – the Member States would agree on coordination simply because they have to. The simplest example is the free movement of goods – the customs union and the prohibition of quantitative restrictions guarantee that there are no barriers whatsoever to the free movement of goods between Member States. This was further reinforced by the case-law of the European Court of Justice (ECJ) that interpreted any domestic product requirement as a measure having an equivalent effect to a quantitative restriction.[68]

The commitment to establish strong institutions and engage in common action to eliminate any barriers to trade are key takeaways for the AfCFTA framework. The concept of the territorial scope of the EU should highlight to African countries the need to engage in an evaluation of the preparedness of institutions and frameworks that can impact upon free trade. Contextually speaking, the preparedness of African tax and customs authorities and the regulatory frameworks that enable their administrative measures must be reviewed and, where necessary, strengthened, particularly to enforce the principle of compatibility of processes, capacity, tools and systems.

[64] Teppo Eskelinen & Matti Ylonen, *Panama and the WTO: New Constitutionalism of Trade Policy and Global Tax Governance,* Review of International Political Economy, 2017, 24 (4), 629 – 656

[65] For more on the lessons from the European Union see: Ivan Lazarov & Joy Waruguru Ndubai, *Identifying the Potential Tax Implications of Selected Provisions of the AfCFTA: Experiences from the EU and some insights from the WTO,* forthcoming, WU GTPC.

[66] Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

[67] The geographical criterion was key in rejecting Morocco's application for EU membership back in 1987.

[68] For instance, requiring a certificate of origin for a product: CJEU, 11 July 1974, Case C-8/74, *Dassonville*, EU:C:1974:82.

2.2.1. Fundamental freedoms

The EU fundamental freedoms form one of the two pillars (alongside the rules on state aid) of the EU Treaty with greatest impact on domestic tax measures. The fundamental freedoms essentially contain a prohibition addressed at the Member States on discriminating between comparable cross-border and domestic situations, and between comparable cross-border situations. In this sense, they look like an especially comprehensive National Treatment and Most-Favoured Nation rules. There are four fundamental freedoms: free movement of goods, services, persons, and capital.

The free movement of goods is based upon several main rules. First, it is the customs union which removes any customs duties between the Member States, as well as imposes a common tariff schedule to third-countries importing goods into the EU. As explained earlier, the customs duties form an own resource of the EU. Moreover, due to the lack of customs duties between the Member States, the revenue from customs is not only redirected (from the Member States to the EU budget) but for intra-EU trade it is entirely foregone. In terms of a percentage points of revenue that needed to be compensated for, several relatively recently acceding Member States can provide an insight: when Bulgaria joined the EU back in 2007, its revenue from customs and import duties went down from 2.8% in 2006 of the total revenue to 0.6% in 2007[69] – first year of EU membership; for Hungary the figures are 1.9% to 0.7% during the first year of EU membership; Slovenia 1.4% to 0.6, etc. However, it must be noted that acceding to the EU is preceded by a rapid decrease in the customs duties and alignment with the EU tariff schedule. Thus, looking at only the year immediately preceding the membership is not especially telling. Ten years before the accession to the EU, Bulgaria had customs duties forming 6.4% of its total revenue, with the figures being 7.4% for Hungary and 7.6% for Slovenia. These are not marginal numbers. While it is difficult to measure the exact mechanisms of compensating this lost revenue, one could note that, for example, the VAT revenue as percentage of the total revenue increased from 19.4% to 32.2% for Bulgaria, 17.3% to 23.5% for Hungary and from 0% to 21.7% during the same 10 year period (in which these countries had to implement the common EU VAT framework.[70]

The free movement of goods also goes hand in hand with the harmonization of the cross-border VAT and excise duties between the Member States. A note of caution might be in order when it comes to the harmonization of the VAT treatment since the common system is based upon a premise of destination based taxation: the exporter levies a zero rate (while retaining the right of deduction), while the importer has to apply its domestic VAT which potentially creates opportunities for VAT fraud (e.g. carousel fraud) that has a significant impact on the revenue of Member States.

Besides the free movement of goods, the EU fundamental freedoms guarantee the free movement of workers, right of establishment, freedom to provide services and the free movement of capital. These create a myriad of direct and indirect impacts on the tax policy. On the one hand, they create direct impact such as on the rules concerning treating resident and non-resident workers alike (with respect to deductibility of expenses), limiting the possibility to impose exit taxes, the treatment of groups of companies, restricting anti-avoidance rules, taxation of passive income, the taxation of dividends and real property by non-residents, deductibility of expenses for services provided from another EU Member State, some limitations on the arm's length principle etc. While it is neither necessary nor possible to exhaustively list all examples of the direct impact of the fundamental freedoms for the purposes of this paper, the main idea becomes clear – Member States cannot impede trade by treating cross-border situations at a disadvantage from a tax perspective (unless they can justify such treatment).

This leads to a number of indirect effects that are probably even more important as they transcend the details of any particular framework of supranational integration such as the EU. The liberalization of the mobility of production factors between a number of relatively similar jurisdictions leads to shifting production factors for regulatory (including tax) reasons. This increases the conditions for (tax) competition between the jurisdictions. At the same time, the Member States that experience capital outflows find themselves restricted in combating these outflows as any measure restricting capital movements might be regarded as restricting the internal market. These developments have been observed in the EU leading to a relatively recent policy shift by the European Commission that started looking closer at measures that target tax competition and at the same time give greater possibility for Member States to combat abusive practices. Besides the effects on capital, the internal market has had an impact also on the mobility of labour with clear internal migration flows: from the less developed East and South to the more developed West and North. This has a potential impact on the revenue generating capabilities of personal income taxes and the overall competitiveness of markets caused by 'brain drains/gain'.

[69] Member States are allowed to retain a fraction of the customs duties as deemed administrative costs

[70] All these figures are derived from the OECD Global Revenue Statistics Database available at https://stats.oecd.org/

Based on the above, AfCFTA member countries need to bear in mind these already observed lessons of history so that when embarking on the course towards supranational economic integration, they can better determine their relative position and act both domestically and within the bodies of supranational decision making to mitigate the expected negative effects as much as possible. It should be noted, that whilst the EU members had significant time and much more accommodation economic, social and political circumstances, African countries face a vastly different landscape. The current state of this landscape means that it would be more worthwhile to pre-empt and act upon the potential challenges for taxation and establish the cooperation necessary to facilitate that.

2.2.2. State aid

Generally, removing barriers to trade and factors of production mobility between sufficiently similar countries - for if countries are not similar, regulatory reasons play little significance in mobility choices – exacerbates tax competition as a form of regulatory competition. Even if tax competition is not necessarily a priori 'bad' since it might lead to more economically efficient allocation of resources and legal frameworks, certain forms of tax competition are undesirable. Tax competition is treated in several ways under EU law. On the one hand, there is the soft law Code of Conduct which is a form of gentlemen's agreement between the Member States to roll back existing and not introduce new forms of harmful tax competition practices. These largely coincide with the OECD understanding of harmful tax practices. On the other hand, however, EU law contains also a powerful hard law barrier to tax competition which are namely the rules on state aid that have been extensively relied upon by the European Commission to tackle fiscal state aid.

Under the rules of state aid, Member States are prohibited from favouring certain undertakings including by offering a more beneficial tax regime. While there are certain exceptions, the enforcement against fiscal state aid measures has had a profound impact on the Member States' tax policy. In principle any form of tax relief can constitute state aid as long as it provides a selective advantage to certain undertakings. This might impact special economic zones, tax holidays, ad hoc tax cuts to certain investors, including by means of advanced pricing agreements, other tax rulings or merely favourable administrative practice, any forms of regimes that favour offshore investors, etc. It seems only natural that the deeper the economic integration established on the basis of the principles of market economy, the more one needs to make sure that no governmental interference would distort the fair competition. Such measures moreover protect smaller less-developed nations against their bigger more economically capable counterparts.

The above does not mean there are no subsidies in the EU. To the contrary, the biggest part of the EU budget goes into subsidies to the agricultural sector. This means that the EU has a common policy towards subsidies and takes away from its Member States the majority of their possibility to have own and separate such policies. Naturally, this shift makes the EU a much more powerful player on the global arena but also requires substantial own resources that provide the capability to act and distribute financial resources.

Although the treatment of subsidies will be addressed in a forthcoming policy brief, there are key considerations to be made in order to balance the need to support nascent industries/sectors against favouring specific undertakings in violation of trade obligations. The availability of subsidies across the continent is a rather more sensitive and nuanced issue and the development of a common approach that is subject to review based on the progress made by countries will be essential. This is particularly important in the context of the treatment of tax incentives, special economic zones and other preferential tax/fiscal regimes.

Having considered the experience of the EU, there are a number of issues that AfCFTA state parties and the institutions that are essential to implementation will need to address:

- The evaluation of areas of tax policy that will require harmonization, or, at a minimum, cooperation will key to preparing the necessary capacity and infrastructure for purposes of compatibility. This will be particularly important for customs cooperation and monitoring of fraud, trade mis invoicing, money laundering and other financial crimes.
- To avoid potential disputes, which can be an expensive process, African countries should consider the introduction of a support mechanism to evaluate the types of direct and indirect tax measures that can violate the MFN and NT clauses as well as be considered NTMs with the potential to be escalated to NTBs. A standing mediation panel could also be an appropriate mechanism.
- A lack of clarity about the application of the rules of the AfCFTA to all types of taxes will create a burden of interpretation for the future dispute settlement body. It means that the competence to evaluate tax-related disputes or consultations must be strictly evaluated and cooperation with

tax experts will be key to ensuring that, where tax issues are identified, alternative mechanisms for resolution are available.

Overall the need to address the issues raised in this section should be viewed as urgent and countries should take fire prevention rather than fire fighting approach. To oversee the success of the AfCFTA, we must acknowledge that the treatment of taxation occupies a more sensitive and political position and it will, as a result, require more technical and administrative cooperation particularly in the current economic circumstances.

3. THE INTERACTION BETWEEN TAXATION MEASURES AND INTERNATIONAL INVESTMENT AGREEMENTS

IIAs include Bilateral Investment Treaties (BITs), multilateral investment agreements and investment provisions contained in FTAs. BITs represent the most common type of IIA, although they all broadly contain similar provisions that seek to regulate relations between investors and host countries.[71] In particular, and of interest to his analysis, IIAs provide a host of protections to investors that can be enforced either through Investor-State Dispute Settlement (ISDS) or State-State Dispute Settlement. ISDS is undertaken through binding international arbitration, a mechanism that has been of particular concern for developing countries in the international tax context. Since, "IIAs impose obligations on States that can create friction with taxation measures undertaken at national level… the actions of tax authorities…and tax policymaking more generally can potentially engage the international responsibility of a State under an IIA when they adversely affect foreign investors and investments".[72]

The last 20 years has seen an increasing trend of tax-related ISDS cases – 165 as of the end of 2021.[73] The majority of disputes have been based upon the old-generation of IIAs which feature broad provisions and do not exclude taxation from their scope.[74] According to UNCTAD[75] some of the most notable provisions include[76]:

- Definitions of investment and investor – this is important as it establishes the types of assets and persons covered by the IIA. Old-generation IIAs contain broad definitions that cover an open-ended list of assets held by foreign investors. Most importantly, they are not cognizant of the challenges that have been faced by DTTs in the area of treaty shopping and overall entitlement to the benefits of a tax treaty. Without similar treatment under an IIA, it will be significantly difficult for tax authorities to determine whether a foreign investor should be covered by an IIA and this is particularly important considering the growing complexity and transparency of ownership chains.
- NT – Similar to the provision contained in the GATS and GATT, this obligation does not necessarily safeguard the distinction of taxpayers based on their residence and preferential treatment for resident investors could be challenged under an IIA.
- Fair and Equitable Treatment (FET) – as one of the most frequently invoked investor protections, seeks to ensure that the standard of treatment of a foreign investor or investment is in line with customary international law and has been interpreted as including regulatory stability and compliance with legitimate expectations of an investor. Since tax policy often has to respond to a changing economic context, FET can expose evolving tax rules to ISDS claims if it is broadly drafted.
- Full Protection and Security (FPS) – This provision is just as broadly applied as FET and requires that the host country does not harm investors or their investments through acts attributable to the State and that to protect investors and investments against actions of private parties. Old IIAs do not clarify the limitations of this provision which, under new generation IIAs should exclusively relate to physical or police protection. As a result some concerns for taxation measures or any tax related conduct by tax authorities like the seizure of assets, or the exercising of information access powers may arise here.
- Expropriation – this protects investors from dispossession of their investments by the host country, most old-generation IIAs also include protection from indirect expropriation. In some cases this has resulted in taxation measures that have the effect of (substantially) depriving the investor of the value of their investment being vulnerable to investor claims.
- Transfer of funds – this provision grants investors with the right to free movement of investment-related flows into and out of the host country. In older-generation IIAs, this has been without exceptions and could leave standard application of withholding taxes or exit taxes vulnerable to investor claims.

As mentioned, the risk of tax-related ISDS cases has been a particular concern for countries.

Relevance for the AfCFTA:

- Consider the stages of completing the African internal market, how each stage would affect domestic tax measures, how best to prepare and when to start preparation.
- Determine which countries would be in competition with one another given their relative similarities outside of regulatory and tax regimes.
- Evaluate and identify new mechanisms to minimise and resolve cross border tax disputes including on VAT.
- Evaluate and address the need for establishing effective boundaries to harmful tax competition.
- Which parts of the AfCFTA would lead to the need of coordination of tax systems? Consider taxes such as VAT and excise duties but also cross-border businesses integration – e.g. taxes on dividends, interest, royalties, capital gains; and withholding taxes.
- Is there a role of establishing significant own resources of the AU and to what extent this would be in line with its objectives and aspirations?
- What are the institutional challenges in the effective implementation of the AfCFTA, especially at the domestic level and what are the necessary preconditions for such implementation?
- What would be the AfCFTA's impact on customs duties revenue and how this impact could be compensated with other revenue streams such as VAT?
- The cross-border integration should take note of fighting cross-border fraud and avoidance;
- Analyse the direct effects that the AfCFTA might have on domestic tax measures.
- Analyse the indirect effects that the AfCFTA might have on domestic revenue streams due to the mobility of production factors and what are the possible ways of countering these effects or increase one's own competitiveness.
- Consider the most sensible policy on tax subsidies within the AfCFTA and how this policy should be enforced.

[71] Peter Muchlinski, *The Framework of Investment Protection: The Content of BITs*, in Karl P. Sauvant & Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Oxford Scholarship Online, 2009.

[72] UNCTAD, *World Investment Report – International Tax Reforms and Sustainable Investment*, UNCTAD, 2022, p.87. Available online at: https://unctad.org/webflyer/world-investment-report-2022

[73] UNCTAD, *International Investment Agreement and their Implications for Tax Measures: What Tax Policymakers need to Know – A Guide based on UNCTAD's Investment Policy Framework for Sustainable Development*, UNCTAD, 2021. Available online at: https://unctad.org/webflyer/international-investment-agreements-and-their-implications-tax-measures-what-tax & UNCTAD (2022),n.113

[74] Ibid

[75] UNCTAD (2021), n.114 – this work was undertaken jointly with the WU GTPC

[76] UNCTAD (2021), n.114

Below is a summary of some high-profile tax-related ISDS cases, the claims raised and the awards given:

Case	IIA	Investor Protection claimed	Award
Yukos Universal v. Russia (2005)	Energy Charter Treaty	Indirect Expropriation	US$ 50 billion plus interest (final award)
Vodafone v. India (I) and (II)	India-UK BIT/India – Netherlands BIT	FET	US$ 5.47 million
Cairn v. India	India – UK BIT	FET	US$ 1.2 billion
Micula v. Romania	Romania – Sweden BIT	Indirect Expropriation and FET	US$ 116 million

The financial and policy impact of these disputes has led to more cautious drafting of IIA provisions. For instance, following the Vodafone and Cairn cases, India terminated thirty bilateral investment treaties in March 2018 to push for renegotiation based on a model agreement designed in 2015. The most important change contained in the model was the increased limitations for investors to initiate ISDS.

Importantly, ISDS outcomes can also impact on trade obligations. The Micula case has remained a disputed matter since 2013. The case concerned the withdrawal of an incentive regime (which included tax benefits) which was undertaken to comply with state aid requirements as part of Romania's entry into the EU. Although the investor was awarded the amount indicated above, the EU declared that the payment of the award would constitute state aid.

Significant financial and policy limitations are at stake where the exercise of investor protections are concerned. In designing any future investment protocol, AfCFTA member countries need to exercise extreme care in ensuring that tax measures may not be challenged in these forums and even where they are, consultation with tax experts is required.

Relevance for the AfCFTA:

- Identify the provisions related to investment that impact the domestic tax policy of Member States.
- Evaluate whether the forthcoming AfCFTA investment protocol provides investors with direct access to disputes through ISDS.
- Evaluate whether the investor protections contain sufficient guidance on the treatment of taxation matters and/or substantial carve-outs to inform arbitrators that taxation should not be regulated in their forums.
- Determine the kind of engagement required between the tax community and the investment community to establish dialogue on the potential impact on taxation measures.
- Review the process of eliminating IIAs between African nations following the entry into force of the investment protocol.
- Determine how countries will prevent the use of old-generation IIAs with non-African countries by investors to challenge tax measures. Evaluate the process for updating them.
- What would be the optimal system of dispute resolution within the AfCFTA regarding dispute resolution of tax disputes and what should be the role of domestic courts in that if any?
- Are existing measures under DTTs sufficient to offer tax certainty to investors, if not what options should be explored? (i.e. mediation)

RECOMMENDATIONS AND NEXT STEPS

Given the impact that trade obligations and investment protections contained in FTAs can have on tax policy and measures, and considering the ongoing implementation of the AfCFTA, member countries should be proactive and embark on identifying current and future challenges, and prepare the framework to respond. The timing for this dialogue could not be more advantageous with the current state of reform of international taxation and IIAs, as well as the WTO debate on its future. In addition, much detail still remains open in the design of the AfCFTA and this is an opportunity to institute a foundation of cooperation between key players in the success of the future customs union and single market.

Member countries now need to consider the following:

- Provide research on the potential impact of the AfCFTA on tax policies, revenue and administration in order to identify the main issues to be addressed in the short and long-term as well as provide countries with recommendations on how to take action. This could, more immediately, address the following key issues:
    - » Identifying provisions of the AfCFTA Agreements that have potential tax policy implications.
    - » The tariff revenue implications in the short term and long term as well as proposed solutions to fill in the revenue gaps for tariff reliant countries.
    - » Customs cooperation and trade facilitation preparedness including key lessons from the Reginal Economic Communities (RECs).
    - » The role of technology in facilitating trade facilitation.
    - » Evaluation of the compatibility of common tax incentive policies with the AfCFTA NTB requirements and the potential for a harmonized approach.
- Initiate ongoing dialogue between the tax, trade, and investment policymakers which in turn requires the building of a shared understanding of the key concepts and overlaps.
- Establish an initiative amongst tax authorities to understand the role that their actions and activities could play as potential obstacles to trade. This could better feed into notifications on and monitoring of tax related NTMs.
- Launch a platform for cooperation, monitoring and joint reform hosted in collaboration between ATAF, AU, and the AfCFTA Secretariat.
- Establish an ongoing program to support countries, traders, and future dispute resolution mechanisms in understanding the role of and impact for taxation.
- Establish a framework for technical support to countries to prepare for the customs cooperation, broad trade facilitation, and review of compatibility of tax policy and measures with the AfCFTA obligations.
- Evaluate the use of mediation to resolve tax related disputes.
- Establish the foundation and sequence of tax coordination in the AfCFTA

This will support the creation of the foundations for cooperation on trade facilitation to eliminate any delays in customs procedures and ensuring simplicity, certainty and clarity for intra-African traders. It will facilitate broad identification of tax-related NTMs that could be viewed as NTBs and the quick action that will be required to address them.

This brief demonstrates that more work is now necessary to understand the expected revenue, policy and administrative impacts of the AfCFTA. As highlighted above, this policy brief is the first in a series on the AfCFTA that will guide and complement broader dialogue and engagement with the AfCFTA Secretariat, the African Union, and ATAF member countries. The primary objective is to set an agenda for the role that tax authorities will play in the implementation of the free trade area. ATAF will provide its members with further analysis on the current and future issues that taxation may raise for the AfCFTA and the obstacles that AfCFTA may present for the implementation of tax measures or reform in the future. Most importantly, this work paves the way for the operationalization of the customs and trade department including the desire to provide technical assistance as part of the new strategy.

Background of the policy brief

This policy brief is one of the publications from the joint research project of the African Tax Administration Forum (ATAF) and the WU Global Tax Policy Center (GTPC), Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business). The project aims at identifying and evaluating the tax implications of the Agreement constituting the African Continental Free Trade Area (AfCFTA). The policy brief draws on key insights and recommendations from research, policy dialogues, presentations and discussions from the 7th African Tax Research Network (ATRN) Congress which was hosted by Ghana Revenue Authority (GRA) from 5 – 7 September 2022 on the theme: The Tax and Revenue Implications of the AfFCTA. It also draws on the deliberations from the technical and consultative webinar which was held on 23 June 2022 on the theme "Evaluating the Revenue and Broader Tax Policy Implications of the AfCFTA". The expected final products of the project are: a scoping paper on the revenue and broader tax implications of the AfCFTA and policy briefs for tax experts on trade principles and trade experts on tax principles.

Credits

This policy brief was produced jointly by the African Tax Administration Forum (ATAF) and WU Global Tax Policy Centre (GTPC) at the Institute for Austrian and International Tax Law, WU Vienna University of Economics and Business. The publication was prepared by Joy Waruguru Ndubai, Dr. Ivan Lazarov and Ruth Wamuyu Maina (all from GTPC) and contributions were provided by Dr Ezera Madzivanyika, Nthabiseng Debeila and Frank Kalizinje (all from ATAF). The teams were supervised by Professor Dr. Jeffrey Owens (GTPC), Dr. Ezera Madzivanyika and Mrs Mary Baine (ATAF Secretariat) who also reviewed the publication and provided invaluable feedback. Credit also goes to Mr Logan Wort, the ATAF Executive Secretary for his high-level review and strategic guidance.

About ATAF

The African Tax Administration Forum (ATAF) is an organisation which was established by African revenue authorities in 2009, in order to improve the performance of tax administrations in Africa. The tax administrations of 41 countries in Africa are members of ATAF, i.e., 74 percent of tax administrations on the continent, making it the premier body on tax matters on the continent. Two countries, Mali, and Somalia were the latest to join the organisation in 2020. ATAF believes that better tax administration will enhance economic growth, increase accountability of the state to its citizens, and more effectively mobilise domestic resources. Now in its 12th year of existence, ATAF has positioned itself as Africa's homegrown solution to improving revenue collection, advancing the role of taxation in governance and state-building and providing a voice for the continent on international tax issues.

The ATAF Secretariat extends its gratitude to all member states for their continued support, the data, and resources provided that underpin ATAF's publications. The support of ATAF members, development partners and donors also play a key role in the success of ATAF's development as a significant platform for Africa on tax matters, with continued technical and financial support since its inception in 2009.

About the WU GTPC

The WU Global Tax Policy Centre (WU GTPC), is located at the Institute for Austrian and International Tax Law, WU (Vienna University of Business and Economics), one of the world's leading Institutions for research and teaching in the field of tax law with a long history of cooperation with other organizations working in the tax arena. The WU GTPC follows in this tradition, building upon the contacts established by the Institute over many years as a leading think tank focusing on the interface between tax policy, tax administration and tax law. It brings together tax policymakers, tax administrators, tax practitioners and researchers from around the globe and provides a forum for discussions on tax policy formulation and implementation, drawing upon the experiences of developed and developing countries and economies in transition.

The views expressed herein, and the related research papers do not necessarily reflect the views of the ATAF and the WU GTPC development partners and funders.

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