Devising Most Favored Nation (MFN) Clauses for the implementation of the AfCFTA in Economic Partnership Agreements

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September 11, 2019

The launch of the operative phase of the African Continental Free Trade Agreement (AfCFTA) is poised to impact the nature of Economic Partnership Agreements (EPA's) between Africa and her trading partners. While EPAs have been touted as the key solution to the low levels of industrialization in the region, the AfCFTA has revolutionized the concept of open borders and tariffs. The treaty provides signatories with the opportunity to stand on their own feet by boosting their connectivity to markets within the African continent. It also aids in developing a brand of competitiveness that is in line with international standards. Simply put the coming into force of the AfCFTA signifies a change of guard which advances the 2063 agenda by advocating and resolving the need for "*African solutions to African problems!*"

Admittedly, change does not occur overnight, neither does African Inter Continental trade; which is crucial in achieving the purposes of the AfCFTA. While Africa waits, she must sustain her economy on various EPAs with her existing trading partners. These agreements are often-times laden with objectives that may be at odds with the intention and purposes of the AfCFTA. Therefore, leaders have to go back to the drawing board and ensure that these partnerships promote the implementation of the AfCFTA especially in the devising of Most Favored Nation (MFN) Clauses.

By design, MFN clauses are intended to ensure a level playing field amongst various players in international trade agreements. However, where an operative MFN clause is interpreted in light of a free trade area agreement, it has the unintended consequence harming the local market if unregulated. A case in point is Article 18 of the AfCFTA. Article 18 provides that parties shall accord to each other on a reciprocal basis, preferences that are no less favorable that those accorded to third parties. The practical implications of this section are that if State Party A has entered into a trade with region X that revokes the imposition of duty on Cars, State A is required to extend to all AfCFTA States parties such preferential treatment. The net effect of this is that countries who have not acceded to a free- trade area (FTA) agreement such as the AfCFTA, would be wary of entering into such a treaty so as to protect their local markets. Conversely, countries that have already acceded to FTA Agreements would be wary of entering into EPA’s with foreign states for the same reason. As a result, levels of industrialization and economic development would be stifled without the access to markets guaranteed EPAs.

In order to resolve this conondrum, this article proposes that state parties to the AfCFTA adopt a singular coordinated response to the MFN clauses in any intended and future trade agreement with a non-AfFCTA party. This can be achieved in two ways: by utilizing the existing regional economic communities (RECs) or through the recommendation of the AfCFTA Council of Ministers.

The importance of RECs in establishing FTAs is recognized by Article 5 of the AfCFTA. This article establishes the role of RECs as building blocs of AfCFTA. It therefore follows that any policies are developed by RECs including any policy relating to MFN treatment would serve as a building bloc for any approach the

AfCFTA would have towards any EPA. However, REC blocs have proven to be ineffective in developing such a response due to divergent national interests. Divergent national interests have the effect of holding back a region as witnessed in Nigeria where the states refusal to sign the EU – EPA as well as the AfCFTA hindered the ECOWAS region from enjoying the full benefits of a FTA. Moreover, such interests discourage regional intergration as witnessed in 2019 when Kenya broke ranks with the leaders of the East African Community (EAC) and ratified the EU EPA. This was despite concerns raised by the EAC that the application of the MFN clause would pose a risk to South – South trade as it discontinued trade incentives with other developing countries.

From the above, it is evident that RECs cannot effectively develop a coordinated response which would resolve this conundrum as a result of divergent national interests. The only recourse left is to adopt a top- down approach that is not laden with the primacy of national interests, to develop transparent, concise and coherent policies which resolve this challenge. This can be achieved through the use of the Office of the Council of Ministers established by Article 11 of the AfCFTA. According to Article 11(3) of the AfCFTA, the Council of Ministers has the mandate to make decisions to ensure the effective implementation of the agreement.This includes the setting of standards and harmonization of appropriate policies to guide the implementation of the AfCFTA. Therefore, the Council of Ministers can develop a singular coordinated response to the MFN clauses. The above can be in the form of a regulation setting minimum standards and basic principles of MFN treatment within the AfCFTA. Such a regulation would be effective as any decision taken by the Council of Ministers within their mandate is binding upon the adoption by state parties. This would set the ball rolling – so to speak – in developing a coordinated response in MFN treatment and improve the implementation of the AfCFTA as the only interaction with state interest would be at the adoption stage as opposed to the formulation stage and such state interest can be resolved through a simple majority as per Article 14 (3) of the AfCFTA.

Conclusion

In conclusion, the effective implementation of the AfCFTA can only be achieved where state parties are assured of the stability of their local markets. This

article notes that one of the key ways to safeguard these markets is through the development of a coordinated response to MFN clauses which can only be effectively attained through the Council of Ministers.

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