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Assessment of the Regulatory Effects of the AfCFTA Protocol on Trade in Services for Ethiopia; the Case of Telecommunication Sector

A Thesis Submitted to Addis Ababa University, College of Law and Governance Studies, School of Law in Partial Fulfillment of LL.M Degree in Business Law

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Approval Sheet

Assessment of the Regulatory Effects of the AfCFTA Protocol on Trade in Services for Ethiopia; the Case of Telecommunication Sector

Declaration

I, the undersigned, declare that the thesis is my original work and has not been presented for a degree in any other University and that works of others included in this thesis are duly acknowledged.

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Acronyms and Abbreviations

AfCFTA	African Continental Free Trade Area
AU	African Union
AEC	African Economic Community
CUs	Customs Unions
CMs	Common Markets
ETA	Ethiopian Communications Authority
ETC	Ethiopian Telecommunications Corporation
EUs	Economic Unions
FTAs	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ITC	International Trade Center
ICT	Information Communication Technology
ITU	International Telecommunication Union
MFN	Most-Favored-Nation
PTAs	Preferential Trade Agreements
RECs	Regional Economic Communities
TRALAC	Trade Law Center
WTO	World Trade Organization

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Chapter One

1. Introduction

1.1. Background of the Study

The interface between international trade and domestic regulatory autonomy has become a crucial theme in today's international trading of goods and services.[1] Players in international trade are stalled on the dilemma of the need to maintain regulatory autonomy to allow domestic rules to respond to local conditions and the possibility of such autonomy to be used to create trade barriers with a view of protectionism.[2] By considering such tensions, the drafters of multilateral and preferential trade agreements including GATS recognized the right of members to regulate, and to introduce new regulations, on the supply of goods and services within their territories in order to meet national policy objectives.[3] In the meantime, they have adopted different approaches to reduce trade-distorting effects of these domestic regulations.[4] Despite these measures and approaches, it has still been reported that cross-national differences in regulation constitute the most significant barrier to international trade more than tariff barriers and have become a central issue in trade negotiations.[5]

Within this unsettled international trade order, the African continent has become the late entrant to these regional trade arrangements. In 2012, the African Heads of State and Government have decided to establish the African Continental Free Trade Area (AfCFTA) by 2017.[6] Based on this decision, the treaty establishing AfCFTA was officially signed by the African leaders in Kigali, Rwanda, by 44 Heads of State and Government of the 55 African Union (AU) member states on March 2018.[7] AfCFTA has been established with an ambitious objective of removing tariff and

[1] Aaditya Mattoo and Pierre Sauvé, "Domestic Regulation and Trade in Services: Looking Ahead", Oxford University Press and World Bank, Washington, DC, 2003, p.1
[2] Ibid
[3] Markus Krajewski, "Domestic regulation and services trade: lessons from regional and bilateral free trade agreements", University of Erlangen-Nuremberg- Law School, 2015 p.2
[4] Aik Hoe Lim and Bart de Meester, "An Introduction to Domestic Regulation and GATS; Putting Principles into Practice" Cambridge University Press, 2014, p.8
[5] Gary WINSLETT, "How Regulations Became the Crux of Trade Politics", Journal of World Trade 50, no. 1, 2016, p.47
[6] International Trade Centre, "A business guide to the African Continental Free Trade Area Agreement," ITC, Geneva, 2018, P.8
[7] Ibid

non-tariff barriers on goods and services with the intention of facilitating intra-African trade, promote regional value chains to foster the integration of the African Continent into the global economy; boost industrialization, competitiveness and innovation, ultimately contributing to Africa's economic development and social progress.[8] In essence, AfCFTA is part of the overall objective of the Abuja treaty[9], which aims at the gradual removal of tariff barriers and non-tariff barriers to intra-community trade and the establishment of a Customs Union by means of adopting a common external tariff.[10] Basically, AfCFTA is designed in line with the WTO Agreements.[11] It has been analyzed that AfCFTA has designed in such a way that it does not operate counter to the spirit of the WTO (supporting a rules-based system for free trade).[12] Therefore, the aforementioned dilemma of balancing domestic regulatory autonomy and free trade facilitation measures in other multilateral agreements will inevitably arise in the context of AfCFTA.

Contrary to its usual hesitation to join some basic multilateral trade agreements, Ethiopia was at the forefront in joining AfCFTA. On March 21, 2019, the House of Peoples Representative has unanimously ratified the agreement establishing AfCFTA in a session attended by 320 members.[13] In justifying this move, the current Prime Minister Abiy Ahimed states that the country's decision to ratify the agreement was consistent with his vision of "*creating a closer and full regional integration, where minds are open to ideas and markets are open to trade".*[14] In consistence with this statement, the government has recently opens up its state state-run Ethio-telecom, Ethiopian Airlines, Ethiopian Power and the Maritime Transport and Logistics Corporation to domestic and foreign investment while insisting that the majority of the stakes in these entities will remain to be held by the government.[15] Therefore, the previous closed and controlled economy of the country will experience another new challenge of maintaining rule based free trade facilitation with aiming at the fulfillment of national policy objectives. This new

[8] Andrea Cofelice, "African Continental Free Trade Area: Opportunities and Challenges" The Federalist Debate November 2018, p.33
[9] A Treaty establishing the African Economic Community (AEC), 1991, Abuja, Nigeria,
[10] International Trade Centre, cited above at note 6, p. 2
[11] Id p.10
[12] Ibid
[13] Addis Fortune, Vol.19, No. 986, March 23,2019 Publication
[14] Semonegna, 2019 available at https://semonegna.com/ethiopia-joins-africa-continental-free-trade-agreement-AfAFCFTA/
[15] Aaron Maasho, "Ethiopia opens up telecoms, airline to private, foreign investors", Reuters, June 5, 2018

challenge coupled with the AfCFTA membership will require the government to make advanced and well thought preparations in regulating sectors of the economy.

Among the sectors opened to the private sector by the government, this thesis will focus on the analysis of the regulatory framework of the telecommunication sector due to its crucial nature in terms of facilitating the country' effort in attracting foreign direct investment and overall importance of the sector in the country's development. As it is noted above, the government has announced its decision to privatize the monopoly fixed line, mobile, Internet and data provider-Ethio-Telecom.[16] This move coupled with the decision to liberalize the telecommunications market will inevitably lead to an open market, with private sector participation and a transparent regulatory regime, which are a pre-requisite for a thriving digital economy.[17] Among these three important conditions, privatization of the Ethio-telecom and liberalization of the sector have already accomplished by the measures taken by the government. The remaining crucial responsibility of the government is to create a comprehensive regulatory framework.

Until recently, the current Ministry of Innovation and Technology was mandated to develop policy instruments, design programs, mobilize funds and execute implementation measures for the development of the country's telecom sector.[18] It had also the control of the regulatory functions and operations of the sector.[19] However, with the passage of the new privatization decision, some regulatory arrangements have been taken. Accordingly, the Communications Service Proclamation No. 1148/2019 has been adopted on June 13, 2019 by the House of Peoples Representatives and published in the official Negarit Gazette on September 2, 2019.[20] Based on this law, Ethiopian Communications Authority has been established with the purpose of regulating the telecom sector. Therefore, the core motive of this thesis is the assessment of this new regulatory framework of the telecom sector in light of the newly established AfCFTA and its regulatory rules. More importantly, the regulatory effects of AfCFTA Protocol on Trade in Services rules on the regulatory measures of the Ethiopian Communications Authority has been analyzed. In addition, attempts have made to uncover the legal and regulatory concerns of the

[16] Lishan Adam, "Risks and Opportunities of Late Telco Privatization; the Case of Ethio-Telecom", Canadian International Development Research Centre (IDRC), 2019. P. IV
[17] The World Bank, "Ethiopia Digital Foundations Project" (P171034), Sep.2019, p.7
[18] Ibid
[19] Ibid
[20] See Communications Service Proclamation No. 1148/2019, Negarit Gazetta, 25th Year No. 82, 2019, Addis Ababa

existing framework in the regulation of the telecom sector with the new advent of the rule based free cross border involvements in the sector.

1.2. Statement of the Problem and Research Questions

In the modern world, economic theories suggests that international trade is beneficial for growth, competitiveness and welfare improvement through its effects on specialization, production and consumption.[21] In allowing these benefits to be shared by all countries, a global trade agreement that eliminates all barriers to trade is the first best option for maximizing global output and welfare.[22] The purpose of such global trade agreements may also be achieved through preferential trade agreement amongst limited number of countries, which usually be done in the form of regional free trade agreements.[23] However, it has also been reported that multilateral system is still perceived as insufficiently attuned to Africa's needs.[24] The asymmetry of influence within most multilateral trade agreements including WTO has been raised as a challenge for most developing countries in the African continent.[25] This is mainly due to the stagnancy of African countries on being a fragmented bundle of small resource-rich but commodity-dependent economies.[26]

Therefore, AfCFTA was presented as a regional integration strategy aimed at aggregating Africa's small countries into one large market that can deliver economies of scale, improved competitiveness, foreign direct investment and poverty reduction.[27]However, these all articulated benefits of regional integration measures are not without challenges to member countries. Scholars in the field have argued that large firms that are taking advantage of such economies of scale may gain dominant position in markets at the expense of Small and Medium Enterprises (SMEs).[28] In addition, market consolidation may arise when SMEs are exposed to stiffer

[21] Bell IHUA, Martin IKE-MUONSO, Olumide TAIWO and Sand MBA-KALU, "An Independent Study on the Potential Benefits of the African Continental Free Trade Area (AfCFTA) on Nigeria", African International Trade and Commerce Research, May 2018 p.11
[22] Ibid
[23] Ibid
[24] Christopher Stevens, "Impacts and Challenges of Multilateral and Bilateral Trade Agreements on Africa" African Development Bank, Economic Research Working Paper Series, No 79, October 2005, p.1
[25] Id p.2
[26] Bell IHUA, Martin IKE-MUONSO, Olumide TAIWO, Sand MBA-KALU cited above at note 21, p. 10
[27] Ibid
[28] Mesut Saygili, Ralf Peters and Christian Knebel, "African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions", UNCTAD Research Paper No.15, 2018 p.7

competition during the transition.[29] Due to this, countries in Africa were resisting the existence of such arrangements in view of protecting their domestic industries. For instance, until recently Nigeria has declined to join AfCFTA. In justifying his decision, President Muhammadu Buhari, the President of Nigeria, stated that "*"We will not agree to anything that will undermine local manufacturers and entrepreneurs, or that may lead to Nigeria becoming a dumping ground for finished goods*….."[30] It is based on this concerns that, as noted above, multilateral and regional trade agreements recognized the right of members to regulate, and to introduce new regulations, on the supply of goods and services within their territories in order to meet national policy objectives. In line with this, AfCFTA has adopted similar approaches in the domestic regulatory powers of member countries.

Within this continental trade context, Ethiopia has more questions to respond and more concerns to address in joining the AfCFTA. This thesis will emphasize on the domestic regulatory measures of the country in line with the recognized right of members to regulate, and to introduce new regulations. Accordingly, the need to balance the following two important points is always a problem as it is a very crucial step to maintain a viable international trade arrangement. The first point is the consistency/compliance of the domestic regulatory measures with the AfCFTA regulatory rules and principles. Following this, the second point is the effectiveness of such regulatory measures to meet national policy objectives. These two points may not always be balanced in international trade contexts. A country may have strong domestic regulatory apparatus that will always maintain its national policy objectives. However, this country will inevitably be subject to scrutiny for creating non-tariff barriers. In the meantime, a country with a weak domestic regulatory organization, taking the words of the President of Nigeria, will undermine its local manufacturers and entrepreneurs, or that may lead to the country becoming a dumping ground for finished goods. Therefore, Ethiopia is expected to address such concerns, particularly in the regulation of the Telecommunication Sector.

Accordingly, based on the above statements of the problem, the thesis has attempted to address the following key research questions.

[29] Ibid
[30] Adamu Jibrilla, "African Continental Free Trade Area (AFCFTA) and Its Implications for Nigeria: A Policy Perspective", International Journal of Research and Innovation in Social Science, Volume II, Issue XII, December 2018, p. 165

1. What are the regulatory effects of free trade agreements on member counties' domestic regulatory power?

2. How is the existing regulatory framework of the recently privatized Telecommunication Sector structured?

3. What are the regulatory effects of AfCFTA Protocol on Trade in Services on the existing regulatory framework of the Ethiopian Telecommunication Sector?

4. Does the existing regulatory framework of the Telecommunication Sector comply with the rules and principles of AfCFTA Protocol on Trade in Services on domestic regulation?

5. What regulatory concerns should Ethiopia address in the Telecommunication Sector in joining AfCFTA?

1.3. Objectives and Significance of the Study

It has been widely reported that AfCFTA has the potential to make a concrete impact on the lives of ordinary citizens across the continent and stimulating Africa's growth trajectory.[31] In joining this highly rated continental trade agreement, Ethiopia needs to have a deep assessment of the specific and general effects of the agreement on its national policies and interests. Therefore, this thesis will serve as a first assessment on the regulatory effect of AfCFTA Protocol on Trade in Services on the regulatory power of Ethiopia. Generally, the main objective of this thesis is to assess the regulatory effects of the AfCFTA Protocol on Trade in Services rules and principles on Ethiopia's existing Telecommunication Sector regulatory framework. Specifically, this thesis gave greater emphasis to the assessment of specific regulatory effects of the AfCFTA Protocol on Trade in Services on the Ethiopian Telecommunication Sector regulatory framework.

In terms of significance, this thesis would help Ethiopia's trade negotiators in making an informed decision on the next rounds of AfCFTA negotiations by considering the effects of such agreements on the country's regulatory objectives. Furthermore, this thesis will serve as guidance for the law maker and regulatory bodies working on different sectors particularly the

[31] International Trade Centre, cited above at note 6, p. III

Telecommunication Sector. In addition to this, the thesis, by providing the first assessment on the area, will serve as a reference material for upcoming researches and it will illustrate a first insight on AfCFTA's effect on Ethiopia's existing and future regulatory approaches.

1.4. The Scope and Limitation of the Study

This thesis is mainly focusing on the assessment of the regulatory effects of the AfCFTA Protocol on Trade in Services' rules on domestic regulation on the existing regulatory framework of the Ethiopian Telecommunication Sector. Therefore, it is more of a regulatory effect assessment on the existing regulatory framework in line with the AfCFTA rules. As such, it is scope is limited to outlining major rules and principles of AfCFTA Protocol on Trade in Services governing domestic regulation and assessing the effect of these rules and principles on the existing regulatory framework of the Ethiopian Telecommunication Sector.

In terms of limitation, the jurisprudential dearth in the area of domestic regulatory powers of member countries of AfCFTA has created a major obstacle to this thesis. In addition to this, absence of decisions of courts and panels due to the infancy of AfCFTA has let the thesis without a binding reference material. The unreachable nature of Ethiopian trade negotiators involved in the AfCFTA rounds of negotiations was also a challenge to this thesis. Finally, the unfortunate event of the COVID-19 pandemic has created a huge obstacle for the thesis to access government institutions, particularly the Communications Authority. Due to social distancing rules and partial lockdown, it was not possible to get in touch with officials and trade negotiators.

1.5. Research Method and Methodology

This thesis is a doctrinal legal research, which is purely an expository type focusing on the exposition of the effects of the AfCFTA Protocol on Trade in Services on the existing Ethiopian Telecommunication Sector regulatory framework. According to Wondimagegn, doctrinal legal research, sometimes called research in law, is the traditional and standard form of legal research, which mainly focusing in analyzing the law to instruct attorneys in consideration of legal problems, to guide judges and decision makers in their resolution of legal disputes and to advise

policy makers on law reform.[32] Therefore, this thesis employs doctrinal, theoretical and reform oriented legal research method. As such, basic methods in doctrinal legal research including legal analysis, legal synthesis, methods of interpretation, and methods of legal reasoning has been employed to arrive at a comprehensive understanding of the research questions. In line with doctrinal legal methodology techniques, this thesis has located relevant legal texts from primary and secondary sources such as legislation, case, journal articles, books, databases, working papers, archival documents and internet sources, interviews and then, evaluates and assesses them, and finally applies the results to the research questions.

1.6. Structure of the Study

This thesis is organized into an introductory chapter and three other main chapters. The introductory chapter provides a background of the study, sets the research problems and questions, outlines objectives and significances of the study, provides the scope, limitations and methodology of the study. The second chapter attempts to lay down the conceptual underpinning of domestic regulation and the AfCFTA. Accordingly, major trends and developments in the free trade area agreements, introduction of AfCFTA and its rules and principles by giving particular emphasis to the Protocol on Trade in Services as well as regulatory bodies and approach of AfCFTA and WTO have been assessed.

Chapter three introduces the existing regulatory framework of the Ethiopian Telecommunication Sector. As such, the chapter analyzes the overall science and regulatory frameworks of Telecommunication systems. It also narrates the background of the Ethiopian Telecommunication Sector and provides basic historical regulatory underpinnings of the sector. More importantly, the chapter assesses major aspects of the current regulatory approach of the Telecom sector in terms of its basic regulatory subject matters. New developments in the telecommunication sector including privatization and liberalization decision have also been analyzed. Chapter four of the thesis contains the assessment of the regulatory effects of the AfCFTA Protocol on Trade in Services on the Ethiopian Telecommunication Sector regulatory framework. It mainly focuses on the assessment of the applicability of the Protocol to the Sector. More importantly, it makes a deep assessment of the effects of the Protocol on the Ethiopian

[32] Wondemagegn Tadesse, "Legal Research Tools and Methods in Ethiopia" Published in Journal of Ethiopian Law, Vol. XXV No. 2, September 2012, P. 7-8

telecommunication sector regulatory framework. It also assesses major regulatory concerns of the country after AfCFTA and provides assessment of best practices in adjusting the regulatory effects of trade agreements. Finally, the thesis has capped with conclusion and recommendation remarks.

Chapter Two

2. Overview of AfCFTA and Domestic Regulation

2.1. General Overview and Current Trends of Free Trade Area Agreements

In today's world trading system, an increasing number of regional integration initiatives have been launched. The main objective of such initiatives is liberalization of trade among the members by granting tariff concessions and removing non-tariff barriers.[33] These regional integration initiatives may take different forms. Depending on their degree of integration, scholars classified forms of regional integration into five categories.[34] Accordingly, regional trade agreements may take the form of Preferential Trade Agreements (PTAs), Free Trade Agreements (FTAs), Customs Unions (CUs), Common Markets and Economic Unions.[35] The five categories are often treated as a sequencing pattern towards closer integration as well as taxonomy of deeper and deeper integration.[36]

Consequently, a PTA is defined as a union in which member countries impose lower trade barriers on goods produced within the union, with some flexibility for each member country on the extent of the reduction.[37] In the case of FTA, member countries completely abolish trade barriers (both tariff barriers and non-tariff barriers) for goods originating within the member countries[38]but with each member retaining its own tariff rates on imports from non-members.[39]However, even within FTA, countries may not abolish trade barriers completely since they tend to exclude some sensitive sectors.[40] The third category, CUs, provides deeper integration than an FTA because, unlike FTAs where member countries are free to maintain their individual level of tariff barriers for goods imported from non-member countries, in a CU, member countries apply a common external tariff on a good imported from outside countries.[41]

[33] Sejuti Jha, "Utility of Regional Trade Agreements: Experience from India's Regionalism", Asia-Pacific Research and Training Network on Trade, Working Paper Series, No. 99, April 2011, p.2
[34] Ibid
[35] S. Khorana, S. McGuire and N. Perdikis, "Multilateral Agreements and Global Governance of International Trade Regimes", Atlantic Future Scientific Paper, 2014, p.6
[36] Ibid
[37] Ibid
[38] Ibid
[39] Sejuti Jha, cited above at note 33, p.2
[40] S. Khorana, S. McGuire and N. Perdikis, cited above at note 35, p.6
[41] Ibid

The last two categories, which are common markets and economic unions, allow free movement of factors of production, and integration of national economic policies and adoption of a common currency respectively.[42] It has been reported that such regional trade initiatives in different forms are dramatically increasing in recent years posing a biggest challenge in multilateral trading system.[43] It is argued that lack of progress in the multilateral arena has triggered the proliferation of regional integration initiatives.[44] Due to this, in today's trading world, no country or region is abstaining from this trend of regional integration.[45] As such, it has been stated that around 400 different regional trade agreements have been notified to WTO until 2007, which shows a significant increasing in numbers and level of integration.[46]

2.2. Introducing African Continental Free Trade Area

As reports indicate, in the post-independence period, integration has been a core element of the development strategy of African countries.[47] It has also been pointed out that this pursuit of integration at regional and continental levels aims at overcoming the colonial legacy of the fragmentation of Africa into small and weak economies, and at harnessing the economies of scale and other benefits of a large integrated market.[48] This will in turn empower Africa to take its rightful position in the global economy and polity.[49] Based on these objectives, regional integration has been accorded high priority in the development agenda of African countries. And the continent's landscape contains a relatively large number of integration schemes.[50] In spite of this, market integration in Africa is still weak and the level of intra-African trade remains relatively low.[51]According to the report of African Union, intra-African trade stands at around 10 per cent compared to 60 per cent, 40 per cent, 30 per cent intra-regional trade that has been

[42] Sejuti Jha, cited above at note 33 p.2
[43] Heribert Dieter, "The Multilateral Trading System and Preferential Trade Agreements: Can their Negative Effects be Minimized?" German Institute for International and Security Affairs, GARNET Working Paper No: 54/08, Berlin, 2008, p.2
[44] The collapse of Ministerial Meeting of the Doha Round in the case of WTO, in July 2008 in Geneva, has been cited as the main reason for the recent inclination of countries towards regional trade agreements.
[45] Heribert Dieter cited above at note 42, p.2
[46] Id p.4
[47] African Union, "Draft Framework, Road Map And Architecture For Fast tracking The Continental Free Trade Area (AFCFTA)", Addis Ababa, Ethiopia p.1
[48] Ibid
[49] Ibid
[50] African Union, "Synthesis Paper on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area" Addis Ababa, Ethiopia, pp.2-3
[51] Id p.3

achieved by Europe, North America and Asia respectively.[52] Due to the fact that Africa does the bulk of its trade with the outside world and the exports are heavily concentrated on primary commodities, the continent has been particularly vulnerable to external macroeconomic shocks and protectionist trade policies.[53]

It is based on this backdrop that the 6th Ordinary Session of the AU Conference of Ministers of Trade decided to fast track the creation of AfCFTA. Based on this decision, the agreement establishing AfCFTA was signed at the 10th Extraordinary Summit of the AU Assembly on 21 March 2018 in Kigali, Rwanda. The AfCFTA Agreement entered into force on 30 May 2019 after the deposit of instruments of ratification by 22 member states as required by the terms of the Agreement.[54] And it is officially launched on 7 July 2019 at the 12th Extraordinary Session of the AU Assembly held in Niamey, Niger.[55] Creation of a single continental market for goods and services, with free movement of business persons and investments as well as expansion of intra-Africa trade across the regional economic communities and the continent in general are some of the core objectives of AfCFTA as provided in its preamble.

In accordance with the plan of action endorsed by the AU Assembly in 2012, two negotiating phases of the AfCFTA was envisaged, phase I involving trade in goods and services and dispute settlement while phase II contains competition, intellectual property rights and investment policy.[56] Based on this, Phase I was launched in June 2015 and now all the protocols included in this Phase are completed and entered in to force in May 2019 with the exception of some outstanding issues such as schedule of tariff concessions, technical regulations, and trade remedies.[57] Negotiations in Phase II are in progress. Overall, AfCFTA will contain six protocols, which are Protocol on Goods, Protocol on Trade in Services, Protocol on Rules and Procedures on Dispute Settlement, Protocol on Competition Policy, Protocol on Investment and Protocol on Intellectual Property Rights. As such, in the next part of this thesis, some basic aspect of AfCFTA has been assessed.

[52] African Union, cited above at note 47 p.2
[53] Ibid
[54] TRALAC Law Center, "African Continental Free Trade Area, A tralac guide", 6th edition, Nov. 2019 p.2
[55] Viola Sawere, "An update on the African Continental Free Trade Area and Southern African Development Community Protocols on Trade in Services", tralac working paper, January 2020 p. 4
[56] Ibid
[57] Ibid

2.2.1. Principles and Values

The agreement establishing AfCFTA has incorporated core principles and values, which shall be complied by member countries. Accordingly, the agreement under article 5 lists 12 principles, which shall govern its operation and members' relationship. Among these principles, the agreement incorporated the principle of transparency and disclosure of information, most-favored-nation (MFN) treatment, national treatment, reciprocity, substantial liberalization, consensus in decision-making and best practices in the RECs, in the State Parties and International Conventions binding the African Union. These core values set out the principles for the current and future negotiations of the AfCFTA and are largely WTO-consistent.[58] These principles with the detail stipulation of article 18 (Continental Preferences) ensures that intra-African trade is prioritized, relative to external (to the continent) trading partners and could have important implications for the sourcing of value-added goods and key inputs into production.[59]

All in all, AfCFTA has adopted major principles of international trade in consistent with major regional trade agreements and the WTO.

2.2.2. Regulatory Bodies of AFCFTA

As it is noted, Article 2 of the treaty establishing the AfCFTA declares the establishment of African Continental Free Trade Area. Accordingly, this treaty puts in place institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the AfCFTA.[60] To begin with, it has been assessed that institutions governing AfCFTA are AU linked political platforms where representatives of the state parties will meet from time to time.[61]Accordingly, the institutional framework of the AfCFTA is provided in its establishment treaty and in the protocols. Based on this, AfCFTA has four main governing institutions, which are the Assembly of the Head of State and Government of the AU, the Council of Ministers (consisting of the Ministers of Trade of the State Parties), the Committee of Senior Trade

[58] International Trade Centre, cited above at note 6, p. 5
[59] Id, p.6
[60] See Article 9 of the Agreement Establishing African Continental Free Trade Area, AU, Addis Ababa, 2018
[61] Gerhard Erasmus, "The Institutional Design of the AfCFTA", tralac Working Paper, No, S19WPO3/2019, May 2019, p. 12

Officials (consisting of Permanent or Principal Secretaries or other officials designated by each State Party) and the Secretariat.[62]

As it is clearly provided under article 10 of the treaty, the Assembly, as the highest decision-making organ of the AU, shall provide oversight and strategic guidance on the AfCFTA. In addition to this, the Assembly has also the exclusive authority to adopt interpretations of the Treaty upon the recommendation of the Council of Ministries. As indicated by writers, this provision may suggest that AU Member States that have not become State Parties to AfCFTA will still have a say on the implementation of the AfCFTA.[63] Due to the fact that the Assembly may delegate its power to other AU organs[64], the African Union Ministers of Trade and the Department of Trade of the AU Commission, via the Assembly, will play an import role in the governance and administration of AfCFTA.[65] In the Council of Ministers, only State Parties will be represented and they will ensure, among other things, effective implementation and enforcement of the AfCFTA Agreement and must take measures necessary for the promotion of the objectives of the Agreement.[66] As provided under article 11 (2) of the treaty, the Council of Ministers shall report to the Assembly through the Executive Council.

The third governing body of the AfCFTA, which is the Committee of Senior Trade Officials is mandated to implement the decisions of the Council of Ministers and is responsible, among other things, for the development of programs and action plans and thereby ensuring the implementation of the AFCFTA.[67] The fourth very important body of the AfCFTA is the Secretariat. As provided in the Treaty, the Secretariat will be established by the Assembly, which shall decide its nature, location and approve its structure and budget. In the meantime, the Council of Ministers of Trade is mandated to determine the role and responsibilities of the Secretariat. The Secretariat will be an autonomous institution within the AU system and have an independent legal personality.[68] In addition to these four main institutions, there will be a number

[62] See Article 9 and the following provisions of the Treaty, cited above at note 60
[63] Gerhard Erasmus, cited above at note 61, p.12
[64] In accordance with the rules of procedure of the Assembly of the AU, the Assembly meets in ordinary session at least once in a year. Due to this fact, it may delegate its power and functions to other AU organs.
[65] Gerhard Erasmus, cited above at note 61, p.12
[66] See Article 11 of the Treaty, cited above at note 60
[67] Id, See Article 12 (2).
[68] Id, See Article 13.

of second tier AfCFTA institutions, which be established either by the four main institutions or by the Protocols of the AfCFTA including the Dispute Settlement Body of the AfCFTA.[69]

2.2.3. AfCFTA's Protocol on Trade in Services

Earlier on, it has been noted that the Protocol on Trade in Services (the "Protocol") is one of the six core protocols of the AfCFTA. This protocol has a particular importance to address the issues of this thesis. As such, the Protocol consists of the framework agreement and five annexes, covering schedules of specific commitments, MFN exemption lists, air transport, list of priority sectors and a framework document on regulatory cooperation.[70] It has been indicated that the core aim of the Protocol is the creation of a single liberal market for trade in services with a large borrowing of models from the WTO's GATS.[71] This protocol introduces new legal disciplines and different approaches from those applicable to trade in goods due the intangible nature of services and the impossibility of regulating them through the imposition of tariff.[72]

Accordingly, the Protocol incorporates principles such as Most Favored Nation[73] and National Treatment[74] as well as non-discrimination among services and service providers of state parties. More importantly, it recognizes the right of State Parties to regulate their service sectors as long as the regulatory measures are transparent and objective.[75] It promotes competition and provides mechanisms of mutual recognition of education or experiences obtained and licenses or certificates granted by a State Party for the purpose of authorizing and licensing or certifying the supply of a service in another State Party.[76] Furthermore, the Protocol guides State Parties to progressive liberalization through sector specific commitments of State Parties to guarantee the conditions for market access and national treatment in each of the four modes of supply of services such as Cross Border Supply (Mode 1), Consumption Abroad (Mode 2), Commercial Presence (Mode 3) and Presence of Natural Persons (Mode 4).[77] Based on this, State Parties have

[69] Gerhard Erasmus, cited above at note 61, p.14
[70] Viola Sawere, cited above at note 55, p.5
[71] Ibid
[72] Gerhard Erasmus, Trade in Services under the AFAFCFTA and domestic regulation, tralac Trade Brief No. S19TB12/2019, 2019, p.1
[73] The Protocol on Trade in Services, AFCFTA, AU, 2018, Article 4
[74] Id., Article 20
[75] Id., Article 8 and the following provisions
[76] Id., Article 10
[77] Viola Sawere, cited above at note 55, p.5

agreed to include business services, communication, finance, tourism and transport services as a Priority Sector while regulatory frameworks were adopted at the 32th Ordinary session of the AU held in Addis Ababa, Ethiopia on February 10-11, 2019.[78] Finally, the revised roadmap for AfCFTA negotiations indicates January 2020 as the expected date for conclusion of the negotiations in the five priority sectors and regulatory framework in all services sectors.[79]

2.3. Approaches of AfCFTA and WTO Agreements

It has been noted AfCFTA has been launched as a Free Trade Area, which is a preferential trade arrangement for liberalizing trade in goods and services among the member states.[80] As provided under article XXIV of GATT, a free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated substantially for all the trade between the constituent territories and products originating in such territories. As it has been widely noted, AfCFTA agreement is consistent with WTO agreements.[81] Due to the fact that AfCFTA has been designed in such a way that it does not operate counter to the spirit of the WTO, it is not expected to diminish any existing WTO obligations and commitments for WTO Members in Africa but may actually extend such obligations and commitments within the AfCFTA to states who are not WTO Members.[82] In particular, the scope of areas of negotiations are mostly similar with the WTO as AfCFTA include goods and services in Phase I and Intellectual Property Rights, Investment and Competition Policy in Phase II using WTO-consistent principles including dispute settlement mechanisms.[83] As such, the AfCFTA mirrors the arrangements of the WTO in many aspects including institutional arrangements and rules and procedures of settlement of disputes.

2.4. General Overview of Domestic Regulation in FTA

As per the well-entrenched rule of international law, states have jurisdiction over their own territory and will only give effect to international obligations binding upon them. In essence, the signing of free trade agreements implies that states are willing to pool their sovereignty towards

[78] Id, p.6
[79] Ibid
[80] Gerhard Erasmus, cited above at note 61, p.1
[81] International Trade Centre, cited above at note 6, p. 9
[82] Ibid
[83] Ibid

the newly established interstate arrangement.[84] As provided in the WTO report, "*Acceptance of almost any treaty involves a transfer of a certain amount of decision making authority away from states, and towards some international institution. Generally, this is exactly why 'sovereign nations' agree to such treaties. They realize that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise."*[85] Due to this fact, when states sign a free trade agreement, the broad natural sovereign powers bestowed on them to regulate and take measures of trade will be highly restricted and states have to accept inter-state obligations permitting the free movement of goods, services and investment across their borders and they must remove non-tariff barriers.[86]

Within such arrangements, the only way of keeping this fragmented sovereignty with states is domestic regulation. As such, states have negotiated and incorporated domestic regulation rights of member countries in free trade agreements. Accordingly, all countries, party to free trade agreements, have the right to put in place domestic regulatory frameworks of different kind to meet national policy objectives.[87] The main variation among free trade agreement regarding domestic regulation lies to the extent in which member countries are allowed to take regulatory measures. In the next sections of this paper, attempts have made to explore domestic regulatory framework of WTO and AfCFTA by giving particular emphasis to service trade domestic regulation.

2.4.1. Domestic Regulation under the WTO

To begin with, the right of members to regulate and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives is clearly recognized under the GATS.[88] However, as reports indicated, developing rules for comprehensive non-discriminatory domestic regulations remains one of the key elements of the unfinished agenda of the GATS.[89] As such, the draft rule on domestic regulation disciplines has not yet been finalized in the WTO context.[90] Due to this, Article VI of the GATS remains to be the main provision with

[84] Gerhard Erasmus, cited above at note 61, p.11
[85] Ibid
[86] Ibid
[87] International Trade Centre, cited above at note 6, p. 34
[88] Preamble of the General Agreement on Trade in Services, WTO, 1994, Marrakech, Uruguay
[89] Markus Krajewski, cited above at note 3, p.1
[90] Ibid

regard to domestic regulation of the service sector.[91] Consequently, article VI of the GATS requires each member to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Accordingly, this provision prohibits the arbitrary and biased application and administration of domestic regulations and ensures consistent and predictable administrative decisions.[92] Furthermore, the provision requires members to maintain or institute an impartial and independent judicial, arbitral or administrative tribunals to make decisions affecting trade in services. In addition to this, sub article 4 of this provision requires members to develop disciplines of domestic regulation to ensure that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.

What is more is the non-discrimination disciplines found in Articles II (MFN) and XVII (National Treatment) of the GATS already exert powerful discipline on domestic regulatory conduct in the services area.[93] Overall, the design of the GATS follows a three-fold approach to reduce trade-distorting effects of domestic regulations.[94] The first is based on the fundamental principle of non-discrimination, which is founded on the idea that discriminatory regulations are against the very idea of trade liberalization.[95] The second element relates with the principle of market access and it outlaws domestic regulations which has the effect of reducing the number of service suppliers or make access to a market contingent on certain legal forms.[96] The third element of domestic regulation considers domestic regulations' possibility of becoming a barrier to trade even if they are neither discriminatory nor formal barriers to market access and pursues members to negotiate on the development of regulatory disciplines amongst members.[97]

2.4.2. Domestic Regulation under AfCFTA

The Protocol has adopted a more or less similar domestic regulatory framework with that of GATS. As such, article 8 of the Protocol recognizes the right of state party to regulate and

[91] Aaditya Mattoo and Pierre Sauvé, cited above at note 3, p.1
[92] Panagiotis Delimatsis, "'Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behavior in Services Through Article VI of the GATS'," Journal of International Economic Law 10, 19 2007 cited in Markus Krajewski, cited above at note 3, p.3
[93] Aaditya Mattoo and Pierre Sauvé, cited above at note 3, p.2
[94] Aik Hoe Lim and Bart de Meester cited above at note 4 cited in Markus Krajewski cited above at note 3, p.2
[95] Markus Krajewski, cited above at note 3, p.2
[96] Ibid
[97] Ibid

introduce new regulations on services and services suppliers within its territory to meet national policy objectives. The qualification of this right, as provided in the same provision, is that such regulations should not impair any rights and obligations arising under the Protocol. Furthermore, Article 9(1) of the Protocol, which is the direct copy of Article VI of the GATS, requires state parties to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, transparent and impartial manner.[98] This obligation will be applicable solely for those sectors where specific commitments are undertaken. Similar to the GATS, the Protocol requires state parties to maintain or institute an impartial and independent judicial, arbitral or administrative tribunals to make decisions affecting trade in services.[99]

However, unlike the GATS, the Protocol excludes the provisions from GATS Article VI that provide for the development of 'any necessary regulatory disciplines' on measures relating to qualification requirements and procedures, technical standards and licensing requirements, in order to ensure that such measures do not constitute unnecessary barriers to trade in services.[100] In addition to what has been stated, the principles governing the operation of AfCFTA will have a crucial impact on the domestic regulatory measures of state parties. Accordingly, the principle of transparency and disclosure of information[101], most-favored-nation (MFN) treatment[102] and national treatment[103] will have an important role in shaping the domestic regulatory measures of state parties with the absence of future negotiation framework on regulatory disciplines. In relation to domestic regulation, Article 10 of the Protocol provides instances of state party's recognition of the education or experience obtained, requirements met, or licenses or certifications granted in another State Party for the fulfilment of its standards or criteria for the authorization, licensing or certification of services suppliers. However, as provided in the same provision, such mutual recognition schemes should not be used to discriminate state parties.[104] Overall, the domestic regulatory framework of the Protocol mirrors the WTO's GATS with some minor differences.

[98] Article 9(1) of the Protocol, cited above at note 73
[99] Id., Article 9(2)
[100] International Trade Centre, cited above at note 6, p. 34
[101] Article 5 and 6 of the Protocol, cited above at note 73
[102] Id., Article 4
[103] Id., Article 20
[104] Article 10(3) of the Protocol, cited above at note 73

2.4.3. Domestic Regulation disciplines and Standards under the WTO and AfCFTA

In the previous two sections of this paper, general domestic regulatory framework of the WTO and AfCFTA has been assessed by giving emphasis to GATS and the Protocol respectively. In this section of the paper, attempts have made to point out major disciplines and standards of domestic regulation and their specific obligatory effects to the member countries from both the WTO and GATS common perspectives. As it has previously noted, trade agreements including WTO and GATS establish rules that constrain governments from maintaining policies that adversely affect foreign participation in the domestic economy. As such, these trade agreements developed rules that directly related with domestic regulation and other rules, which have a huge impact on domestic regulation measures such as national treatment, market access, MFN treatment, mutual recognition and transparency. Based on this, brief assessment of such disciplines and their regulatory effect is made.

I. Domestic Regulation

Basically, disciplines on domestic regulation[105] seek to ensure that internal government measures do not unnecessarily undermine the market opening offered by the core obligations on national treatment, MFN, and market access.[106] In doing so, both substantive disciplines for the development of specific domestic regulations on services (qualification requirements and procedures, licensing requirements and procedures and technical standards) and procedural disciplines for authorization, administration and review of measures affecting trade in services have been developed.[107] In all of these measures, the primary focus of trade agreements has three folds; firstly, the administration of domestic laws, administrative decisions and other rulings; secondly, the necessity of domestic regulatory measures, to the extent that they impose restrictions on trade in services; and thirdly, the establishment of sectorial regulatory disciplines.[108] For all of these particular concerns, both GATS and the Protocol have developed general standards that ensure regulatory measures taken by the government have legitimate

[105] As it is noted, these disciplines are intended to cover measures that are non-discriminatory and qualitative in nature, presumably falling outside the scope of agreements' MFN, national treatment, and market access obligations.
[106] Carsten Fink and Martín Molinuevo, "East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas?", The World Bank, June 2007, p.45
[107] Gabriel Gari, "Recent Preferential Trade Agreements' disciplines for tackling regulatory divergence in services: how far beyond GATS?" Center for Commercial Law Studies p. 12
[108] Carsten Fink and Martín Molinuevo, cited above at note 106, p. 45

regulatory purposes such as protecting consumers, remedying market failures, and ensuring the quality of services.[109] Such disciplines and standards with general application include reasonability, transparency, objectivity and impartial application of regulatory measures with the establishment of an impartial and independent judicial, arbitral or administrative tribunals or procedures.[110]

II. Other Disciplines Limiting Domestic Regulatory Powers

As it has been stated, domestic regulatory rights of member counties are limited not only by the disciplines developed in domestic regulation but also by other disciplines with general application. These disciplines include national treatment, market access, MFN treatment, mutual recognition and transparency. Consequently, National Treatment requires that imported services do not face more restrictive policy measures than domestically supplied services whereas MFN treatment prohibits discriminatory treatments against members in favor of non-members.[111] Under the Market Access discipline, a list of prohibition possibilities by the government including limitations on the form of legal establishment and restrictions on foreign equity participation is provided.[112] Furthermore, the discipline of regulatory transparency requires member countries to perform three important duties with respect to their regulatory measures, which are the duty to publish, duty to consult and duty to inform.[113]Lastly, mutual recognition platforms of regulatory measures will have also an effect on the domestic regulatory measures of state parties.

[109] Ibid
[110] As it has been noted, efforts to develop specific regulatory disciplines in GATS have been failed and the AfCFTA has not contained platforms for the development of such disciplines. Thus, only principles with general application will guide countries' regulatory measures in both cases of AfCFTA and GATS.
[111] Carsten Fink and Martín Molinuevo, cited above at note 106, pp. 20-23
[112] Id. P.22
[113] Gabriel Gari, cited above at note 107, p.6

Chapter Three

3. The Existing Regulatory Framework of the Ethiopian Telecommunications Sector

3.1. Overview of the Telecommunication System

Regulation of a given sector requires a basic understanding of the core components of its scientific operations. Accordingly, it would be helpful to address some issues of the telecommunication systems before dwelling into the telecommunication sector regulatory framework. Scholars on the field define telecommunications as the electrical means of communicating over a distance.[114] The term is also defined to include all types of long-distance communications that use common carriers, including telephone, television, and radio.[115] As per the professionals on the field, *"All communication devices that use digital radio transmissions operate in a similar way. A transmitter generates a signal that contains encoded voice, video or data at a specific radio frequency, and this is radiated into the environment by an antenna, or aerial. This signal spreads out in the environment, and a small proportion is captured by the antenna of the receiving device, which then decodes the information."* [116] In all of these scientific and technological processes of providing communication services, spectrum has a central role.[117] A spectrum is not a material object and thus cannot be physically handled. Rather a spectrum is the potential for space (not the air we breathe but the space in which that air exists) to transmit energy. It includes x-rays, visible light (both light that we produce and light that comes from the sun and other stars), radio and television signals, radio telescope signals used to explore outer space, satellite signals, cellular telephone signals, wireless internet signals and various other forms of energy.[118] The spectrum is equally available everywhere in the world and is a perfectly

[114] Andy Valder, "Understanding Telecommunications Networks", Institution of Engineering and Technology, London, United Kingdom, 2006, p.1
[115] Technology Guides, Telecommunications, p.1
[116] GSMA, "Understanding the Basics of Spectrum Policy for Mobile Telecommunications", Spectrum Handbook, December 2011 p.5
[117] Evan Light, "Open spectrum for development," Policy brief, Association for Progressive Communications (APC),
October 2010, p.3
[118] Ibid

renewable resource meaning that it does not disappear when it is used and it is only limited by the current capabilities of technology and the ways in which it is managed.[119]

Countries own and manage the use of radio frequency spectrum within their territory.[120] As such, it is subject to state authority and must be managed efficiently so as to be of the greatest benefit to the entire population.[121] This spectrum management usually takes place within a regulatory framework comprised of legislation, regulation, procedures and policies.[122] Based on this, authorized spectrum users derive the benefits of the right and associated obligations to access and use the spectrum.[123]

However, there is also an international aspect of such regulations. The telecommunication sector is organized internationally within the framework of the International Telecommunication Union (ITU), which provides the basic framework for the global coordination and management of the radio-frequency spectrum.[124] ITU lays down the foundation for spectrum management worldwide among its member countries with a view of avoiding harmful interference to spectrum uses on earth due to problems that may be caused by transmission of radio stations.[125] In addition to ITU, WTO, within the framework of the GATS, while recognizing the sovereign right of states to manage the frequency spectrum in terms of their own objectives, works to develop the instruments required so that exercise of that right does not in fact result in barriers to trade in services between its members.[126]

3.2. Overview of the Ethiopian Telecommunication Sector

The Ethiopian Telecommunication sector has relatively longer period of history. The history of the sector goes back to 1894 when the then king of Ethiopia, Menelik II introduces the first telecommunication service.[127] Based on this, the first long distance telephone line was

[119] Ibid
[120] GSMA, cited above at note 116, p.7
[121] ITU, "Guidance on the regulatory framework for national spectrum management", Report ITU-R SM.2093-3 (06/2018), Geneva, 2018, p.16
[122] Ibid
[123] Ibid
[124] Id, p.3
[125] Id, pp. 3-4
[126] Id, P.3
[127] Hika Zerihun Lamu, "Ethiopia's Accession to the WTO and the Telecom Sector: Can Ethiopia Accede without Liberalization?", Thesis, Addis Ababa University, 2014, p.7

established between Addis Ababa and Harar in 1894 and the network began to expand from then on, extending to other cities of the country.[128] Although it was established privately at the beginning, the company was placed under government control at the beginning of the twentieth century immediately after its establishment, and was later brought under the control of the Ministry of Post and Communications.[129] In 1952, Ethiopia established the Imperial Board of Telecommunications, which became the Ethiopian Telecommunication Authority in 1981, with the mandate of both the operation and regulation of telecommunication services.[130]

During the Dergue Regime, the Ethiopian Telecommunications was reorganized as Ethiopian Telecommunications Service from October 1975 to February 1981; and Ethiopian Telecommunications Authority (ETA) on January 1981.[131] Both of these institutions were in charge of both the operation and regulation of telecommunications service in Ethiopia.[132] In 1996, the telecommunication sector reform program began with the enactment of a law (Proclamation 49/1996 and Regulation 10/1996) that created a single operator.[133] The proclamation abolished the Ethiopian Telecommunications Authority and it separated regulation from provision by creating two new entities: the Ethiopian Telecommunications Agency as regulator and the government-owned Ethiopian Telecommunications Corporation (the current Ethio-telecom) as monopoly provider of ICT services.[134] A further arrangement was made in 2010 with the establishment of the Ministry of Communications and Information Technology as the primary regulatory authority in the sector.[135] The communications and IT standardization and regulation directorate was created within this Ministry to handle regulatory issues across the entire ICT sector leaving the spectrum management to the Ethiopian Telecommunications Agency.[136]

[128] Mike Jensen and Claudia Sarrocco, "Internet from the Horn of Africa: Ethiopia Case Study," International Telecommunication Union, Geneva, July 2002, p. 6
[129] Ibid
[130] Ibid
[131] Institute of Developing Economies-Japan External Trade Organization, website, https://www.ide.go.jp/English/Data/Africa_file/Company/ethiopia04.html
[132] Ibid
[133] United Nations Economic Commission for Africa, "Review of the legal and regulatory frameworks in the information and communications technology sector in a subset of African countries: What lessons can we learn," Addis Ababa, Ethiopia, July 2017, p.13
[134] Ibid
[135] Ibid
[136] Ibid

Apart from its regulatory aspect, the sector has also been assessed in terms of its performance. Accordingly, it has been reported that the absence of competition in the ICT sector has resulted in a retarded legal and regulatory environment and constrained the growth of ICT infrastructure and services.[137] Furthermore, Ethio-Telecom's fixed-line network is still among the least developed in the world with a tele-density of little more than 1% and a marked disparity between urban and rural areas.[138] A more recent report from the World Bank has also indicated that a country of more than 100 million people where 40 percent are aged under 15, internet use/access was a meager 15 percent at the end of 2016.[139] By comparison, internet usage in Kenya stood at 26 percent and Sudan at 28 percent at the same date.[140] In addition to this, mobile phone use and ownership is significantly behind that of Egypt, Kenya and Sudan, which is amplified when examining the uptake of mobile broadband services.[141] Based on such figures, it has been concluded that Ethiopia is at a disadvantaged position as it is not yet able to reap the benefits of the digital economy emerging in other parts of the continent.[142]

3.3. New Developments in the Telecommunication Sector

3.3.1. Privatization of the Telecommunication Sector

Previously, it has been noted that due to the total government control of the telecommunication services through the Ethio-Telecom, Ethiopia was not sufficiently benefited from the digital economy comparing with its African counterparts. Until the recent move towards privatization and liberalization, Ethiopia was one of the last three countries in the world (along with Eritrea and Djibouti) to retain a national telecom monopoly on all telecommunications services.[143] However, the government has recently announced its intention to privatize the monopoly fixed line, mobile, Internet and data provider - Ethio-Telecom.[144] As indicated by the Prime Minister, the privatization of Ethio-Telecom will involve the sale of the Company's shares to foreign and

[137] Ibid
[138] Dominique Baron, "The Impact of the Telecommunications Services on Doing Business in Ethiopia," Addis Ababa Chamber of Commerce and Sectoral Associations, December 2010, Addis Ababa Ethiopia, p.10
[139] The World Bank, cited above at note 17, p.5
[140] Ibid
[141] Ibid
[142] Ibid
[143] Ibid
[144] Lishan Adam, cited above at note 16, p.1

domestic private investors, with the government holding a 'golden share' that would allow it to outvote all other shares.[145]

As it has been reported, the announcement of the privatization of the Ethio-Telecom has raised much interest from multinational companies such as T-systems in Germany and MTN and Vodacom in South Africa.[146] In line with this, the government has begun the process of valuing Ethio-Telecom's assets and a twenty-one person Privatization Advisory Council was established by the Prime Minister in August 2018 to ensure that this process is transparent and accountable.[147]

3.3.2. Regulatory Implication of the Liberalization Decision

As it has been noted above, in addition to the decision on the privatization of Ethio-telecom, the government has also decided to liberalize Telecommunication Sector for both domestic and foreign investors. In line with this decision, the government has made significant policy reforms in the Telecommunications Sector. As it is indicated, liberalization of Telecommunication Sector to the private sector engagement implicates significant issues of regulation. More importantly, experiences show that the transition from monopoly to competition of the telecom sector requires effective regulatory approach.[148] This is particularly important to manage the smooth transition of the sector from public to the private hands.

As such, the transition from monopoly to competition should be supported by a comprehensive policy measures and frameworks including the adoption of a telecom sector policy, adopting a new pro-competitive regulatory framework implemented by an independent regulatory body, modernizing the incumbent (including corporatization and privatization) and attracting new entrants can be mentioned.[149] As part of such series of reform measures, the government has already made the decision on the liberalization of the sector. This unprecedented decision of privatizing Ethio-Telecom and liberalizing the telecommunication sector was immediately

[145] Ibid
[146] Ibid
[147] Ibid
[148] Yazachew Belew, Telecommunications Services Liberalization in Ethiopia: Implications for Regulatory Issues, 26 J. Ethiopian L. 55 (2014), p. 56
[149] A. Buckingham et el "Telecommunications Reform in Developing Countries," in I.Walden (ed.), Telecommunications Law and Regulations (2009), pp. 767 -777, cited at Yazachew Belew, cited above at note 148, p.58

followed by the legal reform measures. Until now, the effectiveness of such legal reform measures has not been assessed or tested since the legal reforms have yet to be fully implemented on the ground.

3.4. Analysis of the Regulatory Framework of the Ethiopia's Telecom Sector

It has been stated above that transition from monopoly to competition of the telecom sector requires effective regulatory approach. In particular, literatures on the field recommend that such transitions require regulation to contain abuse of market power by the dominant incumbent operator against new market entrants, promote competition, foster investment and other necessary national objectives.[150] However, it should be noted that there is no single regulatory model that fits to all developing countries during such transition times. As such, general guidelines in designing new regulatory framework including the avoidance of regulatory discretion, government interference, arbitrary decision making, unilateral license modification and revocation, or draconian remedies, such as network asset confiscation has to be mitigated and avoided.[151]

Within such guidelines, the regulatory reform of the post liberalization period of the Ethiopia's Telecommunication sector has to be assessed. For this assessment, the thesis has analyzed core regulatory principles in the telecom sector regulation, which mainly are rules on regulatory authority, licensing, interconnection, competitive safeguards, allocation of scarce resources and universal access/service obligations.[152] The analysis of these regulatory principles of the telecom sector is made in light of the newly enacted Communications Service Proclamation No. 1148/2019, which repeals Telecommunication Proclamation No. 47/1996 (as amended) and the Telecommunication Services Council of Ministers Regulation No.47/1999.

3.4.1. Rules on Regulatory Authority

Establishing a regulatory authority is an essential step towards the establishment of effective regulatory framework. Due to this, in almost all measures of regulatory reforms of the telecom

[150] P. L.Smith and B. Welllenius , "Mitigating Regulatory Risks in Telecommunications," Public Policy for the Private Sector, Note No.189, World Bank, Group, July 1999, cited at Yazachew Belew, cited above at note 150, p.69

[151] A. Buckingham et el, cited above at note 152, cited at Yazachew Belew, cited above at note 150, p.70

[152] The lists are parameters to measure the effectiveness of telecom sector regulation framework as enshrined in the GATS Reference Paper. See Yazachew Belew, cited above at note 150, p.70.

sector, countries established a body responsible for regulating the sector's day to day activities.[153] And, the regulatory body of the sector is expected to have a degree of independence, enforcement powers, neutrality and mechanisms for resolving conflicts.[154] In particular, the precondition of independence requires the regulatory authority to have; i) independence from the regulated industry and ii), independence from the sector-policy makers.[155] While the first element of independence requires regulatory authorities to have a separate function from operation functions of the sector market players, the second element insists the regulatory authority to have a degree of autonomy from political influence and control.

Following the decision of liberalization, the Ethiopian government has brought major changes in the regulatory regime of the telecom sector. The Communications Service Proclamation No. 1148/2019 (the "Proclamation") has established Ethiopian Communications Authority (the "Authority") with broad powers of regulating the operation of the telecommunication sector. In terms of the above elements on the regulatory authorities of the telecom sector, it is possible to demonstrate that the new regulatory approach of the government in establishing the Authority is more or less consistent with both elements of independence. To begin with, the Proclamation provides that the Authority will be an independent federal government organ directly accountable to the Prime Minister.[156]

As such, the Authority will have board of management, Director General and Deputy Director General, all of which will be appointed by the Prime Minister, and other necessary staffs.[157] The board of management will have seven members, four of which will be appointed from government institutions and the remaining three members will be appointed from the private sector and academia.[158] The members of the board of management are required to be the citizen of Ethiopia and should not have any direct or indirect financial interest in any company subject to the jurisdiction of the Authority.[159] With this arrangement, the board of management is mandated to oversee the implementation of the Proclamation and the activities of the Authority

[153] A. Buckingham et el, cited above at note 150, cited at Yazachew Belew, cited above at note 148, p.70
[154] L. H. Gutierrez and S. Berg, "Telecommunications Liberalization and Regulatory Governance: Lessons from Latin America," Telecommunications Policy, Vol. 24 2000, p. 885. cited at Yazachew Belew, cited above at note 148, p.70
[155] See Yazachew Belew, cited above at note 148, p.70-75
[156] Proclamation, cited above at note 20, Article 19
[157] Id., Article 7 and 8
[158] Id., Article 8(3)
[159] Id., Article 10

and other general follow up mandates are provided in the Proclamation. The arrangement is in line with the usual approach of all regulatory organs operating in the country. Below the board of management, the Director General will be a crucial decision maker of the Authority with the power of directing and administering the activities of the authority. It will, in general terms, control the day to day activities of the Authority. The Deputy Director General will assist the General Director and will be required to act on behalf of the Director General in his absence. In addition to the internal structure of the Authority, the Proclamation has also brought the Ministry of Innovation and Technology (the Ministry) in the regulation and administration of the telecommunication sector. Accordingly, the Proclamation mandates the Ministry to formulate the general policy for the communication sector with a view of ensuring the utilization of the sector as a platform for the economic and social development in Ethiopia.

Consequently, it can easily be grasped that the Proclamation has established the Authority with due consideration of the independence preconditions assessed in the beginning of this section. This ensures that the Authority will have a separate function from operation functions of the sector market players. In addition, the Proclamation by specifically limiting the membership right of the private sector to those who do not have any direct or indirect financial interest, it fulfills the first aspect of independence, which is independence from the market players. The second element of independence is addressed with the separation of the Authority from the Ministry. As it has been noted, the Proclamation established the Authority as an independent federal government organ, which is directly accountable to the Prime Minister. This means that the Authority will have no risk of influence from the policy maker (Ministry). However, there will still be a political influence over the Authority considering the fact that the Prime Minister has a significant control over the appointment and operation of the Authority. But again, this is a reality for most regulatory bodies mandated to regulate specific sectors and the Authority will have a relative independence due to the absence of middle ministry in between the Authority and the Prime Minister.

Within this institutional context, the Proclamation has also addressed the Authority's decision review process. Accordingly, persons aggrieved by the decision of the Authority may request the Authority itself to review its decision.[160] In addition to this, the Proclamation has also established

[160] Id., Article 38(1)

an Appeals Tribunal with three members who will also be appointed by the Prime Minister.[161] The Appeals Tribunal will have the power to hear appeals from the decisions taken by the Authority and its members will be remunerated by the Authority itself. Finally, parties may take their compliant to the Federal High Court after proving that the Appeals Tribunal has made error of law in its decision.

3.4.2. Rules on Licensing and Technical Standards

In essence, the involvement of regulatory authorities in a given sector commences with the mandate of providing the required licensing and authorizations to entities that are applying to engage in that specific sector. As such, the continuous follow up regulatory measures stems from this very power of licensing. Notably, the effectiveness of licensing rules and procedures are evaluated through the criteria of their tendency to provide limited discretionary powers to the licensing authority, its mechanism of restraining arbitrary exercise by the licensing body and the transparency of the licensing procedures.[162]

Licensing rules of the Ethiopia's telecom sector has now more importance with the decision of liberalization. Accordingly, the Proclamation mandates the Authority to issue licenses for the operation and provision of the communications services.[163] Two important issues are worth noting in relation to issuance of licenses for communication services. The first one is the number of new entrants to the communications sector may be limited by the government. Secondly, the law authorizes the government to determine terms and conditions including the terms of the licenses from time to time.[164] Although these two points may pave the way for potential abuses of power by the Authority, which will create unnecessary barrier in the sector, the law tries to balance such concerns by providing guiding principles.

Accordingly, the Proclamation requires the Authority to be guided at all times by such principles as the principle of transparency, fairness and non-discrimination, efficient use and management of radio frequencies, promoting fair competitions and investment in the communication sector in the formulation of licensing procedures, issuance of communications service licenses and

[161] Id., Article 39
[162] See Yazachew Belew, cited above at note 148, p.78
[163] The Proclamation, cited above at note 20, Article 5
[164] Id., Article 19(2)

preparation of license conditions and terms.[165] The Proclamation has also required the Authority to take considerations of other principles that are necessary to maintain national interests. As noted above, the law mandates the Authority to provide conditions in the communication licenses it provides to private entities. Such conditions to be imposed on communication service licenses are provided by law in an illustrative manner which includes the length of the term of the license and such other measures as requiring the licensee to provide services to the entire territory of the Nation at non-discriminatory prices, putting criteria for setting tariffs for the service to be provided and other technical standards or requirements.[166] The Authority is also at discretion to change those conditions at any time.

All in all, the licensing rules enshrined in the Proclamation have incorporated notable principles to limit the discretionary powers of the Authority and to restrain arbitrary exercise by the Authority. However, there are still licensing issues susceptible for abuse by the government. One of such instances will be the absence of specific conditions that the government should consider in determining the number of new entrants and other detail requirements in the Proclamation. In the long run, this may be interpreted to restrict the number of actors in the sector and will inevitably question the liberalization decision of the sector or favoring the incumbent operator.

In addition to the aforementioned mandates of the Authority in relation to licensing, it has also a mandate to determine the technical standards regarding radio communications and telecommunications equipment.[167] In doing so, the Authority is expected to issue a directive to set a standard for the communication service providers. In relation to this, the power of authorizing or approving the equipment of the telecommunication service providers is also stipulated in the Proclamation. Accordingly, the Authority has the power to specify any radio communications and telecommunications equipment technical efficiency that requires the Authority's approval before it may be connected to a telecommunication system.[168] In addition to this, the Authority has the power to conduct type approval tests and issue efficacy assurance certificates for radio communications and telecommunication equipment and facilities.

[165] Id., Article 20(4)
[166] Id., Article 21
[167] Id., Article 22
[168] Id., Article 23(1)

3.4.3. Rules on Interconnection

Interconnection is another crucial area of regulation after the liberalization of the telecommunication sector. At the core of the rules on interconnection is the tendency of the incumbent operator forcing new entrants to accept unfavorable interconnection terms in the way that disturbs competition.[169] This is mainly apparent due to the absence of equal bargaining power between the new entrants and the incumbent operator.[170] The issue of interconnection also relates with consumer protection considering the fact that with the absence of effective interconnection arrangements between telecom operators, subscribers of different telecom operators will not communicate with each other or cannot connect with services they need.[171] These are the main reasons that necessitate regulatory intervention. As such, it has been suggested that the focus of interconnection regulation should be on dominant operators, which has the ability of establishing interconnection terms and conditions independently of competition.[172] This is mainly due to the fact that universal application of interconnection obligations on all operators including large and small will create excess regulation.[173]

Interconnection is one of the subject areas of the existing regulatory framework of the Ethiopian telecom sector. The Proclamation addresses important issues of interconnection regulations. As such, it specifically obliges a telecom operator to interconnect its telecommunication network with that of another operator at technically feasible locations upon the latter's request of interconnection.[174] For the enforcement of this obligation, the Proclamation provides terms and conditions of interconnection. As a rule, the Proclamation requires or prioritized telecom operators to negotiate and agree on the terms and conditions of interconnection.[175] Such interconnection agreements are required to be made in writing and required to comply with the conditions of the Proclamation and directives to be issued in the future.[176] However, the Proclamation does not treat interconnection as fully commercial. Accordingly, the Authority may intervene and make binding rulings at its own instance or with request of either or both parties to

[169] See Yazachew Belew, cited above at note 148 p.82
[170] Ibid
[171] Id., Pp. 82-83
[172] H. Intven, J. Oliver and E. Sepulveda, ITU, Telecommunications Regulation Handbook Module 3 Interconnection cited at Yazachew Belew, cited above at note 148, p.83
[173] Ibid
[174] The Proclamation, cited above at note 20, Article 42
[175] Id., Article 43 (2)
[176] Id., Article 43(1)

the agreement in three circumstances. These are; i) in cases of any violations of the rules of the Proclamation or any directive adopted by the Authority; ii) in the event of a failure or delay of in reaching consensus between the parties and iii) public interest.[177]

While the intervention options of the Authority provided in the Proclamation into the interconnection agreement are encouraged in light of the above challenges, the interconnection provisions of the Proclamation still lack concrete or specific guidelines to address such challenges. The intervention role of the Authority is very much discretionary and there is still risk of abusing such options by the incumbent operator.

3.4.4. Rules on Allocation and Use of Telecom Resources

As it has been noted in the beginning of this chapter, the telecommunication system involves some resources that have to be managed efficiently so as to provide the greatest benefit to the entire population. In particular, radio frequencies, numbering plan and right of way are subject to regulatory rules of countries.[178] Radio frequency is one of the crucial regulatory issues in the telecommunication sector. Considering this, the Proclamation requires the Authority to control, plan, administer, manage and license the radio frequency spectrum in Ethiopia for both commercial and government users including the military and intelligence services.[179] In order to do so, the Authority is expected to issue a directive on the matter. In addition to this, the Authority is also mandated to assign frequencies to be used for telecommunication service, radio communication services and for radio and television broadcasting.

Based on this, the Authority is required to take into consideration the present use of frequencies and projected future needs of the county in deciding the application of frequency assignment.[180] Furthermore, the Authority has also a power to prescribe, by a directive, fees for the use of radio frequency spectrum resources for the provision of communication services.[181] In deciding the amount of the fees, the Authority is required, among other things, to ensure reasonableness, non-discrimination and transparency as well as encourage the development and expansion of communication service. Furthermore, the Authority is mandated to manage and control the

[177] Id., Article 43(2)
[178] Yazachew Belew, cited above at note 148, p.86
[179] The Proclamation, cited above at note 20, Article 24(1)
[180] Id., Article 25(3)
[181] Id., Article 26(1)

allocation of numbers and addressing resources and their respective numbering fee by issuing a directive.[182]

In addition to these, the Proclamation guarantees telecom operators the right of way. Telecom operators need to have the right of way over any land to install, repair, improve, examine, alter or remove a telecom line including the right to fly telecom lines upon any building as well as the right to cut down any tree obstructing telecom line.[183] As such, the Proclamation has incorporated provisions recognizing such components of the right in a comprehensive manner.[184]

3.4.5. Other Rules of Telecom Regulation

Apart from the above domain of telecom regulators, rules on competitive safeguards and rules on universal access are a paramount regulatory implication. To begin with, competition laws have a significant role in the regulation of a liberalized telecom sector. The Proclamation has mandated the Authority the exclusive power to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and directives.[185] This implies that the Proclamation ousted Trade Competition and Consumer Protection Authority's mandate of regulating competition with respect to the telecommunication sector. The Proclamation outlaws anti-competitive acts of operators.[186] However, it does not prohibit cross-subsidization of operators signaling non-compliance with rules of competition with free trade arrangements.

The other area of telecom regulation is universal access. Telecom regulators may take regulatory interventions to ensure that rural, remote and low-income areas that are commercially unattractive to telecom operators are getting the required telecom services without discrimination.[187] Accordingly, the Proclamation mandates the Authority to develop annual universal access objectives. Such objectives are required to ensure that communications services are accessible to the largest number of users possible particularly in rural and remote areas of Ethiopia.[188] For this purpose, a Universal Access Fund is established by the Proclamation.[189]

[182] Id., Article 27 and 29
[183] Yazachew Belew, cited above at note 148, p.88
[184] The Proclamation, cited above at note 20, Article 32
[185] Id., Article 47
[186] Id., Article 48
[187] Yazachew Belew, cited above at note 148, p.91
[188] The Proclamation, cited above at note 20, Article 49(2)
[189] Id., Article 49(3)

Therefore, it is plausible to demonstrate that the Proclamation introduces sufficient provisions in relation to universal access regulations. Other rules of telecom regulation in relation to consumer protection, national security, lawful tariff and collocation and infrastructure sharing have also been sufficiently addressed by the Proclamation.

3.5. The Current Status of the Authority

The Authority has officially begun its regulatory activities with a public notice for stakeholder's consultation on October 22, 2019.[190] As it is clearly indicated in such public notice, the purpose of the consultation is to collect all interested stakeholders' contributions regarding the proposed regulatory framework and market opening process.[191] The consultation period was from October 22, 2019 to November 22, 2019. Based on this, the public notice indicates that the government has planned to issue two new nationwide licenses for telecommunications service providers, covering a full range of telecommunications services and infrastructure.[192] As such, three similar full-service licenses, one for the incumbent operator (Ethio-Telecom) and two for new entrants will be issued. As provided in the notice, all three service providers will have the right to provide any telecommunications service, including voice, text, and data, using any technology, whether fixed or wireless, anywhere within Ethiopia, and to send and receive telecommunications to and from outside Ethiopia.[193] Accordingly, the Authority has proposed a grace period of three years within which the Authority will not issue additional full-service licenses.[194]

The public notice has also contained detail regulatory approaches of the Authority and the proposed full service licenses (with a very detail conditions) and spectrum licenses as well as the methods of selecting the applicants for licenses. As at the time of writing this thesis, the Authority has yet to make a further notice after the end of the public consultation on November 22, 2019.

[190] Ethiopian Telecommunications Authority, "Ethiopian Telecommunications Sector Stakeholder Consultation No. 001-2019 Public Notice," Addis Ababa, October 22, 2019
[191] Id, p.1
[192] Id, p.2
[193] Id, p.3
[194] Id, p.4

Chapter Four

4. Assessment of the Regulatory Effects of AfCFTA Protocol on Trade in Services for Ethiopia: The Case of Telecommunication Sector

As it has been noted, multilateral disciplines on domestic regulation of services aims to address the restrictive effect of domestic regulatory measures on trade that may occur, on the one hand, due to the protectionist regulations conferring unwarranted benefits to the incumbent services or service providers and, on the one hand, from domestic regulatory measures, not intended to discriminate or restrict trade, but imposing compliance costs, directly associated with the measures.[195] Nevertheless, it has also been noted that the potential effect of such multilateral disciplines on the regulatory autonomy of countries has become a crucial concern among trade negotiators, regulators and national policy makers.[196] In notable multilateral trade arrangements like the WTO, there is a growing fear that there will be a real risk of WTO intrusion into the regulatory freedom of members beyond what was originally intended.[197]

As such, it is evident that multilateral and continental trade agreements have paramount regulatory effect on the domestic regulatory sphere of member countries. In essence, regulatory bodies in trade agreements like the GATS do not regulate trade per see instead they regulate the regulators of services.[198] By doing so, they always tend to limit the domestic regulatory realm of member countries to facilitate free trade among members. Having said this, the next sections of the thesis will analyze the regulatory effects of the AFCFTA Protocol on Trade in Service to the Ethiopian telecommunication sector regulatory framework.

4.1. Applicability of the Protocol to the Ethiopian Telecommunication Sector

Studies indicate that trade agreements may adopt different approaches in liberalizing trade in services.[199] The Protocol follows the GATS approach and member states are expected to make

[195] Luis Abugattas Majluf, "Domestic Regulation and the GATS: Challenges for Developing Countries," Policy Paper on Trade in Services and Sustainable Development: Domestic Regulation, UNCTAD, p.9
[196] Id., p.1
[197] Id., p.2
[198] Robert Stumberg, "GATS Negotiations on Domestic Regulation," Harrison Institute for Public Law Georgetown Law, May 19, 2010, p. 1
[199] For further discussion on approaches of trade in service liberalization See International Trade Centre, cited above at note 6, p.39

schedule of sector specific commitments.[200] The approach requires state parties, after signing the framework agreement, to negotiate on the schedules/lists of commitments and develop sectorial protocols/initiatives.[201] Therefore, signing the Protocol on Trade in Services does not imply the immediate liberalization of all sectors.

Until members have undertaken such schedule of specific commitments to a given sector, most of the rules in the trade agreement will not be applicable on that specific sector. As it has been noted in chapter two of this thesis, the Protocol on Trade in Services address general rules and principles without sector specific implications. Accordingly, the Protocol requires state parties to negotiate over the schedule of specific obligations through the development of regulatory frameworks for each of the sectors, as necessary, taking account of the best practices and acquis from the RECs, as well as the negotiated agreement on sectors for regulatory cooperation.[202] Based on this, the Protocol requires state parties to submit schedules of specific commitments with respect to the sectors that the state parties are willing to commit.[203] The list of priority sectors for this liberalization negotiation are attached in the Protocol,[204] and from such list of priority sectors[205] state parties have agreed to include five important sectors such as business services, communication, finance, and tourism and transport services.[206] The approach that state parties have used is a positive list approach in listing the priority sectors.

The revised roadmap for AfCFTA negotiations indicates January 2020 as the expected date for conclusion of the negotiations in the five priority sectors and their regulatory framework thereof.[207] Despite the fact of some delays in the negotiations[208], the priority sectors will be at forefront in the schedules of specific commitments of member states, and stringent regulatory disciplines, as defined in the Protocol and the schedule of commitment of each state, will be applicable on such sectors.

[200] The Protocol, cited above at note 73, See Article 22
[201] International Trade Centre, cited above at note 6, p.39
[202] The Protocol, cited above at note 73, Article 18 (2)
[203] Id., Article 22
[204] Id., Article 18(4)
[205] The five priority sectors were selected and adopted at the Assembly's July 2018 meeting for state parties to make an initial commitments.
[206] Viola Sawere, cited above at note 55, p.6
[207] Ibid
[208] Attempts have made to access the results of negotiations on the January 2020's deadline, and unfortunately state parties have yet to submit any schedule of commitments on the priority sectors. Therefore, as indicated in the reports, the negotiations over the priority sectors will be completed on the 2022's deadline.

As it has been noted, among the five priority sectors, the communication sector is relevant to the theme of this thesis. While the full extent of the regulatory effect may be difficult to determine at this stage, as this is highly dependent by the schedule of specific commitments as will be undertaken by the Ethiopian government, the Ethiopian Telecommunication Sector regulatory framework will inevitably be affected by the Protocol on Trade in Services. However, specific regulatory effects can be discussed at this stage at a more general level; and below follows analysis of such regulatory effects of the Protocol on the Ethiopian Telecom Sector, which are grouped in to two; effects resulting from the general rules and principles of the Protocol and effects, which will emerge from the country's schedule of specific commitments.

4.2. Specific Regulatory Effects of the Protocol to the Ethiopian Telecommunication Sector

The aforementioned classification of regulatory effects is based on the wordings of the Protocol, in that while its principles and obligations are generally applicable on state parties without any further instrument, the applicability of some of its principles and obligations however require sector specific commitments of member states as a conditions precedent.

4.2.1. Regulatory Effects of the General Rules and Principles of the Protocol

The first category of the regulatory effect of the Protocol stems from its scope of application. Accordingly, it states that the Protocol 'applies to measures by state parties affecting trade in services'.[209] This wording of the Protocol will cover wide range of measures taken by state parties either directly by state parties' central, regional or local governments or authorities or by non-governmental bodies in the exercise of powers delegated by state parties' central, regional or local governments or authorities.[210] Within this general framework of application, the Protocol includes general provisions containing general rules and principles with an implication that such rules and principles will be applicable as defined in the Protocol without referring the schedule of specific commitments. Following this, an assessment of those rule and principles are made in the following sections.

[209] The Protocol, cited above at note 73, Article 2(1)
[210] Id., Article 2(3)

4.2.1.1. Most Favored Nation (MFN) Treatment

In essence, the MFN treatment requires that if a measure introduced by one state party provides a benefit to services and service suppliers of any third country that benefit should be extended to all state parties.[211] In line with this, the Protocol requires a state party shall, upon entry into force, accord immediately and unconditionally to services and service suppliers of any other state party treatment no less favorable than that it accords to like services and service suppliers of any third party.[212] Therefore, the obligation of state parties with respect to MFN treatment is immediate and unconditional that sector specific commitment of state parties is not required. However, the Protocol does not oblige state parties to extend preferences agreed with any third party prior to the entry into force of the Protocol, of which that state party was a member or a beneficiary.[213] Therefore, MFN Treatment will require the regulators of the Ethiopian Telecommunication sector to provide no less favorable treatment to telecommunication service providers from AfCFTA member states than that it accords to telecommunication service providers within non-member states of AfCFTA.

4.2.1.2. Transparency

Transparency is another immediate and unconditional obligation of state parties of the AfCFTA with a wide regulatory implication to the Ethiopian Telecommunication Sector. Basically, the obligation of transparency contains three important sets of obligations; publication, notification and provision of information. These sets of transparency obligations are believed to have created challenges for developing countries to integrate into the trading system. Publication obligation requires state parties to publish promptly, in a medium that is accessible, all relevant measures of general application which pertain to or affect the operation of the Protocol.[214] This obligation is also extended to the publication of those international and regional agreements pertaining to or affecting trade in services to which a state party is a signatory.

The publication obligation of all relevant measures of general application is elaborated in the GATS Annex in Telecommunications. Accordingly, the annex requires state parties to make

[211] International Trade Centre, cited above at note 6, p.33
[212] The Protocol, cited above at note 73, Article 4(1)
[213] Id., Article 4(4)
[214] Id., Article 5(1)

publicly available relevant information on conditions affecting access to and use of public telecommunications transport networks and services. In particular: (i) tariff and other terms and conditions of service; (ii) specifications of technical interfaces with such networks and services; (iii) information on bodies responsible for the preparation and adoption of standards affecting such access and use; (iv) conditions applying to attachment of terminal or other equipment; and (v) notifications, registrations or licensing requirements, if any, are required to be publicly available.[215] Considering the approach of AfCFTA to incline towards WTO, such specific obligations are highly likely to serve as a basis of interpreting the general obligation stipulated in the Protocol.

The obligation of notification obliges state parties to promptly and at least annually notify the Secretariat of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services under the Protocol.[216]

The third set of MFN obligation requires a state party to provide and designate enquiry points for the provision of specific information regarding trade in services, with the exception of confidential information, to other state parties upon request.[217]

All of these will require the regulators of the Ethiopian Telecommunication sector to put in place a system of publication, notification and information provision with respect to their rules and regulations applicable on the Telecommunication Sector. The newly established Ethiopian Communications Authority has rigorously started publication and notification measures after its establishment.[218] As it has been noted in the previous chapter, the Authority held a stakeholders' contributions addressing and publicizing the regulatory framework of the sector including the draft full service license, spectrum license, coverage obligations and spectrum band allocation.[219] It has also informed the stakeholders that further consultation and publication will be made on regulatory topics such as interconnection, collocation and infrastructure sharing or universal access fund and its modalities.[220] Given the fact that the publication obligation can be fulfilled

[215] GATS Annex on Telecommunications, Section 4
[216] The Protocol, cited above at note 73, Article 5(3)
[217] Id, Article 5(5)(6) and Article 6
[218] Please see the official website of the Authority at eca.ethiopia.com
[219] Ethiopian Telecommunications Authority, cited above at note 190, p.2
[220] Id., p.3

through the internet as the jurisprudence of the GATS indicate[221] the cost and time implication of the obligation may not be significant.

Apart from this, the Authority has yet to announce the establishment of any inquiry points. As the experiences of WTO member developing countries indicate, creating an effective enquiry point that can store thousands of documents on technical regulations and other regulatory issues is far from simple.[222] Such enquiry points face challenges such as language barriers and difficulty of understanding questions with technical sophistication.[223] Therefore, the Authority will have to work on the establishment of adequate enquiry point, which will carry out the duty of information provision and other tasks as defined in the Protocol.

4.2.2. Regulatory Effects of the Sector Specific Commitments

As it has been noted in the beginning of this chapter, the Protocol has adopted the GATS approach of liberalizing trade in services, which attempts to liberalize trade in services by developing schedules of specific commitments via the conclusion of separate negotiations among member countries. As such, through the scheme of progressive liberalization, as provided in the Protocol, state parties of the AfCFTA will commit themselves to the specific sector liberalization measures by prioritizing the five sectors indicated in section 4.1 above.

As per the guidelines and modalities, this services scheduling will take a positive listing approach[224] which obliges state parties to explicitly list any sectors to be liberalized and also to indicate any limitation from market access for foreign providers and national treatment for each individual mode of supply.[225] Moreover, the guidelines prioritize reciprocity and envisage the possibility of bilateral negotiations through a request-offer basis under the AfCFTA.[226] This implies that it is possible for a given state party to have two or more services schedules applying to different state party partners.[227]

[221] Robert Wolfe, Regulatory Transparency, developing countries and the WTO, World Trade Review, United Kingdom, 2003 p.163-164
[222] Id., P. 167
[223] Ibid
[224] Trade Law Center, "Trade in Services Negotiations under the AFCFTA," tralac, March 2020, p.2
[225] Ibid
[226] Id., p.4
[227] Ibid

Although the schedules of specific commitments have particular relevance to the principle of market access and national treatment, they do also have, as it will be analyzed below, an important implication to other rules and principles of regulation. In particular, the schedules of specific commitments will specifically address four main areas of commitments of state parties. These are: (i) the terms, limitations and conditions on market access; (ii) conditions and qualifications on national treatment; (iii) undertakings relating to additional commitments; and (iv) the time frame for implementation of such commitments.[228]

Based on this, the forthcoming sections of the thesis will analyze the regulatory effect of the principles and rules of the Protocol, which will however be fully determined by the sector specific commitments of the country to the Ethiopian Telecommunication Sector.

4.2.2.1. Market Access

Market access is one of the crucial subject matters in which member states of the AfCFTA are expected to include in their schedule of specific commitments. The basic essence of market access refers to the access to its territory given by one state party to the services and service suppliers of any other state party.[229] Each state party shall accord services and service suppliers of any other state party treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its schedule.[230] This provision entails two implications; the first is that obligations arising from market access are not immediate and unconditional, and secondly it tells us that parties are required to provide terms, limitations and conditions in a specific schedule and have to commit to such terms and conditions of the schedule. Once a binding commitment is made by a state party, the principle of market access makes sure that access to market will no more be restrictive than as set out in its schedule of specific commitments.

Consequently, restrictions will be applicable only when they are not specified in the schedule of specific commitments made by state parties.[231] The Protocol, in particular, prohibits six instances of market access restrictions: i) limitations on the number of service suppliers; ii) limitations on

[228] The Protocol, cited above at note 73, Article 22(2)
[229] International Trade Centre, cited above at note 6, p.37
[230] The Protocol, cited above at note 73, Article 19(1)
[231] Id., Article 19(2)

the total value of service transactions or assets; iii) limitations on the total number of service operations or on the total quantity of service output; iv) limitations on the total number of natural persons that may be employed in a particular service sector; v) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and vi), limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.[232]

Therefore, depending on the extent to which the Ethiopian government commits to market access in its schedule of commitments, the Ethiopian telecommunication sector regulatory framework will be highly affected by the restriction and limitations of market access provided above. The government has to specifically limit the applicability of those restrictions in its schedule of commitment in order to take internal regulatory measures without violating its treaty obligation.

In particular, it is recommended that two sets of limitations on market access should be provided under the Ethiopia's schedule of specific commitments with respect to its telecommunication sector commitment. Firstly, the government has to provide limitations on the number of service providers. This is mainly due to the fact that the Proclamation maintains the mandate of the government to determine the number of new entrants and the condition and time for issuance of the licenses.[233] This limitation enshrined in the Proclamation should be reflected in the schedule of specific commitments to avoid any risk of non-compliance. Secondly, limitations should be provided with regard to the total number of expatriate employees that may be engaged in the telecom sector. This has a particular relevance to the third mode of service supply, commercial presence. This is mainly due to the fact that telecom operators engaging through the establishment of commercial presence will be subject to applicable Ethiopian laws in relation to expat employees. Currently, the policy/practice of the government towards expat employees is restrictive.[234] Therefore, clear limitation on the total number of expats that may be employed in the telecom sector should be provided.

[232] Ibid
[233]The Proclamation, cited above at note 20, Article 19(2)
[234] There is a directive issued by the Ministry of Labor and Social Affairs regarding the employment of expat employees reserving the right only to top management positions and technical areas on which Ethiopian employees may not have.

4.2.2.2. National Treatment

National Treatment is another crucial aspect of free trade agreements which usually emerges after the entry into the market access obligation. Like market access obligation, national treatment becomes effective after state parties have explicitly committed to it. Basically, national treatment refers to the treatment that a state party will give to a service or service supplier in another state party compared to a domestic 'like' service or service supplier.[235]

Accordingly, the Protocol requires state parties to accord to services and service suppliers of any other state Party treatment no less favorable than that it accords to its own like services and service suppliers.[236] This is without disregarding the fact that state parties may provide conditions and qualifications in their schedule of specific commitments. As such, the Protocol requires state parties to accord to services and service suppliers in any other state party either formally identical treatment with or formally differential treatment to the ones that it accords to its own like services and service suppliers.[237]

As it is noted, the national treatment obligation is very broad in the sense that a given measure will still be considered less favorable if it modifies the conditions of competition in favor of services or service suppliers of the state party compared to like services or service suppliers of any other state party.[238] The term "…modifies the conditions of competition" is susceptible to broader interpretation and application and will mainly be determined case by case.

However, it may be helpful to analyze the provision with the GATS Reference Paper on Telecommunication. This reference paper provides safeguard measures from anti-competitive acts including cross subsidization and hoarding/using of information in ways that are anti-competitive.[239] Therefore, due attention should be given to any measure of the government providing special privilege to the incumbent telecom service provider.

Given the above discussion, national treatment will have significant regulatory effect on the Ethiopian Telecommunication sector. As it has been noted, the Ethiopian Telecommunication

[235] International Trade Centre, cited above at note 6, p.38
[236] The Protocol, cited above at note 73, Article 20(1)
[237] Id., Article 20(2)
[238] Id., Article 20(3)
[239] See Section 1(2) of the GATS Reference Paper

Sector was monopolized by the government starting from its inception. Therefore, the historical tendency of the regulator towards favoring the national telecommunication service provider will inevitably be challenged by the principle of national treatment unless the government has carefully designed its sector specific commitment in the Protocol. This is mainly relevant with regards to the government's acts of cross subsidizing the state-owned telecom operator to address general public interests in the telecommunication sector. Thus, specific limitation on the schedule of specific commitment should be provided to provide favorable treatment in the form of subsidization to the publicly owned telecom operator without violating the Protocol.

4.2.2.3. Domestic Regulation

As it has been closely analyzed under chapter two of this thesis, the issue of domestic regulation is a central element in trade in services, since barriers to trade in services are found not at the border but in the way that countries regulate services within their territories.[240] In effect, most of the limitations and restrictions prohibited in other rules and principles express themselves in the form of domestic regulation. Therefore, the domestic regulatory disciplines of the Protocol have a significant effect on the domestic regulation of the telecommunication sector.

The Protocol contains clear provisions regarding domestic regulation. Accordingly, the domestic regulation provisions of the Protocol will only be effective on those sectors where a state party has undertaken commitments. [241] As such, the Protocol accords a state party the right to regulate and introduce new regulations on services and services suppliers within its territory in order to meet national policy objectives, in so far as such regulations do not impair any rights and obligations arising under this Protocol.[242]

The Protocol has also imposed two sets of obligations restricting domestic regulatory power of state parties. The first obligation is to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, transparent and impartial manner.[243] The second obligation relates with the state parties' obligation to maintain or institute judicial, arbitral or administrative tribunals or procedures which provide a prompt review of, and where

[240] International Trade Centre, cited above at note 6, p.34
[241] The Protocol, cited above at note 73, Article 9(1) of the Protocol
[242] Id., Article 8
[243] Id., Article 9(1)

justified, appropriate remedies for, administrative decisions affecting trade in services.[244] This obligation also entails a further obligation on state parties to ensure that such administrative procedures are objective and impartial where the institutions are not independent.

Domestic regulation has also another aspect under the Protocol, i.e. mutual recognition. The Protocol creates a platform for state parties to recognize the education or experience obtained, requirements met, or licenses or certifications granted in another state party.[245] Such recognition (which may be achieved through harmonization or otherwise) may be accorded either based upon an agreement or arrangement with the state party concerned or autonomously, and shall not be used as a means of discrimination between state parties. As such state parties have an obligation to provide the mutual recognition platform to all the members.

Subject to the details of sector specific commitments of the Ethiopian government, such domestic regulation rules of the Protocol will have a tremendous effect on the Ethiopian Telecommunication sector. The specific regulatory effects of the rules of domestic regulation of the Protocol should be seen from two aspects. Firstly, the general principles and specific commitments enshrined, respectively, in the Protocol and the schedule of specific commitments with respect to the telecommunication sector will have a regulatory restriction in the country's domestic regulatory power. Accordingly, as it has been assessed in the previous sections, the principle of MFN Treatment, Transparency, Market Access and National Treatment have their own significant regulatory effect over the country's domestic regulatory domain. Therefore, the domestic regulation rules of the Protocol are highly interrelated with the aforementioned principles and rules as the Ethiopian Telecommunication sector will be subject to such rules and principles.

The second aspect of the regulatory effect of domestic regulation has a standalone effect. This is to mean that, as provided above, the Protocol contains domestic regulatory disciplines separate from the general and specific principles enshrined in it. Consequently, in this aspect the Protocol contains two sets of obligations with regulatory effects. These are: i) administration of regulatory measures in a reasonable, objective, transparent and impartial manner; and ii) establishment of judicial, arbitral or administrative tribunals or procedures to provide a prompt review and

[244] Id., Article 9(2)
[245] Id., Article 10(1)

remedies, if any for administrative decisions affecting trade in services. However, the concrete list of regulatory effects emanating from these two broad obligations is far from clear from the text of the Protocol. This is why the GATS, where the text of the Protocol is taken, sought to develop regulatory disciplines on domestic regulation. As such in the context of GATS, the reference paper was issued with respect to the domestic regulatory disciplines of the state parties in the telecommunication sector. Until the AfCFTA take similar measures, the aforementioned regulatory rules of the Protocol will regulate state parties' domestic regulatory measures.

4.2.2.4. Other Regulatory Effects of the Protocol

The Protocol has also contained additional rules with vital regulatory effect to the Ethiopian Telecommunication Sector. To begin with, the Protocol indicates the possibilities of states parties to enter in to negotiations for additional commitments with respect to measures affecting trade in services not subject to scheduling under the market access and national treatment.[246] Illustrative instances of such additional commitments including qualification, standards or licensing matters are provided by the Protocol. In the context of WTO, some member states have adopted a reference paper on pro-competitive commitments relating to the regulation of basic telecommunications by using the above provision of additional commitment.[247]

The other important obligation in the Protocol with a regulatory effect is the state parties' obligation to cooperate and take measures against acts of service suppliers, which restrain competition and thereby restrict trade in services.[248] Furthermore, the Protocol has also provided a qualified prohibition on a state party from applying restrictions on international transfers and payments for current transactions relating to its specific commitments. All in all, these rules and disciplines of the Protocol, upon acceptance by the government, will have a significant effect on the regulation of the Ethiopian Telecommunication sector.

4.3. Assessment of Major Regulatory Concerns of the Country after AfCFTA

It has been noted that the interface between international trade and domestic regulatory autonomy has become a crucial theme in today's international trading of goods and services.

[246] Id., Article 21
[247] International Trade Centre, cited above at note 6, p.38
[248] The Protocol, cited above at note 73, Article 12

Two contending views advocating, on the one hand, the risks of multilateral trade agreements intrusion to the domestic regulatory realm and, on the other hand, the risks of protectionist measures of member countries in the name of domestic regulation have become the subject of discussions in literatures. This dilemma of international trade will, inevitably, be prevalent in the case of AfCFTA and it will have a regulatory effect on the Ethiopian Telecommunication Sector. Therefore, having a balanced approach between AfCFTA's objective to promote free trade and Ethiopia's domestic regulatory objective to protect its interest in free trade arrangement is a necessary step forward towards achieving a meaningful and objective regulatory framework in the Telecommunication Sector.

At this stage of AfCFTA, where state parties including Ethiopia are yet to even finalize, let alone submit, the schedule of specific commitments, it is difficult to assess the full compliance of the Ethiopian Telecommunications sector regulatory framework to the AfCFTA protocol on Trade in Services. Setting aside the specific regulatory issues, the regulatory concerns of the country can, however, be classified in to two; the risk of non-compliance and the risk of intrusion. The next two parts of the thesis attempts to envisage the two regulatory concerns of the Country briefly.

4.3.1. Risk of Non-Compliance

As a rule, trade agreements are binding legal documents and they need to be executed and implemented. As a consequence of this binding nature, one of the member states to the trade agreement may take actions to enforce the agreement through the dispute settlement rules if that member state believes that its partners are not fully living up to the terms.[249] Therefore, countries need to maintain the compliance of their domestic measures to their trade agreement obligations both to defend their rights and to avoid being brought before dispute settlement bodies.[250] However, in reality, it has been reported that there is high possibility for the policymakers to be entirely unaware that a new law or internal measure that they are about to issue may clash with the obligations undertaken in their free trade agreements.[251] Due to this, trade measures may be taken against countries that are not diligent enough to maintain compliance of their internal structure to the trade agreements that they are in in accordance with the dispute settlement rules.

[249]UNCTAD, "Trade Policy Frameworks for Developing Countries: A Manual of Best Practices", United Nations, 2018, p.44
[250] Ibid
[251] Ibid

The Protocol is not an exception to this norm of trade agreements. It has contained both soft enforcement measures of ensuring compliance through transparency in the form of publication and notification, and hard enforcement measures in the form of dispute settlement rules.[252] In line of this, the Ethiopian Telecommunication regulatory framework will always be under the risk of non-compliance unless adequate preparation is made to maintain its compliance with the Protocol. As it has been analyzed in chapter three of the thesis, the existing Ethiopian Telecommunication regulatory framework has more or less inclined to the idea of liberalization and there are less concerns of non-compliance with respect to the basic rules of free trade agreements. As such, the new communications proclamation has mandated the Communications Authority to monitor the implementation of treaties dealing with communication services to which Ethiopia is a party.[253] In addition to this, the Authority has also an obligation to ensure compliance of the telecommunications operators with international obligations entered into by Ethiopia in the Telecommunication Sector.[254]

Therefore, the Authority is required to prepare itself to undertake compliance and follow up programs of ensuring the compliance of the Ethiopian Telecommunication Sector regulatory frameworks to the Protocol. In addition to this, the Authority has a further obligation of ensuring that telecommunication operators including Ethio-Telecom complies with the rules of the Protocol. However, considering the country's infant experience of trade agreements and its inexperience of regulating a liberalized telecommunications sector, there will, inevitably, be a risk of non-compliance. Lastly, as it has been noted above, the level of compliance of the Telecommunication Sector regulatory framework will highly be determined by the sector specific commitments of the government. Hence, the usual lack of coordination between the regulatory authority and trade negotiators may result non-compliance of the sector to the rules of Protocol.

4.3.2. Risk of Intrusion

It has been noted that there are views against free trade agreements' tendency of limiting state parties' domestic regulatory power. This view was reflected in extreme way in the Canadian

[252] The Protocol, cited above at note 73, Article 25
[253] The Proclamation, cited above at note 20, Article 6(18)
[254] Id., Article 6(21)

Environmental Law Association's report in relation to WTO stating that *"there should be no role for the WTO in over-seeing non-discriminatory regulation. This exercise represents a wholly unwarranted intrusion of trade law into domestic public safety laws*.[255] It has also been argued that multilateral agreements like the GATS intervene with democratic governance of member countries by intruding into their regulatory domain.[256] This is mainly due to the difficulty of developing effective multilateral disciplines in the area of domestic regulation of services without seeming encroaching upon national sovereignty and unduly limiting regulatory freedom.[257]

Having said this, it is imperative that state parties of AfCFTA are also potentially vulnerable to such risks of intrusion due to notable economic differences amongst each other. As such, the Ethiopian Telecommunication Sector regulatory framework will be one of the targets of such continental regulatory intrusion due to numerous reasons. Among such reasons, lack of experience in managing deep integrated trade agreements on the part of the Ethiopian government coupled with the potential huge market of the Ethiopian Telecommunication Sector to huge continental telecommunication service providers will create the risk of intrusion of the Protocol. Therefore, much emphasis should be given to the country's sector specific commitments of the telecommunication sector. As it has been noted, the telecommunication sector has already been listed as a priority sector for state parties to undertake and finalize the schedule of commitments. As such, Ethiopia is expected to list and submit its commitments in the telecommunication sector, and this will determine the full extent of the risk of intrusion of the Protocol in the existing regulatory framework of the sector.

4.4. Best Practices in Adjusting the Regulatory Effects of Trade Agreements

As it has been assessed so far, Ethiopia's decision of joining the AfCFTA poses both risks of non-compliance and regulatory intrusion unless effective measures of preparation and adjustment is made. Such risks of non-compliance and regulatory intrusion as well as other needs of internal adjustments have also been prevalent in the post period of joining free trade agreements in developing countries. In order to fill this gap and to guide developing countries, reviews of best

[255] Canadian Environmental Law Association, CELA Report 397 (2000), cited at Luis Abugattas Majluf cited above note 195, p.3
[256] Sinclair & Grieshaber-Otto (2002) cited at Luis Abugattas Majluf cited above note 195, p.3
[257] Luis Abugattas Majluf cited above note 195, p.3

practices have been developed by international trade organizations.[258] Accordingly, in order to address issues related to non-compliance, some WTO member countries have established a system in which draft laws and regulation will be screened for their WTO consistency.[259] This will help state parties to ensure that laws and regulatory measures are in consistence with their treaty obligations. Moreover, best practices of counties have also affirmed that state parties of a given trade agreement have to put in place a system to ensure that their partners are abide by their commitments.[260] As such, it has been suggested that state parties may take advantage of several programs and databases at WTO level in order to monitor the compliance of their partners with the commitments made in trade agreements.[261] However, this will determined be after the AfCFTA has finalized its full-fledged internal structures. For all of these activities, countries are advised to designate an independent compliance and follow up authority to make sure that the country is in compliance with its international trade obligations.

In the case of Ethiopia, the necessity of adopting best practices of countries in order to comply with its AfCFTA trade obligation is not questionable. In the meantime, greater emphasis should be given to the sector specific commitments of the country in general and its specific commitments in the Telecommunication Sector. As it has been analyzed, the full extent of the regulatory effect of the Protocol will be determined mainly based on the schedule of specific commitments. Therefore, both the risk of non-compliance and intrusion will have to be managed at the first stage of the trade negotiation otherwise it will be too late to manage at the later stage of the trade agreement.

[258] For instance, UNCTAD has published a Trade Policy Framework for developing countries containing a manual of best practices in 2018.
[259] UNCTAD, cited above at note 249, p.45
[260] Ibid
[261] Ibid

Conclusion and Recommendation

At its inception, the thesis was missioned to explore and provide analytical answers for five research questions. The first question has targeted at identifying the regulatory effects of free trade agreements on member counties' domestic regulatory power and major free trade agreements including WTO have been assessed. The assessment has demonstrated that free trade agreements, while recognizing the right of members to regulate and introduce new regulations to meet their national policy objectives, stipulate rules and principles with significant restrictions on domestic regulatory powers of member countries. Such restrictions may be provided in the form of domestic regulatory disciplines and other principles such as market access, national treatment, MFN treatment and transparency which limits member countries' domestic regulatory measures.

The second question pertains to the analysis of the existing regulatory framework of the recently liberalized Telecommunication Sector. Based on this, the thesis assessed that until recently, both the operation and regulation of the Telecommunication Sector was under the absolute control of the government. The sector was not open for private sector engagement and the issue of regulation had little attention due to the absence of competition in the sector. However, due to the plan to privatize of Ethio-telecom and liberalize the sector to both domestic and foreign investors, the government has taken regulatory reforms in the sector and the newly enacted Communications Service Proclamation No. 1148/2019 has a particular relevance in the regulation of the sector.

It has also been indicated that this Proclamation liberalizes the Telecommunication Sector and established the Ethiopian Communications Authority as the regulator of the Sector with a wide range of powers. In particular, the thesis has analyzed the regulatory powers of the Authority in terms of core regulatory measures of the telecommunication sector including rules on regulatory authority, licensing and technical standards, interconnection, allocation and use of telecom resources, and other rules of telecom regulation. As such, it has been examined that the Proclamation contains free trade consistent provisions and, in most cases, it complies with the principles of free trade agreements. It is also uncovered that the Proclamation requires the Authority to make measures of compliance to international agreements to which Ethiopia is a party. Finally, the chapter briefs the current status of the Authority.

The third and a very important question of the thesis relates with the assessment of the regulatory effects of AFCFTA Protocol on Trade in Services on the existing regulatory framework of the Ethiopian Telecommunication Sector. To address this question, the thesis primary analyzes the applicability of the Protocol to the Ethiopian Telecommunication Sector. Based on this, it has been revealed that the Telecommunication Sector will be subject to the discipline of the Protocol upon the submission of the Schedule of Specific Commitments by the Ethiopian government. It has been pinpointed that the submission of the Schedule of Specific Commitments of the Telecommunication will be prioritized as per the decision of the state parties of AfCFTA. As such, the thesis has addressed the specific regulatory effects of the Protocol on the Telecom Sector, which have been classified in to effects resulting from the general rules and principles of the Protocol and effects, which will emerge from the schedule of specific commitments.

While the regulatory effects of the principle of MFN Treatment and Transparency have been analyzed in the first category, in the second group of regulatory effects, the effect of rules of Market Access, National Treatment, Domestic Regulation and other rules of the Protocol have been assessed. More importantly, the thesis has discovered that: (i) the Schedule of Specific Commitments of the country will have a significant implication to the existing regulatory framework of the Sector; and (ii) the full extent of the regulatory effects of the Protocol will be determined by a reference to the contents of the Schedule of Specific Commitments.

The fourth question of the thesis was examination of the compliance of the existing regulatory framework of the Telecommunication Sector with the rules and principles of the Protocol. In this regard, it has been noted that although the Proclamation contains free trade friendly provisions, the compliance of such provisions with the Protocol will be determined based on the list of specific commitments of the country in the Telecommunication Sector.

And, this (fact) leads us to the fifth question of the thesis, which assesses major regulatory concerns of the country after AfCFTA. The assessment has identified two major concerns or risk in joining the AfCFTA. These are the risk of non-compliance to the Protocol and the risk of intrusion by the Protocol's domestic regulatory rules and disciplines.

To address the aforementioned regulatory concerns and ensure the utmost benefit of the AfCFTA, the following recommendations are made for consideration to the government of Ethiopia in general and the regulators of the Telecommunication Sector in particular.

1. The government of Ethiopia should clearly identify, and indicate in its Schedule of Sector Specific Commitments, the regulatory restrictions that it plans to maintain in relation to market access and national treatment in the Telecommunication Sector. The government should make a deep assessment of country-based cases and economic consideration in providing such restrictions.

2. More importantly, two sets of limitations should be indicated with respect to market access. These are: i) limitations on the number of service providers; and ii) limitations should on the total number of expatriates that may be employed in the sector.

3. With respect to national treatment, a specific limitation should be indicated in the schedule to provide favorable treatment in the form of cross-subsidization to the publicly owned telecom operator.

4. As it has been indicated, the Schedule of Specific Commitments will determine the full extent of the country's obligation in the AfCFTA. Thus, it is recommended that the government of Ethiopia should give greater attention to the negotiations in relation to the Schedule of Specific Commitments.

5. The risk of regulatory intrusion of the AfCFTA should be assessed from technical and economic perspectives of the Sector and the risk control measures should be clearly indicated in the Schedule of Specific Commitments.

6. The Authority should establish an enquiry point with a clear mandate of following up developments and provision of information at the level of AfCFTA in relation to the Telecommunication Sector;

7. The Authority has to put in place a system of compliance with the Protocol on Trade in Services and should advise the government on the consistency of new laws and measures with its treaty obligation;

8. The government of Ethiopia should ensure that the appropriate budget is allocated to the Authority to enable the Authority attract qualified and skilled personnel as well as maintain its independence and impartiality;

9. The Authority should provide continuous trainings and follow up to Ethio-telecom and the new entrant telecom operators on the country's treaty obligations and their compliance duties;

BIBLIOGRAPHY

Books, Articles and Documents

Aaditya Mattoo and Pierre Sauvé, "Domestic Regulation and Trade in Services: Looking Ahead", Oxford University Press and World Bank, Washington DC, 2003.

Adamu Jibrilla, "African Continental Free Trade Area (CFTA) and Its Implications for Nigeria: A Policy Perspective", International Journal of Research and Innovation in Social Science, Volume II, Issue XII, December 2018.

African Union, "Draft Framework, Road Map and Architecture for Fast tracking The Continental Free Trade Area (CFTA)", Addis Ababa, Ethiopia.

African Union, "Synthesis Paper on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area" Addis Ababa, Ethiopia.

Aik Hoe Lim and Bart de Meester, "An Introduction to Domestic Regulation and GATS; Putting Principles into Practice" Cambridge University Press, 2014.

Andrea Cofelice, "African Continental Free Trade Area: Opportunities and Challenges" The Federalist Debate, November 2018.

Andy Valder, "Understanding Telecommunications Networks", Institution of Engineering and Technology, London, United Kingdom, 2006.

Bell IHUA, Martin IKE-MUONSO, Olumide TAIWO and Sand MBA-KALU, "An Independent Study on the Potential Benefits of the African Continental Free Trade Area (AfCFTA) on Nigeria", African International Trade and Commerce Research, May 2018.

Canadian Environmental Law Association, CELA Report 397, 2000.

Carsten Fink and Martín Molinuevo, "East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas?" The World Bank, June 2007.

Christopher Stevens, "Impacts and Challenges of Multilateral and Bilateral Trade Agreements on Africa" African Development Bank, Economic Research Working Paper Series, No 79, October 2005.

Dominique Baron, “The Impact of the Telecommunications Services on Doing Business in Ethiopia,” Addis Ababa Chamber of Commerce and Sectorial Associations, December 2010, Addis Ababa, Ethiopia.

Ethiopian Telecommunications Authority, “Ethiopian Telecommunications Sector Stakeholder Consultation No. 001-2019 Public Notice,” Addis Ababa, October 22, 2019.

Evan Light, “Open spectrum for development,” Policy brief, Association for Progressive Communications (APC), October 2010.

Gabriel Gari, “Recent Preferential Trade Agreements’ disciplines for tackling regulatory divergence in services: how far beyond GATS?” Center for Commercial Law Studies.

Gary WINSLETT, “How Regulations Became the Crux of Trade Politics”, Journal of World Trade 50, No. 1, 2016.

Gerhard Erasmus, “The Institutional Design of the AfCFTA”, tralac Working Paper, No, S19WPO3/2019, May 2019.

Gerhard Erasmus, “Trade in Services under the AfCFTA and domestic regulation”, tralac Trade Brief No. S19TB12/2019, 2019.

GSMA, “Understanding the Basics of Spectrum Policy for Mobile Telecommunications”, Spectrum Handbook, December 2011.

Heribert Dieter, “The Multilateral Trading System and Preferential Trade Agreements: Can their Negative Effects be minimized?” German Institute for International and Security Affairs, GARNET Working Paper No: 54/08, Berlin, 2008.

Hika Zerihun Lamu, “Ethiopia’s Accession to the WTO and the Telecom Sector: Can Ethiopia Accede without Liberalization?” Thesis, Addis Ababa University, 2014.

International Trade Centre, “A business guide to the African Continental Free Trade Area Agreement,” ITC, Geneva, 2018.

ITU, “Guidance on the regulatory framework for national spectrum management”, Report ITU-R SM.2093-3(06/2018), Geneva, 2018.

Lishan Adam, "Risks and Opportunities of Late Telecom Privatization; the Case of Ethio-Telecom", Canadian International Development Research Centre (IDRC), 2019.

Luis Abugattas Majluf, "Domestic Regulation and the GATS: Challenges for Developing Countries," Policy Paper on Trade in Services and Sustainable Development: Domestic Regulation, UNCTAD.

Markus Krajewski, "Domestic regulation and services trade: lessons from regional and bilateral free trade agreements", University of Erlangen-Nuremberg-Law School, 2015.

Mesut Saygili, Ralf Peters and Christian Knebel, "African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions", UNCTAD Research Paper No.15, 2018.

Mike Jensen and Claudia Sarrocco, "Internet from the Horn of Africa: Ethiopia Case Study," International Telecommunication Union, Geneva, July 2002.

Panagiotis Delimatsis, "Due Process and 'Good' Regulation Embedded in the GATS Disciplining Regulatory Behavior in Services Through Article VI of the GATS", Journal of International Economic Law 10, 2007.

Robert Stumberg, "GATS Negotiations on Domestic Regulation," Harrison Institute for Public Law Georgetown Law, May 19, 2010.

S. Khorana, S. McGuire and N. Perdikis, "Multilateral Agreements and Global Governance of International Trade Regimes", Atlantic Future Scientific Paper, 2014.

Sejuti Jha, "Utility of Regional Trade Agreements: Experience from India's Regionalism", Asia-Pacific Research and Training Network on Trade, Working Paper Series, No. 99, April 2011.

Technology Guides, Telecommunications.

The World Bank, "Ethiopia Digital Foundations Project" (P171034), Sep.2019.

Trade Law Center, "Trade in Services Negotiations under the AFCFTA," tralac, March 2020.

TRALAC Law Center, "African Continental Free Trade Area, A tralac guide", 6th edition, Nov. 2019.

UNCTAD, “Trade Policy Frameworks for Developing Countries: A Manual of Best Practices”, United Nations, 2018.

United Nations Economic Commission for Africa, “Review of the legal and regulatory frameworks in the information and communications technology sector in a subset of African countries: What lessons can we learn,” Addis Ababa, Ethiopia, July 2017.

Viola Sawere, “An update on the African Continental Free Trade Area and Southern African Development Community Protocols on Trade in Services”, tralac working paper, January 2020.

Wondemagegn Tadesse, “Legal Research Tools and Methods in Ethiopia” Published in Journal of Ethiopian Law, Vol. XXV No. 2, September 2012.

Yazachew Belew, “Telecommunications Services Liberalization in Ethiopia: Implications for Regulatory Issues”, 26 J. Ethiopian L. 55 (2014)

Legislation

1. The Treaty establishing the African Economic Community (AEC), 1991, Abuja, Nigeria,
2. Communications Service Proclamation No. 1148/2019, Negarit Gazetta, 25th Year No. 82, 2019, Addis Ababa
3. The Protocol on Trade in Services, AfCFTA, AU, 2018
4. General Agreement on Trade in Services, WTO, 1994, Marrakech, Uruguay

Online Sources and Newspapers

1. Addis Fortune, Vol.19, No. 986, March 23,2019 Publication
2. Semonegna, 2019 available at https://semonegna.com/ethiopia-joins-africa-continental-free-trade-agreement-AfCFTA/
3. Institute of Developing Economies-Japan External Trade Organization, website, https://www.ide.go.jp/English/Data/Africa_file/Company/ethiopia04.html