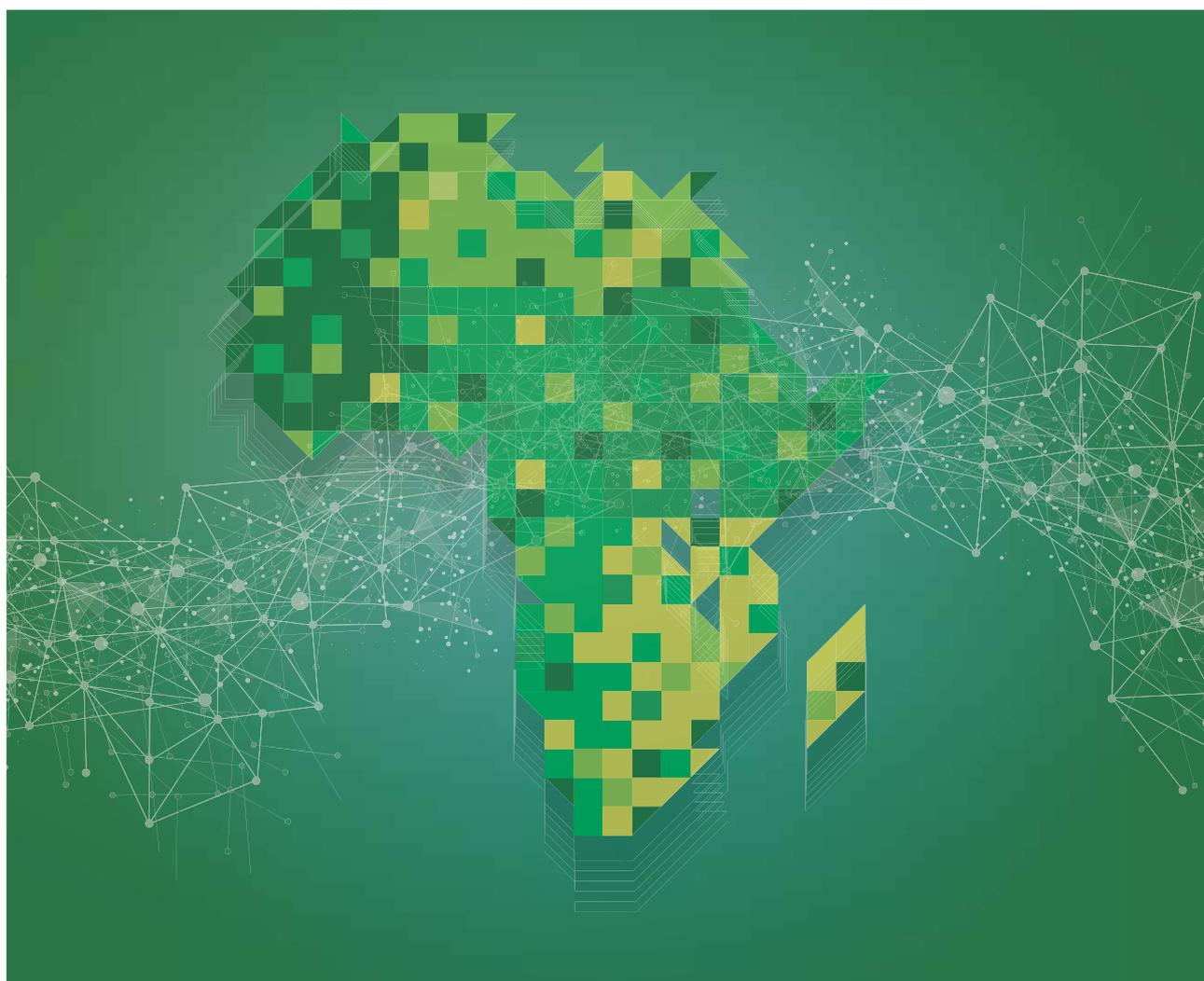


A BUSINESS GUIDE TO THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT



A Business Guide to the African Continental Free Trade Area Agreement

About the paper

This reference guide provides insights into the business implications of the African Continental Free Trade Agreement, a pillar in the move towards a border-free Africa.

To help businesses bring their voice to the process, the guide provides context for the agreement, highlights on protocols, and the way forward for trade in goods and services as well as for subsequent negotiation areas that include investment, intellectual property rights and competition policy.

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Foreword

At a time when trade is facing incredible headwinds and questions are being raised about the utility of regional integration processes, the Establishment of the African Continental Free Trade Area (AfCFTA), signed in March 2018, is a welcome bright spot. By seeking to deepen economic integration of the African continent by creating a single continental market with free movement of business, people and investments, the AfCFTA is a testament to the power of cooperation and a shared vision.

The projected benefits of the agreement are significant. With expectations of a virtuous cycle of increasing intra-African trade and international investment, the AfCFTA has the potential to make a concrete impact on the lives of ordinary citizens across the continent. By facilitating job creation and greater competitiveness of African micro, small and medium-sized enterprises (MSMEs), the AfCFTA will be a crucial ingredient in lifting people out of poverty and invigorating Africa's growth trajectory. These objectives are to be achieved through successive rounds of negotiations that progressively eliminate tariffs and non-tariff barriers to trade in goods and liberalize trade in services.

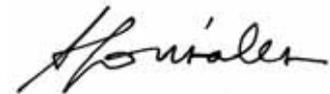
The African business community is a key beneficiary of the agreement. Potential advantages to the private sector include increasing economies of scale and access to cheaper raw materials and intermediate inputs; better conditions for regional value chains and integration into global value chains; catalyzing the transformation of African economies towards greater utilization of technology and knowledge; facilitating both intra-African and external direct capital flows to African countries, and creating a labour market and a demand pull throughout the continent.

To ensure that the private sector can benefit from the African Free Trade Area, it is important that business understands what the AfCFTA and future negotiations will cover. Business should ensure its voice is heard as governments craft and operationalize the agreement. In order to do that, they need to be fully aware of the issues, potential benefits and opportunities and, most importantly, the role they can play.

With this objective, this guide sets out the context and the guiding principles behind the agreement and analyses its provisions. It compares them to existing multilateral and regional trade agreements to identify potential synergies, issues, opportunities and benefits for African business, particularly MSMEs. It also explains the ongoing negotiations and indicates the road ahead for future negotiations in realizing the objectives of the AfCFTA.

This knowledge will enable business to engage effectively in advocacy and public-private dialogue mechanisms to support the negotiations and subsequent implementation of AfCFTA.

Using this guide, we encourage business associations to monitor and participate in the negotiations to help formulate agreements that will improve the regional business and trading environment. ITC will continue working with the African Union Commission, the business community as well as policymakers in the region to increase their understanding of the agreement and how best to take advantage of the benefits of the AfCFTA.



Arancha Gonzalez
Executive Director
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Contents

Foreword	iii
Acknowledgements	iv
Acronyms	vii
Executive summary	viii
CHAPTER 1 ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA	1
Background	1
Key features and purpose of the Agreement	1
Guiding objectives and principles	4
Expected benefits	6
Alignment with WTO agreements	9
African business: The ultimate beneficiaries	10
CHAPTER 2 PROTOCOL ON TRADE IN GOODS	11
Accelerating intra-African trade in goods	11
Encouraging growth through Regional Economic Communities	11
Ongoing negotiations on key tariff concessions	12
Unpacking the Protocol	14
CHAPTER 3 FACILITATING TRADE IN GOODS	23
Framework for harmonization of customs laws and procedures (Annex 3)	23
Trade facilitation (Annex 4)	23
Transporting goods (Annex 8)	24
CHAPTER 4 PROTOCOL ON TRADE IN SERVICES	26
High economic value of services in Africa	27
Alignment with WTO GATS approach	31
Outlining general obligations and disciplines	33
Forthcoming work: Annexes to the Protocol	39
Different trade liberalization approaches	39
Next steps in negotiations	40

CHAPTER 5 PHASE 2 NEGOTIATIONS: INVESTMENT, INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY	41
Investment provisions	41
Intellectual property rights	42
Competition policy	42
CHAPTER 6 Promoting free movement of people across borders	44
Mixed success within Regional Economic Communities	44
Enabling free movement for business people	44
CHAPTER 7 Roles and opportunities for the business community	47
Risks of trade liberalization	47
Engagement opportunities for African business	47
APPENDICES	49
Appendix I Agreements or Documents referred to in the Preamble to the Establishment of the AfCFTA	49
Appendix II GDP by economic activity in Africa	52
Appendix III Export of commercial services in Africa	53
Appendix IV Import of commercial services in Africa	54
REFERENCES	55
Boxes, Tables and Figures	
Box 1 Architecture of the Establishment of the AfCFTA	4
Box 2 Architecture of the Protocol on Trade in Goods	15
Box 3 Objectives of the Protocol on Trade in Services (Article 3)	33
Table 1 Status of regional integration in Africa	7
Table 2 Comparison of the Protocol on Trade in Goods with WTO agreements on goods	16
Table 3 Structure of AfCFTA Protocol on Trade in Services compared with GATS	31
Table 4 Modes of supply of services	32
Table 5 Format of schedules of commitments	37
Table 6 Trade in services liberalization among Regional Economic Communities	39
Figure 1 African Regional Integration Index	8
Figure 2 Protocol on Trade in Goods and its Annexes	14
Figure 3 Value of services as % of GDP in African countries, 2017	27
Figure 4 Commercial service exports, 2017 (\$ million)	28
Figure 5 Commercial service imports, 2017 (\$ million)	29
Figure 6 Commercial trade in services – largest African countries compared with leading global trading countries, 2017 (£ million)	30

Acronyms

Unless otherwise specified, all references to dollars (\$) are to United States dollars.

AEC	African Economic Community
AfCFTA	African Continental Free Trade Area
AfDB	African Development Bank
AMOT	African Ministers of Trade
AU	African Union
AUC	African Union Commission
BIAT	Boosting Intra-African Trade
CEN-SAD	Community of Sahel-Saharan States
CFTA	Continental Free Trade Area
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HS	Harmonized System
ICT	Information and communications technology
IGAD	Inter-Governmental Authority on Development
IPRs	Intellectual property rights
ITC	International Trade Centre
MSME	Micro, small and medium-sized enterprise
NTB	Non-tariff barrier
OAU	Organization of African Union
PAIC	Pan-African Investment Code
REC	Regional Economic Community
SADC	Southern African Development Community
SDG	Sustainable Development Goal
SEZ	Special Economic Zone
SPS	Sanitary and phytosanitary (measures)
TBT	Technical barriers to trade
TFA	Trade Facilitation Agreement (WTO Agreement on)
TFTA	Tripartite Free Trade Area
TIR	Transports Internationaux Routiers (International Road Transport)
TRIMS	Trade-Related Investment Measures (WTO Agreement)
TRIPs	Trade-Related Intellectual Property Rights (WTO Agreement)
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
WTO	World Trade Organization

Executive summary

This publication gives business leaders and policymakers a reference guide to the current status of progress towards a border-free Africa, led by the Establishment of the African Continental Free Trade Area (AfCFTA). It also provides them with insights into the business implications of various provisions of the Agreement and key issues and challenges in future negotiations. This knowledge is imperative for all stakeholders, especially the private sector, to ensure that they play a decisive role in the negotiation and subsequent implementation through business advocacy and public-private dialogue.

The projected benefits of the agreement are significant. The target market for the AfCFTA is projected to rise from an estimated 1.27 billion to 1.7 billion by 2030, out of which about 600 million will be in the middle class (Bramdeo 2018). In terms of aggregate gross domestic product (GDP), this will range from \$2.1 trillion to \$3.4 trillion or \$6.7 trillion at Purchasing Power Parity terms. In terms of investments and consumer spending, the AfCFTA is expected to attract an estimated \$4 trillion (Azikiwe, 2018).

This provides African business with a great opportunity to implement forward-looking business decisions so they can maximize the benefits from the AfCFTA and integrate seamlessly with regional and global value chains.

The Agreement, which is over 450 pages long, has been assessed in detail in this publication along with detailed comparisons with relevant multilateral and regional agreements.

In 2012, African Heads of State and Government, recognizing that ‘the promotion of intra-African trade is a fundamental factor for sustainable economic development, employment generation and effective integration of Africa into the global economy’, decided to establish the Continental Free Trade Area (CFTA) by 2017. On 21 March 2018, the Establishment of the AfCFTA was signed in Kigali, Rwanda, by 44 Heads of State and Government of the 55 African Union (AU) Member States.¹

The Agreement is a starting point for more detailed negotiations on trade in goods and services and other trade-related issues including competition, investment and intellectual property rights (IPRs). It comprises three frameworks:

- 1 An overarching **Establishment of the African Continental Free Trade Area**. This sets out the vision to create a single liberalized market for goods and services, facilitated by movement of persons, in order to deepen the economic integration of the African continent. This is to be achieved through successive rounds of negotiations towards the elimination of tariffs and non-tariff barriers to trade in goods, and progressive liberalization of trade in services.

In addition, the AfCFTA is to provide for cooperation in all trade-related areas, customs matters and the implementation of trade facilitation measures. The Agreement sets out the institutional arrangements for managing the AfCFTA and provides a mechanism for the settlement of disputes.

- 2 A **Protocol on Trade in Goods**, consisting of a framework of general obligations and nine Annexes as well as provision for national schedules of tariff concessions, is yet to be negotiated. Its objectives are the progressive elimination of tariffs and non-tariff barriers; enhanced efficiency of customs procedures, trade facilitation and transit. Modelled on the General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO), the core issue to be resolved is how ambitious the final tariff liberalization deal will be. This deal and other related issues need to be resolved before

¹ For a list of the countries that signed the Agreement, the Kigali Declaration and the Protocol to the Treaty Establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and Right of Establishment, visit African Union, Indication of Legal Instruments to be Signed at the 10th Extraordinary Session of the Assembly on the Launch of the AFCFTA, available at <https://au.int/sites/default/files/pressreleases/34033-pr-indication20of20signing20authority20-20updated20final20final20docx.pdf>

the end of 2018, since African Heads of State and Government expect to adopt the Schedules of Tariff Concessions at their next Summit in the first quarter of 2019.

- 3 A **Protocol on Trade in Services**, comprising a framework of general obligations with Annexes and national schedules of specific commitments, is also yet to be negotiated. Its objective is to progressively liberalize trade in services on the basis of equity, balance and mutual benefit, by eliminating barriers to trade in services. Based on the WTO General Agreement on Trade in Services (GATS), negotiating guidelines are currently being drafted for consideration by Member States. The AU Assembly has directed African Ministers of Trade to 'submit Schedules of Specific Commitments on Trade in Services in line with agreed modalities to the February 2019 Session of the Assembly for adoption.'

Negotiations on investment provisions, IPRs and competition policy issues will commence in the second half of 2018 (Phase 2).

In parallel with the adoption of the AfCFTA, the Protocol to the Abuja Treaty relating to Free Movement of Persons, Right of Residence and Right of Establishment was opened for signature at the 2018 AU Summit in Kigali. The Protocol recognizes that the free movement of persons in Africa will facilitate the establishment of the AfCFTA. Its objective is to facilitate the implementation of the African Economic Community by providing for the progressive implementation of the free movement of persons, right of residence and right of establishment. Included in its provisions are the intention to abolish visa requirements, introduce the African Passport, and oblige State Parties to mutually recognize academic, professional and technical qualifications.

It is expected that implementation of the AfCFTA will support the Boosting Intra-African Trade (BIAT) aim to double intra-African trade by 2022 and promote industrialization, since it will require the establishment of cross-border value chains and promote a larger and more sophisticated range of investments. Enhanced intra-African trade in goods will also promote employment, social advancement, consumer choice, and a range of other objectives closely associated with the Sustainable Development Goals (SDGs). However, there are significant risks as trade liberalization on its own does not lead to lower poverty levels in the absence of financial sector development, rising education levels and strong governance structures (Le Goff and Singh, 2014).

As key stakeholders, the role of the business community in influencing the outcomes and success of the AfCFTA is important to ensure the potential benefits to business and the wider community are realized. The final chapter describes specific ways African business can contribute to the AfCFTA negotiations, in partnership with governments, chambers of commerce and industry; and other regional and international organizations.

CHAPTER 1 ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA

This chapter sets out the context and the guiding principles behind the Establishment of the African Continental Free Trade Area, outlines some key provisions and explains the ongoing negotiations to realize the objectives of the AfCFTA.

Background

In 2012, at the African Union (AU) 18th Session from 29–30 January in Addis Ababa, Ethiopia, African Heads of State and Government recognized that ‘the promotion of intra-African trade is a fundamental factor for sustainable economic development, employment generation and effective integration of Africa into the global economy’ and decided to establish the Continental Free Trade Area (CFTA) by 2017. In doing so, they endorsed a framework, road map and architecture for fast-tracking the establishment of the CFTA and the Action Plan for Boosting Intra-African Trade. The following milestones were set:

- Finalization of the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) Tripartite FTA (TFTA) initiative by 2014;
- Completion of FTA(s) by Non-Tripartite Regional Economic Communities (RECs), through parallel arrangement(s) similar to the EAC-COMESA-SADC Tripartite Initiative or reflecting the preferences of their Member States, between 2012 and 2014;
- Consolidation of the Tripartite and other regional FTAs into a CFTA initiative between 2015 and 2016; and
- With the option to review the target date according to progress made.

In practice, these deadlines have not been met. Progress towards the TFTA, seen as one of the building blocks for the CFTA, has been slower than was expected. It was launched at the Third Tripartite Summit on 10 June 2015 in Sharm El Sheikh, Egypt, as a framework, with negotiations outstanding on rules of origin, trade remedies and tariff offers. However, while Member States were given 12 months to conclude these outstanding negotiations, the new deadline of June 2016 was not met. As a consequence, the commencement of Phase II negotiations covering trade in services, competition policy, intellectual property rights, and cross-border investment, was delayed pending the conclusion of negotiations on Phase I issues. At the seventh Tripartite Sectoral Ministerial Committee (18 June 2018 in Cape Town) Ministers took note of the progress on outstanding issues relating to tariff reduction negotiations and rules of origin, agreed to proceed with Phase II negotiations, and urged Member States to ratify the TFTA by 2019.

This has implications for the AfCFTA negotiations as 26 of the 55 AU Member States are Member/Partner States of the Tripartite. Given that the 26 Tripartite Member/Partner States have had difficulty in reaching agreement on issues such as tariff reduction and rules of origin, it can be expected that those difficulties would be magnified under the AfCFTA. However, the political impetus behind the AfCFTA could help to break logjams at the Tripartite level. In practice, this is what has influenced progress with the AfCFTA.

Key features and purpose of the Agreement

On 21 March 2018 the Establishment of the African Continental Free Trade Area (AfCFTA) was signed in Kigali, Rwanda, by 44 Heads of State and Government of the 55 AU Member States.² The Agreement is a

² For a list of the countries that signed the Agreement, the Kigali Declaration and the Protocol to the Treaty Establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and Right of Establishment, visit African Union,

starting point for more detailed negotiations on trade in goods and services and other trade-related issues such as competition, investment and intellectual property rights. It comprises three frameworks:

1. An overarching Establishment of the African Continental Free Trade Area;
2. A Protocol on Trade in Goods, comprising a framework of general obligations and nine (incomplete) Annexes, as well as provision for national schedules of tariff concessions yet to be negotiated; and
3. A Protocol on Trade in Services, also comprising a framework of general obligations, with provision for Annexes (sectoral and cross-cutting) and national schedules of specific commitments, also yet to be negotiated.

Moving towards the African Economic Community by 2063

The AfCFTA is a key step towards achieving the vision of an African Economic Community (AEC), set out in the Abuja Treaty³. The AEC was established by Article 3 of the Treaty with the following objectives:

- To promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development;
- To establish, on a continental scale, a framework for the development, mobilization and utilization of the human and material resources of Africa in order to achieve self-reliant development;
- To promote cooperation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to the progress, development and the economic integration of the Continent; and
- To coordinate and harmonize policies among existing and future economic communities in order to foster the gradual establishment of the Community.

Included in the ambitions was the objective of establishing, at the level of each Regional Economic Community and within a period not exceeding 10 years, a FTA by 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.

More recently, in 2013 during the commemoration of the 50th anniversary of the Organization of African Unity (OAU), African Heads of State and Government launched Agenda 2063, which is described as ‘a shared framework for inclusive growth and sustainable development for Africa to be realized in the next fifty years. It is a continuation of the pan-African drive over centuries, for unity, self-determination, freedom, progress and collective prosperity pursued under Pan-Africanism and African Renaissance. It builds on and seeks to accelerate the implementation of past and existing continental initiatives for growth and sustainable development.’ Member States emphasized a guiding vision ‘to build an integrated, prosperous and peaceful Africa, driven and managed by its own citizens and representing a dynamic force in the international arena’.

Aiming to double intra-African trade by 2022

One of the flagship projects identified under Agenda 2063 is the creation of the CFTA, which ‘aims at significantly accelerating growth of intra-African trade and use trade more effectively as an engine of growth and sustainable development. It includes doubling of intra-African trade by 2022, strengthen Africa’s

Indication of Legal Instruments to be signed at the 10th Extraordinary Session of the Assembly on the launch of the AfCFTA, available at <https://au.int/sites/default/files/pressreleases/34033-pr-indication20of20signing20authority20-20updated20final20final20docx.pdf>.

³ Treaty establishing the African Economic Community (AEC), Abuja, Nigeria, 3 June 1991, available at <https://au.int/sites/default/files/treaties/7775-treaty-0016 - treaty establishing the african economic community e.pdf>

common voice and policy space in global trade negotiations and establish the financial institutions within agreed upon timeframes.’

Another policy document adopted by the AU in 2012 was the Action Plan on Boosting Intra-African Trade. The Plan identified seven action clusters, namely trade policy, trade facilitation, improving productive capacity, trade-related infrastructure, trade finance, trade information, and factor market integration. On the trade policy issue, Africa has faced a number of challenges including the absence of a continental framework for facilitating intra-regional trade, high tariffs between AU Member States, overlapping membership in RECs, and lack of diversity in its exports base (AU, 2012). Implementation of the AfCFTA will help address some of these challenges, but as has been pointed out in recent research (e.g. Aner *et al.*, 2015; Maas, 2015), procedural obstacles associated with obtaining visas and work permits add substantial costs to trade between nations.

Once implemented, the Agreement is expected to cut tariffs on 90% of goods traded within the continent. This is expected to increase intra-African trade, which is disappointingly low when compared to intra-regional trade within other trade configurations, such as the Association of South East Asian Nations or the European Union (EU). In 2016, for example, intra-African exports accounted for 18% of total exports, compared to 59% and 69% respectively for intra-Asian and intra-European exports (Sow, 2018). It has been observed that African countries trade more value-added products amongst themselves, unlike their exports to the rest of the world which are mainly commodities (Songwe, 2018). The AfCFTA has therefore the potential to increase intra-African trade in manufactured and other value-added products, which can prepare African countries for entry to other emerging economies and developed country markets.

Easing movement of people across the continent

Signed at the same time as the Establishment of the AfCFTA, the Protocol to the Treaty Establishing the African Economic Community relating to the Free Movement of Persons, Right of Residence and Right of Establishment (African Union, 2018b) captures the commitment of AU Member States to establish mechanisms for the free movement of persons, capital, goods and services so as to promote integration of the African people, and facilitate intra-African trade, investment and mobility of labour. These freedoms shall be realized ‘progressively’, by first implementing the right of entry and abolition of visa requirements (phase 1), implementing the right of residence (phase 2) and finally implementing the right of establishment (phase 3) (Article 5). Further analysis of the Protocol on Free Movement is provided in Chapter 6.

Ratification by Member States

The Agreement and its related Protocols (on Trade in Goods, Trade in Services, and on Rules and Procedures on the Settlement of Disputes) will enter into force 30 days after 22 Member States have ratified the Agreement. As at July 2018, six Member States have ratified the AfCFTA.⁴

⁴ Chad, Ghana, Kenya, Niger, Rwanda and Swaziland

Box 1 Architecture of the Establishment of the AfCFTA

Preamble

Sets out the background to the Agreement and the Member States' motivations in concluding it.

Part I: Definitions

Sets out definitions of key terms used in the Agreement.

Part II: Establishment, Objectives, Principles and Scope

Establishes the Agreement, according to a set of general objectives, to be governed by 12 core principles, and outlines its scope.

Part III: Administration and Organization

Sets out the institutional framework to govern implementation of the AfCFTA, including the Assembly, the Council of Ministers, Committee of Senior Trade Officials, and the Secretariat, as well as decision-making processes and rules.

Part IV: Transparency

Enjoins the Parties to adopt domestic procedures to enhance transparency in promulgating and notifying laws, regulations, and administrative practices, including notification of such to the Secretariat.

Part V: Continental Preferences

Provides that Parties will accord each other the most favourable reciprocal treatment accorded to third parties, while not detracting from the right of Parties to maintain more favourable treatment for members of their RECs.

Part VI: Dispute Settlement

Reaffirms the Protocol on Rules and Procedures on the Settlement of Disputes.

Part VII: Final Provisions

This largely covers implementation procedures including entry into force, as well as withdrawal review, and amendment provisions.

Guiding objectives and principles

The Agreement sets out a number of general and specific objectives (AU, 2018a).

General objectives

The general objectives set out the vision for the AfCFTA (Article 3), which are to:

- Create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African vision of 'an integrated, prosperous and peaceful Africa' enshrined in Agenda 2063;
- Create a liberalized market for goods and services through successive rounds of negotiations;
- Contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs;
- Lay the foundation for the establishment of a Continental Customs Union at a later stage;
- Promote and attain sustainable and inclusive socioeconomic development, gender equality and structural transformation of the State Parties;

- Enhance the competitiveness of the economies of State Parties within the continent and the global market;
- Promote industrial development through diversification and regional value chain development, agricultural development and food security; and
- Resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.

Specific objectives

The specific objectives (Article 4) necessary to realize these general objectives include:

- Progressive elimination of tariffs and non-tariff barriers to trade in goods;
- Progressive liberalization of trade in services;
- Cooperation in all trade-related areas including investment, intellectual property rights and competition policy;
- Cooperation on customs matters and the implementation of trade facilitation measures;
- Establishment of a mechanism for the settlement of disputes concerning the rights and obligations of Members; and
- Establishment and maintenance of an institutional framework for the implementation and administration of the AfCFTA.

Core principles

The AfCFTA is to be governed by 12 core principles (Article 5):

1. Driven by Member States of the African Union;
2. RECs' FTAs as building blocs for the AfCFTA;
3. Variable geometry;
4. Flexibility and special and differential treatment;
5. Transparency and disclosure of information;
6. Preservation of the *acquis*;
7. Most-favoured-nation (MFN) treatment;
8. National treatment;
9. Reciprocity;
10. Substantial liberalization;
11. Consensus in decision-making; and
12. Best practices in the RECs, in the State Parties and International Conventions binding the African Union.

Essentially, these core principles set out the principles for the current and future negotiations of the AfCFTA and are largely WTO-consistent. The term *acquis* is used in a similar manner to the way it is used in the EU (e.g. Jørgensen, 1999), as shorthand for the accumulated obligations and commitments that AU Member

States have with other regional and international organizations including the WTO.⁵ It has been observed that these principles may be considered to be inherently contradictory, for example MFN and reciprocity.

One example of a possible contradiction concerns the MFN principle under which all State Parties are treated equally, which does not sit squarely with the principle of reciprocity. An appreciation of the interrelationship between these two principles may be assisted by considering the following examples.

Expected benefits

Prioritizing intra-African trade

Two provisions aim to ensure 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.

The provisions in Part V (Article 18) of the overarching Agreement, which deal with 'continental preferences', provide that 'following the entry into force of this Agreement, State Parties shall, when implementing this Agreement, accord each other, on a reciprocal basis, preferences that are no less favourable than those given to Third Parties.' Article 18 continues that 'a State Party shall afford opportunity to other State Parties to negotiate preferences granted to Third Parties prior to entry into force of this Agreement and such preferences shall be on a reciprocal basis. In the case where a State Party is interested in the preferences in this paragraph, the State Party shall afford opportunity to other State Parties to negotiate on a reciprocal basis, taking into account levels of development of State Parties'.

Similarly, Article 4 in the Protocol on Trade in Goods, which deals with the MFN principle, provides that 'Nothing in this Protocol shall prevent a State Party from concluding or maintaining preferential trade arrangements with Third Parties, provided that such trade arrangements do not impede or frustrate the objectives of this Protocol, and that any advantage, concession or privilege granted to a Third Party under such arrangements is extended to other State Parties on a reciprocal basis.'

Improving regional and continental trade integration

As noted above, one of the objectives of the AfCFTA is to 'resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes' (Article 3), while the principles of the AfCFTA include 'RECs' Free Trade Areas as building blocs of the AfCFTA' and 'best practices in the RECs, in the State Parties and International Conventions binding the African Union' (Article 5).

The eight RECs recognized by the AU are the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).

Acknowledgement that the RECs are building blocs towards establishment of the AfCFTA is also provided in the Final Act of Lagos (1980), the Treaty Establishing the African Economic Community (Abuja, 1991) and the Constitutive Act of the African Union (Lomé, 2000). Indeed, the Final Act of Lagos and the Abuja Treaty recognize strengthening of RECs and deeper integration at the REC level as a necessary step towards integration of the continent, while the treaties and agreements establishing the RECs reiterate the fact that these bodies are intermediate steps towards the creation of the African Economic Community (see for example the Preamble to the EAC Treaty, 2007; ECOWAS Treaty, 1993; COMESA Treaty, 1993; SADC Treaty, 1992; and Article 7 of the Treaty Establishing IGAD, 1996).⁶

⁵ For a critique of the use of the term *acquis* in the context of the AfCFTA negotiations, see Erasmus, 2015.

⁶ See EAC Treaty at http://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf; ECOWAS Treaty

Table 1 below gives the status of regional integration in Africa as at 2016 (AU, UNECA and AfDB 2017, p. 15). The table shows that the eight RECs recognized are at different levels of integration, with the EAC being the most integrated.

Table 1 Status of regional integration in Africa

RECs	Free Trade Area	Customs Union	Single market	Countries that have implemented free movement protocol	Economic and monetary union
AMU	x	x	x	3 out of 5	x
CEN-SAD	x	x	x	Unclear	x
COMESA	✓	x	x	Burundi and Rwanda ratified; Kenya and Zimbabwe signed but not ratified	x
EAC	✓	✓	✓	3 out of 5	x
ECCAS	✓	✓	x	4 out of 11	x
ECOWAS	✓	✓	x	All 15	x
IGAD	x	x	x	No protocol	x
SADC	✓	x	x	7 out of 15	x

Source: AU, UNECA and AfDB 2017, p. 15; COMESA, 2016; and Pan-African Citizens' Network n.d., p. 4.

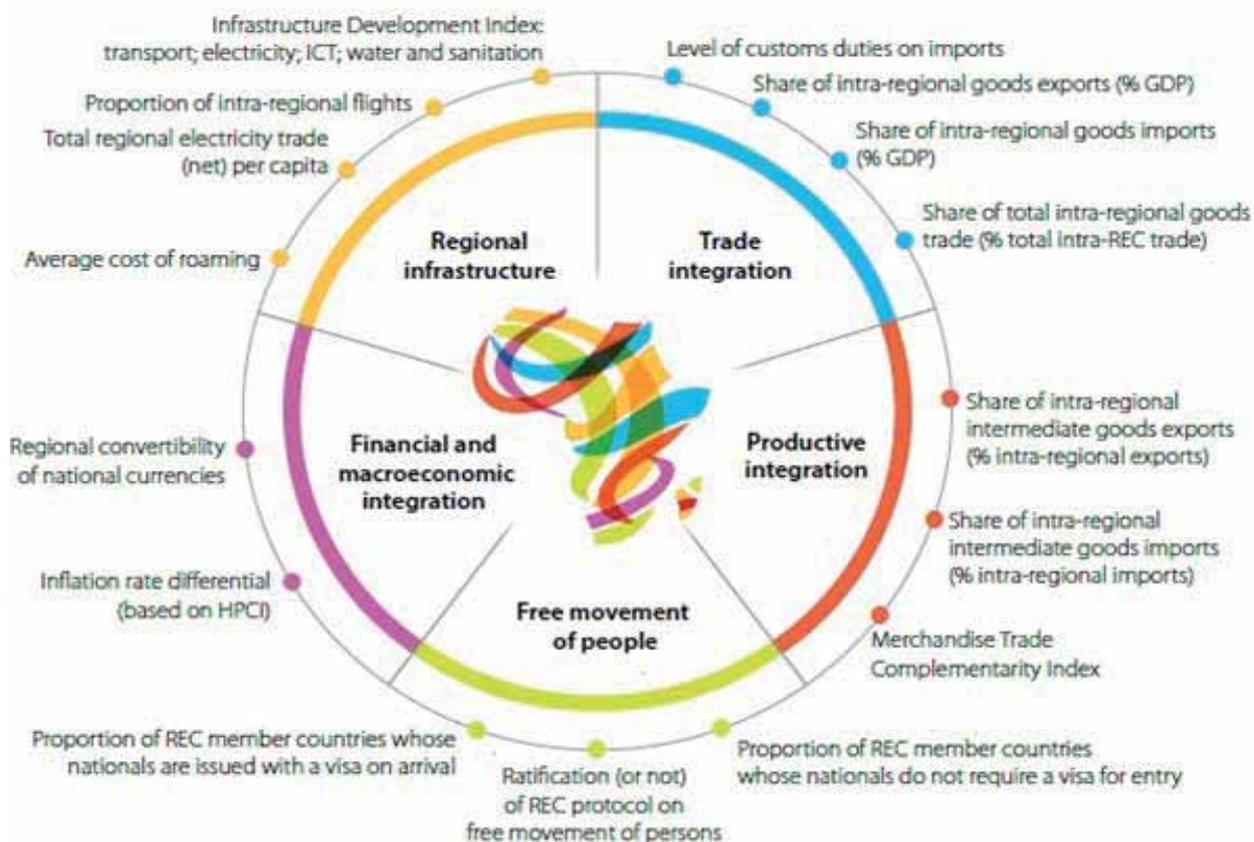
Table 1 shows that there is greater trade integration compared to implementation of the regional protocols on free movement of people. In 2016, the United Nations Economic Commission for Africa (UNECA) unveiled the African Regional Integration Index, which looks at integration from five dimensions: trade integration, productive integration, free movement of people, financial and macro-economic integration, and regional infrastructure (Figure 1, Aidi, 2018). Although it has been recognized that the first version of the Index has certain limitations (such as the large number of indicators and omission of social indicators such as the average number of school years and Africa Gender Equality Index), there are interesting findings, including:

- Highest scores are on trade;
- Average REC scores are furthest apart on free movement of people;
- EAC is the highest performing REC on trade integration, while IGAD is the highest performing on regional infrastructure;
- EAC is the highest performing on productive integration, while ECOWAS is the highest performing on free movement of people.

at <http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf>; COMESA Treaty at <http://www.comesa.int/wp-content/uploads/2016/06/COMESA-Treaty.pdf>; SADC Treaty at http://www.wipo.int/edocs/lexdocs/treaties/en/sadc/trt_sadc.pdf; and IGAD Agreement at <http://www.ifrc.org/docs/idrl/N527EN.pdf>

Figure 1 African Regional Integration Index

The Index: Five Dimensions and sixteen Indicators



Source: UNECA. Africa Regional Integration Index Report (2016)

With the adoption of the AfCFTA, RECs are re-examining their progress on regional integration in line with the Final Act of Lagos and the Abuja Treaty. For example, it was reported that the South African Cabinet approved the Establishment of the TFTA in May 2018.⁷ At the time of writing this report, only Egypt, Kenya and Uganda have ratified the TFTA, and South Africa’s ratification is expected to set the pace for other countries in the three Tripartite RECs to do the same.

Binding obligations between countries at the REC level will therefore remain but will be expanded to other RECs and countries under the AfCFTA. The experience of RECs in negotiating tariff preferences; identification, monitoring and elimination of non-tariff barriers; the EAC’s deep integration through the Single Customs Territory and Common Market; COMESA’s Digital FTA, electronic trade facilitation instruments and research and innovation programmes; EAC and COMESA’s Simplified Trade Regime; and ECOWAS’ leadership on free movement of persons can all be scaled up to the continental level as the focus shifts from negotiation to implementation of the AfCFTA (Mangeni, 2018).

In ECOWAS, for example, the Trade Liberalisation Scheme provides for preferential duties for goods that originate in ECOWAS Member States and meet other criteria for preferential treatment. These other criteria

⁷ Republic of South Africa Department of Government Communications (2018, 11 May) ‘Approved Agreement to establish Tripartite Free Trade Area between COMESA, EAC and SADC’ [Media Release]. Available at <https://www.gcis.gov.za/newsroom/media-releases/approved-agreement-establish-tripartite-free-trade-area-between-comesa-eac> (accessed 5th July 2018).

include the conditions, inter alia that they appear on an approved list of products; be accompanied by a Certificate of Origin and an ECOWAS Export Declaration Form; and be transported under cover of the ECOWAS Inter-State Road Transit (ISRT) Log Book. In practice, traders have found it difficult to comply with these conditions for a number of reasons, including the existence of administrative barriers at borders and unnecessary checkpoints on highways, non-compliance by some Member States to grant zero rate of duty to approved products, and lack of sensitization of economic operators on the provisions of the Trade Liberalization Scheme (AU, UNECA and AfDB, 2017; Nuhu, n.d.).

The AfCFTA will therefore help ECOWAS enhance its trade integration and assist other countries that are not fully implementing FTAs, such as Angola, Djibouti, Eritrea and Ethiopia, to become more integrated (AU, UNECA and AfDB 2017, p. 35). RECs, such as CEN-SAD, AMU and IGAD that have not yet concluded FTAs may have the opportunity to move forward with integration beyond the REC level without completing this stage (Zamfir, 2015). However, continental integration is a challenge if some prerequisites are not addressed, including infrastructure, the creation of effective mechanisms to engage the private sector, export supply side constraints and increased connectivity between existing infrastructure (Geda and Seid, 2014; Mureverwi, 2016).

The AfCFTA not only ensures the continuation of the benefits accrued from the deeper integration in the RECs, but also provides for alignment of RECs' laws and regulations. In case of inconsistency between the Agreement and any regional agreement, the provisions of the AfCFTA Agreement 'shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement' (Article 19). The AfCFTA makes it possible for RECs to get the full benefits of integration in terms of market size and large-scale investment from Africa and outside the continent (Bridges Africa, 2017). RECs are also the focal points for promoting, following up and evaluating implementation of the Protocol on Trade in Services (African Union 2018b, Article 28).

Alignment with WTO agreements

The AfCFTA Agreement is consistent with WTO Agreements. It has been 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). The AfCFTA is not therefore 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. For example, the areas of negotiation within the AfCFTA include goods and services in Phase I (similar to the WTO), and intellectual property rights, investment and competition policy in Phase II (similar to the WTO) using WTO-consistent principles including dispute settlement mechanisms.

Forty-four out of the 55 AU Member States are members of the WTO. Those that are not WTO Members include Algeria, Comoros, Equatorial Guinea, Eritrea, Ethiopia, Libya, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Somalia, South Sudan, and Sudan. With the exception of Eritrea and the Sahrawi Arab Democratic Republic, the accession processes are in progress. Virtually all AU Member States are therefore WTO Members who have, to a large extent, aligned their trade policies to those of the WTO.

The AfCFTA Agreement refers to the Marrakesh Establishment of the WTO (1994) and the GATT 1994. Preferential integration through a regional trade arrangement (RTA) such as the AfCFTA contradicts the most favoured nation (MFN) and national treatment principles in the WTO. While the MFN principle requires all WTO members to treat one another equally or no less favourably than they treat other trading partners that may or may not be WTO Members, the national treatment principle requires members not to give domestic goods preferential treatment over foreign goods.

The GATT, however, recognizes that RTAs act as mechanisms for facilitating trade between the constituent territories and provides for an exception to the MFN principle (Article XXIV), so long as the conditions in that article are met, notably the requirement that an economic integration agreement such as an RTA should cover 'substantially all trade'. Article V of GATS similarly allows regional trade agreements (RTAs) to extend preferential treatment in relation to trade in services, so long as the conditions of 'substantial sectoral coverage' and 'the absence or elimination of substantially all discrimination' are met. In addition, RTAs are also recognized in the WTO under what is known as the 'enabling clause', more formally known as the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Barnekow and Kulkarni, 2017, p. 101). WTO Members are also required to notify the WTO of the

RTAs that they have entered into, and such membership is usually reflected in the periodic trade policy reviews carried out in WTO Member countries.

Institutional arrangements of the Agreement mirror the WTO arrangements. Part III of the overarching Agreement sets out the institutional arrangements, and decision-making powers and procedures that will govern the implementation of the AfCFTA. While this is not directly relevant to the conduct of trade and investment on a daily basis, it is important to appreciate that these arrangements will be invoked in the event of disputes, and will also, over time, work on broadening the scope of the agreement and potentially deepening its coverage.

In addition, the cross-cutting transparency provisions (Part IV) will contribute to the information available to business about the status of the Agreement, its implementation by Member States, and progress towards meeting liberalization objectives. Given the opaque operating environment in which some trade across the continent is conducted, this could prove to be highly valuable assuming it is implemented diligently by all Member States.

Part VI introduces the Protocol on the Rules and Procedures on the Settlement of Disputes.⁸ The Dispute Settlement institutions and processes closely mirror those of the WTO. The Agreement establishes a Dispute Settlement Body comprising representatives of Member States, which will take decisions by consensus; the Dispute Settlement Body has the authority to establish Dispute Settlement Panels, and an Appellate Body (Article 5 of the Protocol). Articles 6–24 of the Protocol govern the procedures for establishing Panels and adjudicating disputes, including the rules that will govern these processes.

African business: The ultimate beneficiaries

Implementation of the AfCFTA Agreement will lead to removal of tariff restrictions on intra-African trade, address some of the non-tariff barriers that have restricted trade between AU Member States and make it easy to situate industrial production in different countries within Africa (Kaberuka, 2018; Ogunyemi, 2017; Alli, 2018). In addition to increasing industrial production, it is expected that there will be substantial increase in intra-African trade in agriculture, which should lead to improvements in real wages and employment (UN Office of Human Rights Commissioner, 2015). The Agreement will rationalize trade between the different RECs and provide for coherence in terms of Africa's trade with the rest of the world (Ismail, 2016; Saygili, Peters and Knebel, 2018; Regions Refocus and Third World Network, 2016; Mureverwi, 2016; Apiko and Aggad, 2018; Quiles, 2016). Freer trade within Africa will lead to increased competition, innovation and prosperity for Africa's people in the long run (Gobena, 2016).

The target market for the AfCFTA is estimated to constitute 1.27 billion people, projected to rise to 1.7 billion by 2030, out of which about 600 million people will be middle class (Bramdeo, 2018). In terms of aggregate GDP, this will range from \$2.1 trillion to \$3.4 trillion or \$6.7 trillion at Purchasing Power Parity terms. Aggregate private and business-to-business consumption is expected to constitute \$4 trillion, and in addition to the growth of intra-African trade by 52.3%, global trade is projected to grow to 6% by 2022 (*Ibid.*). In terms of investments and consumer spending, the AfCFTA is expected to attract an estimated \$4 trillion (Azikiwe, 2018).

Other potential benefits to business include permitting producers to benefit from economies of scale, to access cheaper raw materials and intermediate inputs; improve the conditions for regional value chains and enhance the potential for integration with global value chains; catalyse the transformation of African economies towards greater utilization of technology and knowledge; and facilitate both intra-African and external direct capital flows to African countries (Saygili, Peters and Knebel, 2018).

⁸ Article 3(2) notes that additional rules and procedures may be developed, in which case those subsequently elaborated would prevail over those in the Protocol.

CHAPTER 2 PROTOCOL ON TRADE IN GOODS

This chapter outlines the Protocol's objectives, current status of negotiations and possible implications for economic growth and trade. The Protocol's many parts, articles and annexes are reviewed to consider how they will affect African business and their trading partners.

Accelerating intra-African trade in goods

The principal objective of the Protocol on Trade in Goods is to boost intra-African trade in goods through:

- progressive elimination of tariffs;
- progressive elimination of non-tariff barriers;
- enhanced efficiency of customs procedures, trade facilitation and transit;
- enhanced cooperation in the areas of technical barriers to trade and sanitary and phytosanitary measures;
- development and promotion of regional and continental value chains; and
- enhanced socioeconomic development, diversification and industrialization across Africa.

In achieving this, it is expected that implementation of the Protocol will support the aim of the BIAT to double intra-African trade of goods by 2022. The institutional mechanism through which this is to be achieved is the continental Customs Union, as framed in the Abuja Treaty.

A secondary objective is to harmonize African trade arrangements and institutions, in order to enable trade to flow and be governed more effectively. It is widely hoped that achieving the objective of doubling intra-African trade in goods will promote industrialization on the continent, since it will require the establishment of cross-border value chains in various sectors, thereby promoting a larger and more sophisticated range of investments, including in various services. By promoting industrialization, enhanced intra-African trade in goods will also promote employment, social advancement, consumer choice, and thereby a range of other objectives closely associated with the Sustainable Development Goals (SDGs). In time, therefore, enhanced intra-African trade would promote social and economic development across Africa.

As set out above, these general objectives are seen as a means towards achieving the AU's Agenda 2063 blueprint for African development and are enshrined in Article 3 of the overarching Establishment of the AfCFTA. They are supported by the specific objectives in Article 4 of the Agreement setting out the instruments through which the general objectives will be attained, notably progressive elimination of tariffs and non-tariff barriers to trade in goods. This is to be achieved through the Protocol on Trade in Goods, including its Annexes and (still to be negotiated) national schedules of tariff concessions.

Encouraging growth through Regional Economic Communities

The AfCFTA is built upon the legal arrangements of the existing RECs to ensure conformity and participation. However, as many commentators have argued, there are many obstacles in the way of achieving the Protocol's objectives. Some are structural; others are institutional.

Structural barriers are primarily economic. While African economies are unique, for the most part they share some key characteristics. Most are relatively poor; largely agrarian and subsistence-based; and rural, outside of a few large and rapidly growing urban centres. With few exceptions they mostly export primary products, such as mining commodities and cash crops, and import a variety of manufactured and capital goods. Private sectors tend to be relatively shallow and comprise predominantly small and informal enterprises. Consequently, manufacturing production, where it is to be found in substantial concentrations, tends to be driven by relatively large foreign firms through foreign direct investment.

Partly for these reasons, most African governments actively participate in RECs, through which small markets are pooled, making them more attractive to both foreign firms and domestic firms with capacity to export. Furthermore, regional public goods such as transport and electricity networks can be more optimally and efficiently designed, established and funded, working with international development partners, than at the national level alone.

RECs also have institutional capacities to supplement national institutions and can broker the deals needed to overcome regional barriers to trade and investment. Consequently, the RECs construct trade deals that reduce the barriers at the border, such as import tariffs, customs procedures, and visa requirements. They also address a variety of behind the border barriers such as licensing requirements, national technical standards and specifications.

The RECs that comprise the AfCFTA are at various stages of implementing these initiatives (and more), and some have not moved beyond a focus on regional security matters to encompass a trade agenda. As a result, some observers are sceptical that the AfCFTA could add much value in terms of achieving the objectives as discussed in Chapter 7.

Consequently, the AfCFTA is consciously constructed on the basis of the various legal arrangements comprising the RECs; or what is known as the *acquis* (see Chapter 1, core principles). As such its legal architecture is intended to be in conformity with the RECs, rather than in competition with them.

Ongoing negotiations on key tariff concessions

Currently there is no consensus on the tariff modalities to govern goods trade liberalization. Since the Kigali Summit in March 2018, divergences have increased, culminating in the African Ministers of Trade (AMOT) adding to the options on the table regarding the ultimate level of ambition, at their last AMOT meeting in Dakar in June 2018. The following issues are still to be decided:

- **Proportion of tariff lines to be designated as ‘sensitive’ or ‘excluded’:** Both the AfCFTA Negotiating Forum and the AMOT converged on several potential categorizations, shown below, but the Heads of State and Government, on the advice of the AfCFTA Champion⁹, recommended that full liberalization be considered, and referred this back to their officials for ensuing national and regional consultations. Since the officials were deadlocked, and the Ministers were not able to resolve it, it is not clear how this deadlock could be resolved in the months ahead, and particularly through the envisaged national and regional consultations. Nonetheless, Heads of State and Government are expected to take a final decision at the January 2019 Summit.
- **Criteria for designating products as sensitive or excluded:** Assuming that the sensitive/excluded products approach prevails, the criteria by which products would be so designated has not been agreed upon. Further technical work has therefore been mandated.
- **Anti-concentration clause:** Again, assuming that the sensitive/excluded products approach prevails, another outstanding issue is that of the proposed ‘anti-concentration clause’. Since intra-African trade

⁹ AfCFTA Champion statement to July 2018 Assembly of Heads of State and Government: ‘I would like to invite this Assembly to provide political guidance on this matter so that we do not delay the process of making the AfCFTA work. In making this statement I would like to draw your attention to the recent meeting of Trade Ministers in Dakar which ‘invites Summit to consider whether an exclusion and a sensitive list advances the continental objective of boosting intra Africa trade, industrialization and market integration’. In my view the exclusion list will frustrate the growth of intra-Africa trade and we should in this regard discourage it. We may however accommodate the sensitive list so that there is gradual process of liberalization over 10 years or so in order to allow Member States to institute appropriate adjustments. This approach is consistent with the existing practice in our Regional economic communities. Before I conclude this matter, let me also say that research by our strategic partners, the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Economic Community for Africa (UNECA), has demonstrated that our trade is concentrated in about 30 tariff lines. In this connection a 1% exclusion amounts to blocking trade in about 53 tariff lines. This has the effect of even reducing the existing levels of inter-Africa trade when our desire is to increase this trade. This will obviously undermine the objectives of the AfCFTA. If Summit agrees with my recommendations, these would then override the recommendation of the African Union Ministers of Trade which I referred to earlier where specifically Member States will be consulting on this matter up to the end of September this year.’

levels are low, the concern expressed by some State Parties is that even with a small exclusion basket a country could effectively exclude all imports from its African trading partners from liberalization. Hence, the anti-concentration clause would prevent this from happening, by obliging said country not to concentrate all its exclusions on particular sectors and products, in order to minimize this risk. However, State Parties are divided on how the corresponding anti-concentration formula could or should be constructed, with concerns being expressed that current options on the table are too complex and would be difficult to administer.

- **Customs Unions:** How tariff liberalization will be applied to LDCs and non-LDC counterparts within Customs Unions. Since it is already agreed that LDCs will have longer tariff phase down periods – 13 years for sensitive products versus 10 years for non-LDCs – it is apparent that this issue could be difficult to resolve.
- **Tariff levels:** The tariff level, in the tariff book, to which negotiations, and subsequent liberalization, would apply. State Parties implement different versions of the Harmonized System (HS), with some apparently not being Contracting Parties to the HS at all,¹⁰ so the first issue is to ensure that one system is used – and that requires a process around harmonization. In part related to this is the issue of on which level of the HS (likely to be 2017) negotiations should be conducted, with most parties apparently favouring using the HS at the 6-digit level.

Nonetheless some issues have been agreed:

- Tariff negotiations will be between Member States and Customs Unions or RECs that have no preferential trade arrangements between them;
- Member States' negotiations shall be undertaken confidentially until concluded; and
- Tariff phase downs shall be in equal instalments upon entry into force of the Agreement, with a period of five years envisaged for the initial basket of goods slated for liberalization (either 90% or 85%, depending on whether a group of seven countries (G7) view prevails – see below).¹¹

Modalities options currently under investigation: Consensus excluding the G7 view

Option 1: An initial level of liberalization of 90%

- No exclusions
- X% sensitive products

Option 2: An initial level of liberalization of 90%, with 3 potential pathways:

- 1% exclusion list; 9% sensitive
- 3% exclusion list; 7% sensitive
- 5% exclusion list; 5% sensitive

Modalities options currently under investigation: the G7 view

The G7 is arguing for greater flexibilities, and specifically that the final agreement should result in 85% liberalization, with the remaining 15% to be divided into a group of 'sensitive' and excluded baskets, the precise percentages of each to be determined. The remaining 48 Member States are agreed that the initial tariff cuts should result in reducing 90% of trade to zero, with opinion on the size of the sensitive/exclusion amounts divided. To complicate matters further, at their meeting on 3–4 June 2018, in Dakar, Senegal,

¹⁰ Examples include Equatorial Guinea, Gambia, Libya, Sahrawi Arab Democratic Republic, São Tomé and Príncipe, Seychelles, Somalia, South Sudan, Sudan, and Tunisia (WCO, 2018).

¹¹ Djibouti, Ethiopia, Madagascar, Malawi, Sudan, Zambia and Zimbabwe.

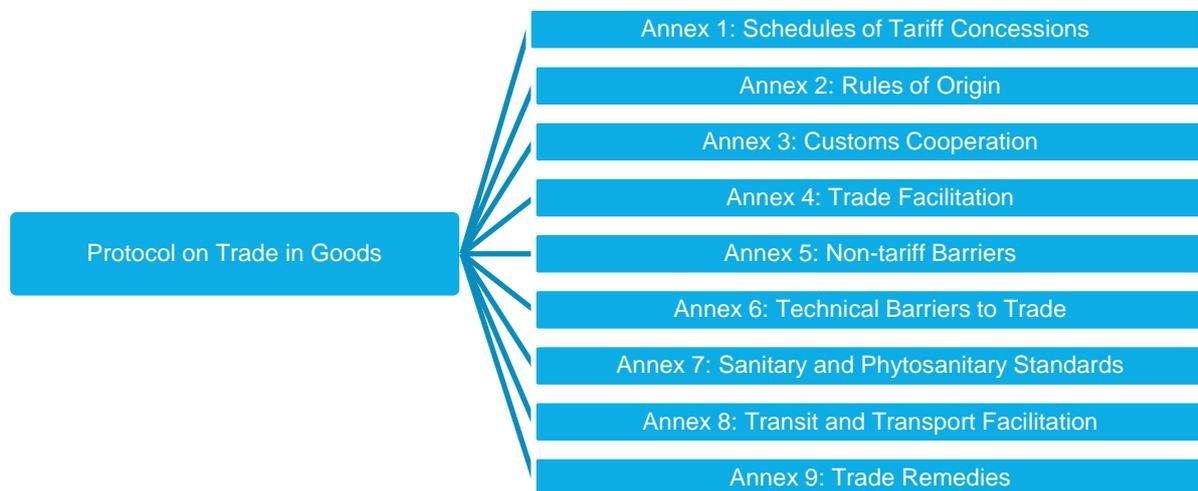
African Ministers of Trade (AMOT) have questioned the wisdom of having an exclusion basket, since a number of the RECs do not, and there are concerns that having one will undermine the shared goal of doubling intra-African trade.

These divergent positions have substantial implications for businesses wishing to access tariff concessions. Notable in this regard is that, by some estimates, excluding even 1% of intra-African imports from liberalization could result in no effective actual import liberalization, meaning the entire exercise could have been pointless. Therefore, how these debates are resolved is consequential for the AfCFTA project, and its outcomes should be closely monitored by companies seeking greater access to African markets.

Unpacking the Protocol

The Protocol consists of 32 Articles, covering a variety of subjects with implications for actual trade in goods, and nine Annexes, which are integral parts of the Protocol (Figure 2). Table 2 provides a comparative analysis of the Protocol and its Annexes with the WTO agreements on goods.

Figure 2 Protocol on Trade in Goods and its Annexes



Box 2 Architecture of the Protocol on Trade in Goods

Preamble

Sets out the background to the Protocol and the Member States' motivations in concluding it.

Part I: Definitions, Objectives and Scope

Defines key terms, restates key objectives in the main Agreement insofar as they related to trade in goods, and establishes the scope of the protocol, being trade in goods amongst the parties, and incorporating nine related annexes to the protocol.

Part II: Non-Discrimination

Reaffirms that Most-Favoured Nation Treatment, National Treatment, and Special and Differential Treatment will apply.

Part III: Liberalization of Trade

Scopes out the coverage of the Protocol: import duties; schedules of tariff concessions; quantitative restrictions; export duties; non-tariff barriers; and rules of origin.

Part IV: Custom Cooperation, Trade Facilitation and Transit

Affirms that these matters will be governed by the respective Annexes (3, 4 and 8).

Part V: Trade Remedies

Affirms that these matters (anti-dumping, countervailing duties, and safeguards) will be governed by Annex 9.

Part VI: Product Standards and Regulations

Affirms that technical barriers to trade, as well as sanitary and phytosanitary measures, will be governed by the respective Annexes (6 and 7).

Part VII: Complementary Policies (SEZs; II; STEs)

Establishes that the Parties policies concerning special economic zones will be subject to regulations to be developed by the Council of Ministers; infant industry protection may also be subject to implementation guidelines to be adopted by the same body; and established transparency (notification) obligations in respect of state trading enterprises.

Part VIII: Exceptions

These comprise three: General, such as for health and public safety; Security; and Balance of Payments.

Part IX: Technical Assistance, Capacity Building and Cooperation

Part X: Institutional Provisions

These cover consultation and dispute settlement; Implementation, Monitoring and Evaluation; and amendment of the Protocol.

Table 2 Comparison of the Protocol on Trade in Goods with WTO agreements on goods

AfCFTA	WTO Agreements	Comments
Protocol on Trade in Goods	General Agreement on Tariffs and Trade (GATT)	Similar in approach
Annex 1: Schedules of Tariff Concessions	Schedules of Concessions	Article II of GATT provides for Schedules of Concessions to be annexed to the Agreement. Similar in approach.
Annex 2: Rules of Origin	Agreement on Rules of Origin	No reference to WTO Agreement on Rules of Origin.
Annex 3: Customs Co-operation and Mutual Administrative Assistance	Articles VIII and X of GATT (Fees and Formalities, and Transparency), elaborated by the Agreement on Trade Facilitation	AfCFTA draws mainly from the Agreement on Trade Facilitation, with which it is aligned.
Annex 4: Trade Facilitation		
Annex 5: Non-Tariff Barriers		No WTO equivalents. Annex concerns the identification, categorization, monitoring and elimination of Non-Tariff Barriers.
Annex 6: Technical Barriers to Trade	Agreement on Technical Barriers to Trade	AfCFTA mainly a cooperation agreement based on WTO TBT Agreement.
Annex 7: Sanitary and Phytosanitary Measures	Agreement on the Application of Sanitary and Phytosanitary Measures	AfCFTA mainly a continental implementation agreement based on WTO Sanitary and Phytosanitary Agreement.
Annex 8: Transit	Article V of GATT (Transit), elaborated by the Agreement on Trade Facilitation	AfCFTA draws mainly from the Agreement on Trade Facilitation, with which it is aligned.
Annex 9: Trade Remedies	Agreement on Subsidies and Countervailing Measures Agreement on Safeguards Anti-Dumping Agreement ¹²	Reaffirms State Parties rights and obligations under the relevant WTO agreements and provides for how trade remedies will be pursued under the AfCFTA.

¹² WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

National treatment

A core principle underpinning the AfCFTA is that of national treatment (Article 5). Under this principle all State Parties to the AfCFTA (eight of which are not members of the WTO¹³) must treat products imported from other AfCFTA State Parties in the same way as they treat products produced domestically. This means that governments may not discriminate against imported products in the domestic market simply because they are imported.

The principle is *similar to the WTO GATT*, which states that ‘the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.’¹⁴

In the AfCFTA, the provision is drafted thus: ‘A State Party shall accord to products imported from other State Parties treatment no less favourable than that accorded to like domestic products of national origin, after the imported products have been cleared by customs. This treatment covers all measures affecting the sale and conditions for sale of such products in accordance with Article III of GATT 1994.’

It is important to appreciate, as the GATT recognizes, that imported goods first have to be cleared by customs, meaning that before they enter the domestic market other forms of discrimination, or entry conditions, may be applied. Most obviously this could entail import duties, since State Parties are still free to decide which products will be subjected to tariff liberalization (Annex 1 on Schedules of Tariff Concessions), but it also maintains a State Party’s right to prevent imports should they constitute a designated risk, for example health or technical standards (Annex 6 on Technical Barriers to Trade; Annex 7 on Sanitary and Phytosanitary measures), or not meet value addition requirements to be agreed under Annex 2 on Rules of Origin.

An important caveat to these exceptions, which gets to the heart of national treatment, is that governments should not impose arbitrary non-tariff barriers (NTBs) that unfairly discriminate against imports. Accordingly, Annex 5 on Non-Tariff Barriers was established to regulate these potential barriers.

Liberalization of trade - eliminating tariffs

The key provision relating to liberalization of trade concerns the provision (Article 7) obligating State Parties to ‘progressively eliminate’ import duties or charges having equivalent effect on goods originating from the territory of any other State Party in accordance with their Schedules of Tariff Concessions, which will be attached to the Protocol under Annex 1 and will become an integral part of the Protocol.

In these Schedules, State Parties are required to set out the products to be subject to liberalization and the import duties that will be applied to those products that are not fully liberalized. State Parties are committed to apply preferential tariffs to imports from other State Parties in accordance with its Schedule of Tariff Concessions, which are to be in conformity with the adopted tariff modalities.

The Schedules of Tariff Concessions, the adopted tariff modalities and outstanding work on tariff modalities to be negotiated and adopted, are to be an integral part of this Protocol (Article 8). The Protocol allows for certain exceptions, notably those goods subject to trade remedies¹⁵, which are governed by Annex 9 on Trade Remedies. It also allows for State Parties to modify their schedules of tariff concessions, but only if they maintain ‘a general level of commitments not less favourable than the initial commitments’ (Article 11). This will ensure no backsliding on liberalization commitments, although the balance of concessions can vary

¹³ Algeria, Equatorial Guinea, Eritrea, Ethiopia, Libya, Somalia, South Sudan, and Sudan. All except Eritrea and South Sudan are observer states that are negotiating their accession.

¹⁴ The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

¹⁵ These are perhaps better known as ‘trade defence’ instruments, encompassing anti-dumping and countervailing duties, as well as safeguard duties. These can be imposed by Parties after a proper investigation has been conducted, in cases where unfair or highly disruptive trade is suspected.

over time. It should be noted, however, that the procedures and methods for arriving at judgements of whether the overall balance of concessions has been maintained are not specified.

The Schedules of Tariff Concessions under Annex 1 are still under negotiation. The core issue is how ambitious the final tariff liberalization deal will be, or the 'modalities' governing liberalization. There are several issues wrapped up in the modalities debate:

- How much intra-African trade will be subjected to tariff liberalization, and/or tariff cuts;
- Whether the measurement of ensuing liberalization will be determined on the basis of the number of tariff lines in a to be agreed tariff book, or the actual trade over a yet to be agreed base period;
- Whether the tariff book to which liberalization will be applied is the HS 2017, or a previous version, since a number of Parties have not yet converted their tariff books to HS 2017;
- How much, if any, trade will be excluded from liberalization, either temporarily or completely;
- The extent to which Member States will be able to 'concentrate' tariff exclusions, whether temporary or permanent, on key sectors and products;
- The timing of tariff cuts, particularly insofar as this relates to LDCs versus non-LDCs; and
- The sequencing of tariff cuts.

Clearly much still remains on the table. All this needs to be resolved before the end of 2018, since African Heads of State and Government expect to adopt Annex 1 at their next Summit, which will take place in the first quarter of 2019.

Central to understanding this debate is Article 6 of the Protocol on Trade in Goods, concerning Special and Differential Treatment. This allows for State Parties that have different levels of development, and/or have been accorded 'individual specificities' by the other State Parties, to deviate from the tariff liberalization modalities.

Quantitative restrictions (quotas)

The Protocol enjoins State Parties not to impose quantitative import restrictions, except where relevant WTO agreements can be invoked as well as provisions of the AfCFTA (Article 9); and provides for State Parties to impose export duties, which must be notified to the AfCFTA Secretariat (Article 10). The Protocol essentially enforces the status quo ante, since some Member States do impose quantitative import restrictions, and/or export duties.

Rules of origin

In addition to the uncertainty over the ultimate tariff liberalization package, businesses will need to be clear on the rules of origin applicable to tariff concessions.

Rules of origin govern companies' access to the concessions available under preferential trade agreements. Their purpose is to ensure that prescribed minimum levels of value addition take place with the preference 'zone', in this case AfCFTA State Parties. A related purpose is to prevent product transshipments through the zone, by companies not conducting substantial economic activities in the zone.

Every preferential trade agreement has an underlying philosophy concerning its rules of origin. Put simply, this oscillates between flexible and strict criteria, with the latter generally requiring more complex specification and adherence procedures. Since African states, generally speaking, have relatively weaker institutional capacities to monitor and enforce complex rules of origin, the approach has been to apply more flexible rules. However, this is not the case in Southern Africa, where a strict approach prevails under SADC's FTA. At the time of writing this tension had not been resolved.

The detailed rules at the AfCFTA level are contained in Annex 2. This Annex contains many detailed prescriptions concerning which products can qualify for originating status, and why, extending to the methods

by which they are produced, domestically, regionally, and using international inputs. There is too much detail to summarize in this guide, so businesses are referred to the Annex for clarity, and should seek advice from specialists in the field. Broadly, though, they can be divided into two categories:

- Wholly obtained, meaning entirely produced (Article 5 of Annex 2). Included here are natural products, secondhand and scrap goods;
- Sufficiently worked or processed (Article 6 of Annex 2), meaning sufficient value has been added to them, according to criteria still being negotiated.

The Annex elucidates when a product will not be conferred originating status (Article 7). The intention is to ensure that 'real' value is added, and so a range of simple processes such as washing parts, painting them, peeling vegetables, etc are specifically excluded. Intra-State Parties' trade automatically qualifies for originating status, as per Article 8, with the attribution of origin to the State where final manufacturing takes place (unless that stage is disqualified as per Article 7).

Goods produced in Special Economic Zones (SEZs) are dealt with in Article 9. This article needs to be read in conjunction with Article 23(2) of the Protocol on Trade in Goods, which leaves open the possibility that the Council of Ministers may still develop specific regulations to govern trade in such goods. At this stage, though, products produced in SEZs within State Parties will qualify for conferral of origin subject to all the other provisions of Annex 2.

Annex 2 also covers a number of technical issues pertaining to:

- The way in which goods cross borders, for example in containers, whether separated from essential materials or not;
- The spare parts and tools that ordinarily accompany a product, 'sets'¹⁶ of goods; and
- 'Neutral elements' that may be necessary to use (e.g. machinery) or consume (e.g. energy) in the production of a product but should not be considered in determination of origin.

Part III of Annex 2 deals with proof of origin. It allows for two forms of certification: official, and exporter declarations;¹⁷ in both cases the qualifying text must provide sufficient detail about the product(s) to enable authorities in the importing state to determine the validity of the origin claim. Designated Competent Authorities in all State Parties are empowered to review and revoke origin certificates. The Annex also covers a number of issues pertaining to the certificates themselves, such as what happens if a replacement (Article 26) or duplicate certificate (Article 25) is needed, and the treatment of goods in transit (Article 24).

Three special cases are also addressed:

- Personal effects (Article 28), which below specified monetary thresholds are exempted from origin requirements;
- Goods for display at Fairs or Exhibitions (Article 29), wherein goods imported specifically for display at a general event, and under the control of the Customs Authority, may be sold at the event; and
- Goods shipped through another State Party's territory, i.e. in transit (Article 30).

The final part of the Annex covers the documentary requirements for certificates of origin. This is relevant to Part IV, covering administrative cooperation amongst the Designated Competent Authorities in State Parties. Article 36 is particularly relevant to businesses since it governs how disputes over origin status will be

¹⁶ Some products are made up of several components or sub-products, or materials which, collectively, constitute a 'set'. Each discrete component can be traded separately, making conferral of origin status difficult. Hence Article 14(2) provides a prescription that the value of non-originating products may not exceed 15% of the Ex-Works price of the set.

¹⁷ This draws a distinction between 'Approved Exporters', i.e. those that export frequently and participate in other State Parties' Authorized Economic Operator schemes, and any others exporting product(s) up to \$5,000 worth.

handled, largely by deferring to the Exporting State Party's Designated Competent Authority to conduct verification checks, within a six-month window.

Finally, and crucially, it is important to note that the precise rules of origin (value addition thresholds subdivided into general and product-specific criteria) are, at the time of writing, still under negotiation, and will constitute Appendix IV of Annex 2. Only once these are adopted could the AfCFTA tariff preferences be operationalized and be meaningfully relevant to businesses.

Custom cooperation, trade facilitation and transit

Part IV of the Protocol focuses on measures and arrangements for the management of trade in goods by customs authorities, but the detail is contained in Annexes (explained in Chapter 3) as follows:

- Customs cooperation and mutual administrative assistance (Article 14 and Annex 3);
- Implementation of trade facilitation (Article 15 and Annex 4); and
- Transit (Article 16 and Annex 10).

Trade remedies

Part V of the Protocol concerns trade remedies and is linked to Annex 9. Trade remedies are best thought of as defence instruments, being import duties. They are invoked to address serious disruptions to domestic industries arising from predatory pricing by companies in partner countries, or illegal subsidies in those countries, or generalized surges of imports. In all cases proper economic assessments must be carried out prior to application of the duties concerned, by a properly designated and responsible authority, and result in a finding of injury to domestic producers.

Accordingly, Annex 9 sets out the circumstances in which such measures can be taken and the processes that govern their application (Articles 4–9). They draw extensively on the WTO agreements governing trade remedies, since most AfCFTA State Parties do not have institutional and legislative structures, and hence any experience with operating trade remedies. Articles 11 and 12 recognize these capacity shortcomings and cover technical assistance, as well as capacity building and cooperation, respectively. In recognition of these needs and lack of experience with implementing trade remedies, Article 14 enjoins State Parties to adopt Guidelines on Implementation of Trade Remedies, which are being separately developed.

Annex 9 is of consequence to business, since trade remedies can be used to deny market access benefits, whether warranted or not. Companies need to be cognisant of the view destination countries' implementing institutions may take of imports into their markets, and how domestic competitors may respond to such imports, particularly by lodging applications for protection through imposition of trade remedies. Since most African states have no experience in these matters, it is likely that as the institutions begin to spread through the continent they will interpret and implement Annex 9 and its associated Guidelines quite differently, potentially creating an additional layer of complexity and uncertainty for exporters. Import-competing companies, on the other hand, may feel a measure of relief is available to them regarding 'unfair competition'. Much depends on how the agreements are interpreted and applied, and the efficiencies thereof.

Non-tariff barriers

Part VI of the Protocol, and the related Annexes, concerns two areas of standards that constitute non-tariff barriers:

- Technical barriers to trade (Article 14 and Annex 6); and
- Sanitary and phytosanitary measures (Article 15 and Annex 7).

Annex 6 on technical barriers to trade (TBTs) adopts the WTO definition, incorporating standardization, technical regulations, conformity assessment procedures, accreditation, and metrology (Article 2(2)), and confirms that the WTO TBT Agreement forms the basis for the Annex (Article 3(1)), meaning that AfCFTA Member States that are non-WTO Members have adopted the WTO TBT Agreement by reference. Articles 4–12 essentially affirm this overarching legal structure, enjoining State Parties to adhere to and implement

WTO and other relevant international standards where they exist, and African cooperative mechanisms in order to pursue development of standards where none exist, with a view to establishing such at the multilateral level. Article 13 establishes the Sub-Committee for TBT, reporting to the Committee on Trade in Goods, the purpose of which is to oversee implementation of the Annex as well as to promote cooperation amongst the State Parties on matters pertaining to TBT, whether at AfCFTA or multilateral levels.

Annex 7 deals with sanitary and phytosanitary measures (SPS). It also incorporates WTO law by reference, and subordinates State Parties to other key international agreements, notably concerning designation of disease free regions within their territories (listed in Article 1(2)). Article 5 strikes a pragmatic tone, in framing how State Parties should approach the sometimes-tricky issue of risk assessments to determine the appropriate levels of SPS protection for specific products. In essence it favours a science-based approach, drawing on international agreements as appropriate, but allowing for a degree of precaution when international precedents and/or scientific data is not available. This leaves open the possibility that some states may seek to use SPS measures to protect local producers, in which case aggrieved parties still have access to the NTB Mechanism covered in Annex 5 (see below).

Furthermore, Article 12 provides for aggrieved State Parties to request technical consultations with the other State Party, which must respond within 30 days. It also provides in Article 12(4) for the matter to be referred to the SPS sub-committee (provided for in Article 15 and reporting to the Committee for Trade in Goods) for consideration, meaning an alternate channel to the NTB Mechanism is available. Article 13 provides for an expedited emergency SPS procedure, wherein only 48 hours need be provided by the implementing Party to its trading partners. Should this lead to a request for technical consultations, those should be held within 10 working days of the notification.

The Protocol also provides for a mechanism for identification, categorization, monitoring and elimination of NTBs (Article 12 and Annex 5). Annex 5 recognizes at the outset (Article 3) that NTBs can take many forms, including TBTs and SPS measures, as well as customs regulations and procedures (see Chapter 3). Accordingly, Appendix 1 of Annex 5 contains a general categorization of NTBs. The Annex also provides for the following institutional framework intended to identify, report on, resolve, monitor, and eliminate NTBs in parties to the AfCFTA (Articles 4–10):

- At the AfCFTA level, a Sub-Committee on NTBs comprised of representatives from the State Parties;
- In the Secretariat, an NTB Coordination Unit;
- In the State Parties, National Monitoring Committees including private and public sector representatives, and National Focal Points whose role is to manage implementation of the agreement in relation to NTBs and report on said implementation; and
- RECs NTB monitoring mechanisms, to be established where these do not already exist, and which are enjoined to cooperate with the AfCFTA structures established under Annex 5.

The procedures governing this institutional structure are set out in Appendix 2 of Annex 5 and are referred to as the 'mechanism'. Article 12(4) is notable, as it clearly states that the mechanism will only deal with NTBs that the 'RECs are not able to resolve, are inter-REC in nature, or arise from State Parties that are not members of any REC.' This affirms the value-adding potential of the AfCFTA.

Article 13 charges the State Parties to prepare time-bound NTBs elimination plans, or matrices, prioritized according to potential impacts on intra-African trade. Article 14 enjoins the NTB Coordination Unit to circulate quarterly reports, or status updates on NTBs elimination.

However, Annex 5 is silent on how the NTBs mechanism will relate to the two sub-committees established under Annexes 6 and 7. This carries the danger of forum-shopping, although from the standpoint of companies wishing to have specific issues resolved, having more forums available means that the most effective channel can be pursued, and minimizes the danger of bottlenecks should only one be available.

Complementary policies

Part VII addresses 'Complementary Policies' including Special Economic Arrangements/Zones (Article 23); Infant Industries (Article 24); and State Trading Enterprises (Article 25). Since these institutional arrangements can have substantial impacts on the actual conduct of business in host markets, as well as the competitiveness of Parties' exports, the intention is to introduce regulations to govern how those arrangements will operate in practice, as well as to ensure greater transparency in their operations.

Exceptions

Part VIII contains standard exceptions to the Protocol on Goods and are framed in line with the general exceptions provisions of the WTO (GATT Article XX). The general exception provisions are required to cover certain circumstances, such as a State Parties' right not to import the products of prison labour or products that may compromise public safety or morals, to afford State Parties the right to restrict imports if deemed essential for national security, and for balance of payments reasons. They can also be considered 'safety valves' in the event of a State Party experiencing severe economic problems linked to goods imports. Another way of thinking about them is that they provide the State Parties with 'policy space' to deviate from the provisions of the AfCFTA under certain circumstances.

Since the exceptions are broadly framed, it is important for business to be aware of them and to monitor the political economy circumstances of potential markets in which they may be applied, since they could prove quite disruptive to the conduct of trade and investment. Nonetheless, invocation, as is the case with the WTO, is likely to be the exception rather than the norm, not least because other Parties can do the same, potentially leading to the AfCFTA being ineffective.

CHAPTER 3 FACILITATING TRADE IN GOODS

This chapter outlines the annexes of the AfCFTA that deal with the implementation of the provisions on trade in goods by customs and other border agencies. This separate section reflects the fact that similar provisions are contained in a separate WTO Agreement on Trade Facilitation (TFA), which was adopted at the WTO's Bali Ministerial Conference in 2013 and entered into force in 2017. The WTO TFA is elaborated in Articles V, VIII and X of the GATT.¹⁸

There are three relevant Annexes to the Protocol on Trade in Goods:

1. Annex 3 (Customs Cooperation and Mutual Administrative Assistance)
2. Annex 4 (Trade Facilitation)
3. Annex 8 (Transit)

Framework for harmonization of customs laws and procedures (Annex 3)

Annex 3 (Customs Cooperation and Mutual Administrative Assistance) provides a framework for simplification and harmonization of customs laws and procedures at the continental level using international standards derived from the World Customs Organization (WCO) and WTO.

First, it requires Member States to apply the WCO Convention on the Harmonized Commodity Description and Coding System (HS, as amended) as the basis for classification of goods in the national tariffs. Second, it requires harmonization of laws, regulations and practices based on the Agreement on Implementation of Article VII of the GATT (Agreement on Customs Valuation, 1994). Third, simplification and harmonization of customs procedures is to be based on the WCO's Revised International Convention for the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention, 2004). Finally, exchange of information among customs administrations for the purpose of prevention, investigation and suppression of Customs offences is to be carried out based on protocols derived from the WCO's International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Suppression of Customs Offences (Nairobi Convention, 1977). This is also consistent with Article 12 of the TFA.

Trade facilitation (Annex 4)

The substantive provisions of Annex 4 (Trade Facilitation) are clearly based on the text of the TFA. For example, Article 1 of the TFA requires that 'Each Member shall promptly publish the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders, and other interested parties to become acquainted with them...' followed by a list of required information to be published including import, export and transit procedures; applied rates of duties and taxes; import, export or transit restrictions or prohibitions etc. In the AfCFTA Annex, Article 4, paragraph 1 of Annex 4 (Publication) provides that 'Each State Party shall to the extent possible promptly publish on the internet the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders and other interested State Parties to become acquainted with them...' followed by a list that is substantially the same as that provided in Article 1 of the TFA.

These two texts are similar, but not identical, and lead to different legal obligations. While the TFA text makes the publication of the listed information mandatory, the text in AfCFTA Annex 4 obliges State Parties to publish such information *on the internet* depending on their ability ('best endeavour' in WTO language).

This compromise language reflects the fact that the TFA presents not only potential benefits, but also significant challenges for Africa (Batibonak, 2017). In October 2013, prior to the adoption of the TFA, African

¹⁸ International Trade Centre. 2013. *WTO Trade Facilitation Agreement - A business guide for developing countries*, available at <http://www.intracen.org/wto-trade-facilitation-agreement-business-guide-for-developing-countries/>.

Ministers of Trade reaffirmed ‘the importance of trade facilitation where our priorities include enhancing infrastructure and boosting productive and trade capacities, in addition to reducing transport costs, barriers, incentivizing the undertaking of reforms and improvements to the customs regulatory systems as well as boosting intra-African trade’ (African Union, 2013).

These challenges are reflected in this text, where the ‘hard’ issues of infrastructure are presented together with the ‘soft’ issues that are at the core of the TFA although the anticipated assistance from developed countries for implementation of the TFA does not include financing infrastructure (Batibonak, 2017). For AU Member States that are also WTO Members, they needed to ensure that they did not make commitments at the AfCFTA that go beyond their commitments at the WTO, hence the compromise language.

In contrast, the draft text on Enquiry Points in Annex 4 (Article 1 paragraph 3 of the TFA) uses mandatory language (‘Each State Party shall establish and maintain ...’) in contrast to the TFA which qualifies the obligation with the words ‘within its available resources’. Other articles are lifted almost verbatim from the TFA, with the same legal obligations. These include articles on Advance Rulings (Article 3 of the TFA), Procedures for Appeal or Review (Article 4), Fees, Charges and Penalties (Article 7), Pre-Arrival Processing (Article 7 paragraph 1), Separation of Release from Final Clearance (Article 7 paragraph 3), Electronic Payments (Article 7 paragraph 2), Time Release Studies (Article 7 paragraph 6), Risk Management and Post-Clearance Audit (Article 7 paragraphs 4 and 5), Authorized Operators (Article 7 paragraph 7), Expedited Shipments (Article 7 paragraph 8), Perishable Goods (Article 7 paragraph 9), Border Agency Cooperation (Article 8), Use of International Standards (Article 10 paragraph 3), Single Window (Article 10 paragraph 4), Pre-Shipment Inspection (Article 10 paragraph 5), Use of Customs Brokers (Article 10 paragraph 6), and Freedom of Transit (Article 11).

More interesting are the absence of provisions that are in the TFA text but omitted from Annex 4 (at least in the latest draft). These include Notification Requirements (in Article 1 paragraphs 1.1 and 4), Opportunity to Comment, Information before Entry into Force and Consultations (Article 2), Other Measures to enhance Impartiality, Non-Discrimination and Transparency such as notices for enhanced controls and inspections, detention and test procedures (Article 5), Rejected Goods (Article 10 paragraph 8) and Temporary Importation, Inward and Outward Processing (Article 10 paragraph 9). Finally, Special and Differential Treatment (SDT) is one of the principles specified in Article 5 of the AfCFTA Agreement, therefore applies to the Annex (although this is not specified in the Annex).

Transporting goods (Annex 8)

Annex 8 on Transit is based on the Transports Internationaux Routiers (TIR) Convention (1975). For example, definitions of the term ‘container’ in both Annex 10 and in the TIR Convention are similar, though not identical. This also applies for definitions of the terms ‘Customs Office of destination,’ ‘Customs Office of departure,’ ‘Customs Office of entry,’ ‘Customs transit,’ etc. Instead of the TIR Carnet provided in the TIR Convention as a requirement for the provisions to cover transport of goods in transit, the Annex makes provision for the African Union Transit Document.

The carriers must be licensed, the means of transport approved by customs, and the transport must be guaranteed by a surety – all these are requirements for transit transport under the TIR Convention. As at 22 May 2018, there were 74 Contracting Parties to the TIR Convention, including four from Africa – namely Algeria, Liberia, Morocco, and Tunisia. However, the provisions of the convention are included in the protocols covering transit issues in the EAC, COMESA, ECOWAS and SADC.

Protocol relating to Free Movement of Persons

In parallel with the adoption of the AfCFTA, a separate Protocol to the Abuja Treaty relating to the Free Movement of Persons, Right of Residence and Right of Establishment was adopted and opened for signature at the same time as the Establishment of the AfCFTA. This Protocol is considered in more detail in Chapter 6. However, it is mentioned now because it contains provisions that are relevant to customs and trade facilitation. Specifically, Article 8 of the Protocol provides that:

- Member States shall designate and share with other Member States information relating to their official entry and exit points or ports.

- Member States shall in line with national or regional procedures keep the designated official entry and exit points open to facilitate the free movement of persons, subject to reciprocity and the protection measures a Member State may take.

Article 8 is consistent with Standard 3.1 of the WCO Revised International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention, 1999) which states that 'The Customs shall designate the Customs offices at which goods may be produced or cleared. In determining the competence and location of these offices and their hours of business, the factors to be taken into account shall include in particular the requirements of the trade.' Similarly, the requirement for cross-border inter-governmental cooperation and controls in border management is provided in Articles 12 and 25 of the Free Movement Protocol, which are consistent with Transitional Standards 3.4 and 3.5 of the Revised Kyoto Convention.

CHAPTER 4 PROTOCOL ON TRADE IN SERVICES

Chapter 4 summarizes the key provisions, objectives and progress of negotiations of the Protocol on Trade in Services, noting that the service sector in Africa is very important, given that it can account for over 50% of GDP in many countries. However, the level of trade in services remains low in Africa.

It may be helpful to first set out an understanding of what services are. There used to be a very simple rule for defining services as 'anything that you cannot drop on your foot' (McKinnon, 2014). This was probably intended to mean that trade principally comprises goods, services and agricultural products; and services are anything that is not a good (goods including both agricultural and industrial products). The reality is more complex. Intangible (or invisible) trade also covers broader items such as foreign direct investment (which can relate to goods as well as services), intellectual property rights and royalties (which are received as exports from selling a country's services abroad).

Wolak, Kalafatis and Harris (1998) suggest that services can be defined by four characteristics:

1. Intangible – 'anything that you cannot drop on your foot' – as described above;
2. Inseparable – simultaneous delivery and consumption, often with the supplier and consumer both present (even via the Internet), which enables consumers to affect or shape the performance and quality of the service;
3. Heterogeneous – high variability in service delivery, which can allow a degree of flexibility and customization that can give businesses a real advantage over competitors;
4. Perishable – although they can be pre-ordered, services cannot be stored and carried forward to a future time period, which makes them 'time dependent' and very perishable (with no need for inventory management as there is with the supply of goods).

Various international organizations define services differently. Not even the WTO has a definition of what constitutes a service. Rather, it defines 'trade in services' as the supply of a service by one of four 'modes of supply' (see Table 4 below).

In considering services that could form the basis of a multilateral trade agreement, the WTO adopted a sectoral classification used by members as the basis for their sector specific commitments under the GATS. This classification, commonly referred to as 'W/120' from the WTO document reference number¹⁹, is a useful reference point, as it is also used as the basis for trade in services commitments under many trade agreements. It includes the following broad categories of services:

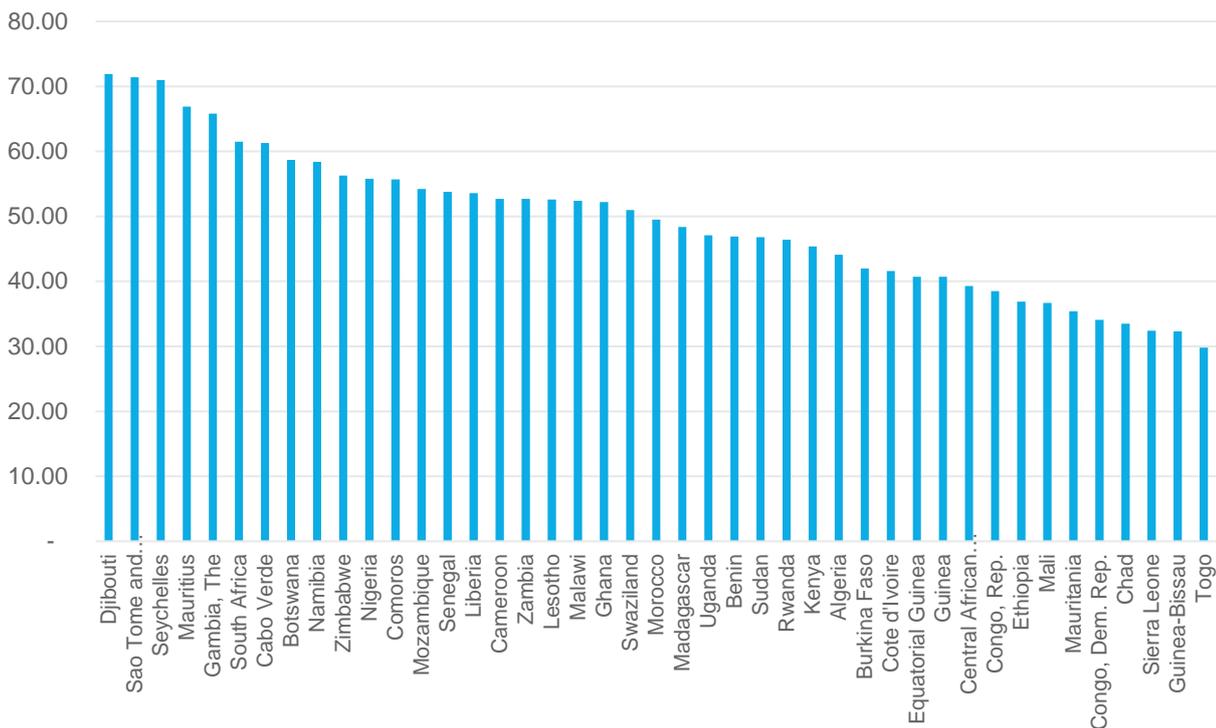
- Business services (including professional and ICT services)
- Communication services (including audio-visual services)
- Construction services
- Distribution services
- Educational services
- Environmental services
- Financial services
- Health and social services
- Recreational, sporting and cultural services
- Tourism services
- Transport services
- Other services

¹⁹ World Trade Organization. 1991. Services Sectoral Classification List, available at https://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc.

High economic value of services in Africa

In measuring economic output, the World Bank accounts for services as any activity that does not fall under agriculture, industry or manufacturing. As Figure 3 illustrates, the services sector represents at least 50% of GDP in many African countries (average 53.2% in sub-Saharan Africa), and more than 70% in some economies such as Seychelles, Sao Tome and Principe and Djibouti. The World Bank Group (Saez, McKenna and Hoffman) note that in Africa, while agriculture's share of GDP has declined and manufacturing has stagnated, services are increasing as a share of total employment and GDP, driving value addition and providing critical inputs to boost other economic activities.

Figure 3 Value of services as % of GDP in African countries, 2017

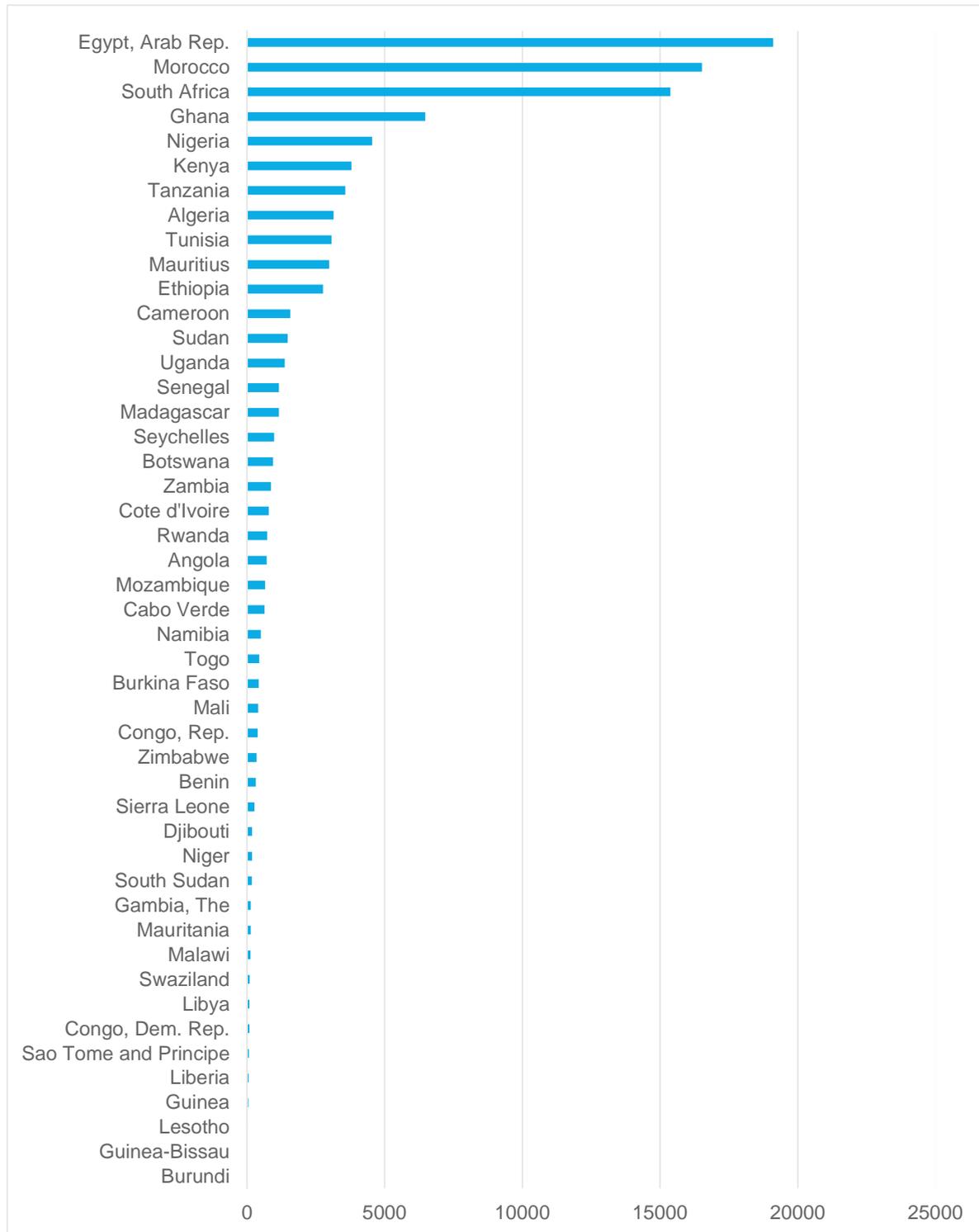


Source: World Development Indicators, 2018.

Intra-African trade in services remains low

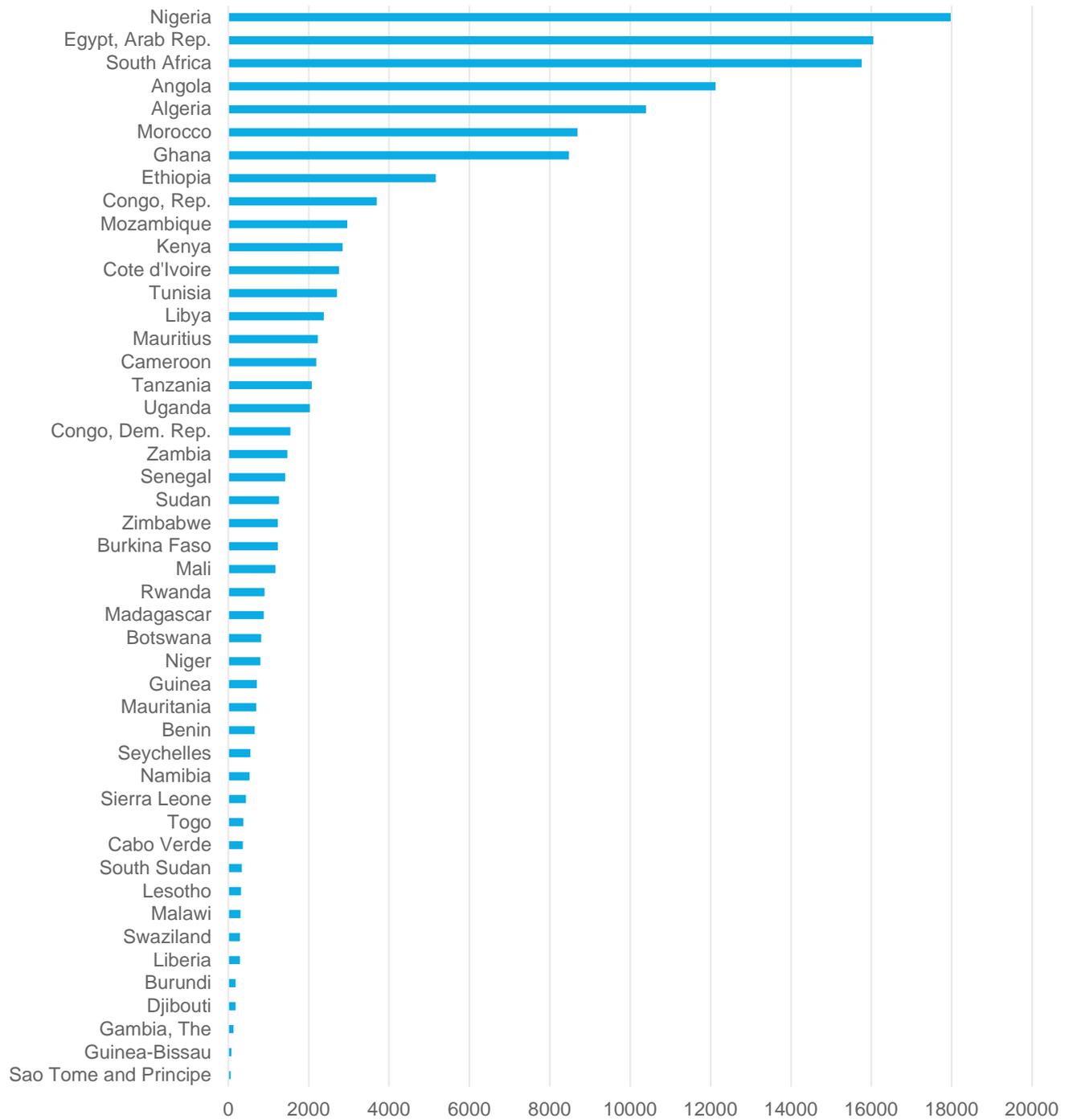
Having said that, the level of trade in services enjoyed by AU Member States is low. Given the lack of reliable trade data, it is not possible to present an accurate picture of African trade in services at an intra-regional level. However, global trade data compiled by the World Bank provided indications of the relative size of export and import trade in services by individual AU Member States. Figures 4 and 5 show that in 2017 the largest exporters of trade in services in Africa by value of global trade were Egypt, Morocco, South Africa, Ghana and Nigeria, while the largest importers were Nigeria, Egypt, South Africa, Angola and Algeria.

Figure 4 Commercial service exports, 2017 (\$ million)



Source: World Development Indicators, 2018.

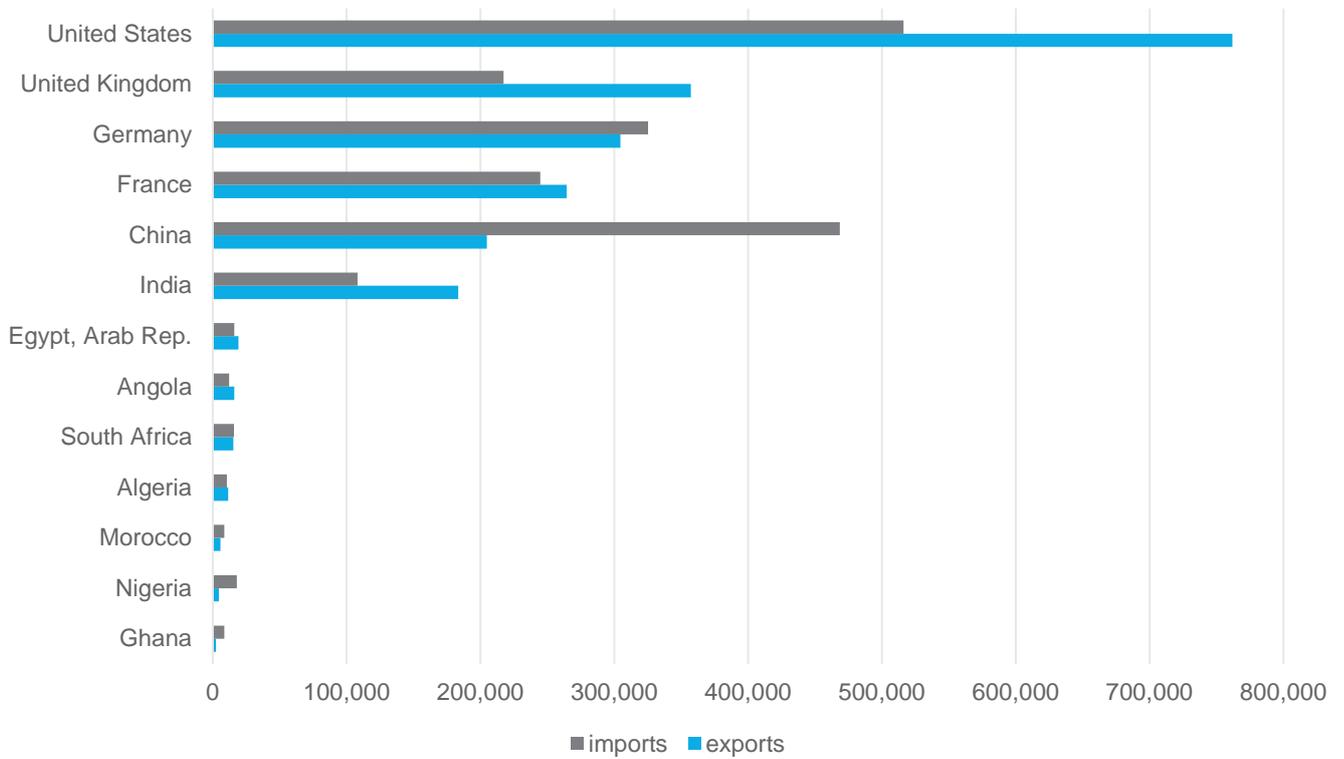
Figure 5 Commercial service imports, 2017 (\$ million)



Source: World Development Indicators, 2018.

By comparison with other countries, however, the value of global services exports of Egypt, Africa’s largest exporter of services, is still insignificant when compared with the value of trade in services by leading developed and developing countries.

Figure 6 Commercial trade in services – largest African countries compared with leading global trading countries, 2017 (£ million)



Source: World Development Indicators, 2018.

Alignment with WTO GATS approach

In this section the content of the AfCFTA Protocol is compared with similar provisions in the WTO General Agreement on Trade in Services (GATS), highlighting both the similarities and the differences. As the Protocol is based on the structure, principles and obligations set out in the WTO GATS, there are strong parallels between both agreements.

Table 3 Structure of AfCFTA Protocol on Trade in Services compared with GATS

AfCFTA			Correlation with GATS		
Part	Title	Articles	Part	Title	Articles
I	Definitions	1	I	Scope and definitions	I - III
II	Scope of application	2			
III	Objectives	3		N/A	N/A
IV	General obligations and disciplines	4 - 17	II	General obligations and disciplines	IV - XV
V	Progressive liberalization	18 - 24	III	Specific commitments	XVI - XVIII
			IV	Progressive liberalization	XIX - XXI
VI	Institutional provisions	25 - 29	V	Institutional provisions	XXII - XXVI
			VI	Final provisions	XXVII - XXIX

Definitions and scope of application

The definitions (Article 1) are taken from the GATS almost word for word and incorporated virtually without change.

On scope (Article 2), the following four areas are identical, or virtually identical, to GATS:

- **Measures taken at all levels of government that affect trade in services:** The Protocol applies to 'measures affecting trade in services'. Measures are all laws, regulations, administrative actions and other measures taken by governments at central, regional and local levels.
- **Services supplied in the exercise of governmental authority:** Services supplied by governments or under governmental authority are excluded if they are supplied neither on a commercial basis, nor in competition with one or more service suppliers. The aim is to exclude what some countries refer to as 'public services' and others such as the EU refer to as 'services of general economic interest'.²⁰
- **Air services:** The Protocol applies to all services, except for measures affecting air traffic rights, however granted, and services directly related to the exercise of air traffic rights. This is because, as in the GATS, measures affecting air traffic rights are addressed in countries' air services agreements. However, the

²⁰ European Commission. Services of General Economic Interest, available at http://ec.europa.eu/competition/state_aid/overview/public_services_en.html.

Protocol does apply to measures affecting aircraft repair and maintenance services; the selling and marketing of air transport services; and computer reservation system services.

- **Government procurement:** The Protocol does not apply to procurement by governmental agencies purchased for governmental purposes and not with a view to commercial re-sale.

Modes of supply

There is no definition of a service, but as in the GATS agreement 'trade in services' is defined as the supply of a service through what are commonly referred to as 'modes of supply'. These are not the way that service suppliers think about their businesses. The purpose is to help to classify trade barriers affecting market access (the ability of services and service suppliers to enter the market) and national treatment (the treatment of foreign services and service suppliers compared with domestic services and service suppliers).

The four modes of supply are defined in exactly the same way as in the GATS (Table 4).

Table 4 Modes of supply of services

Mode of supply	Short description	AfCFTA definition	Example
Mode 1	Cross-border supply	From the territory of one Member into the territory of any other Member.	Online services supplied via the Internet (e.g. e-commerce) by a supplier in Country A to a consumer in Country B.
Mode 2	Consumption abroad	In the territory of one Member to the service consumer of any other Member.	Hotel in Country B providing services to a visiting citizen from Country A. Note: Any limitations on the freedom to provide services are placed by the country of the <u>consumer</u> to prevent the consumer from seeking services in Country A (e.g. a requirement to obtain insurance domestically, due to the prudential objective of ensuring that insurance is obtained where the risk is located).
Mode 3	Commercial presence	By a service supplier of one Member, through commercial presence in the territory of any other Member.	Bank in Country A setting up a branch, subsidiary or joint venture in Country B.
Mode 4	Movement of natural persons	By a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.	Bank manager of bank in Country A moving temporarily to Country B to set up or run its branch office, subsidiary or joint venture.

Box 3 Objectives of the Protocol on Trade in Services (Article 3)

The objectives of the Protocol on Trade in Services (Article 3) build on those in the overarching Agreement Establishing the AfCFTA referred to above, namely to:

- enhance competitiveness of services through: economies of scale, reduced business costs, enhanced continental market access, and an improved allocation of resources including the development of trade-related infrastructure;
- promote sustainable development in accordance with the Sustainable Development Goals (SDGs);
- foster domestic and foreign investment;
- accelerate efforts on industrial development to promote the development of regional value chains;
- progressively liberalize trade in services across the African continent on the basis of equity, balance and mutual benefit, by eliminating barriers to trade in services;
- ensure consistency and complementarity between liberalization of trade in services and the various Annexes in specific services sectors;
- pursue services trade liberalization in line with Article V of the GATS by expanding the depth and scope of liberalization and increasing, improving and developing the export of services, while fully preserving the right to regulate and to introduce new regulations;
- promote and enhance common understanding and cooperation in trade in services amongst State Parties in order to improve the capacity, efficiency and competitiveness of their services markets; and
- promote research and technological advancement in the field of services to accelerate economic and social development.

Outlining general obligations and disciplines

The general obligations and disciplines, which are to be followed by all State Parties to the AfCFTA, largely follow a GATS approach (Articles 4–17).

Most-favoured nation (MFN) treatment

The key obligation is that of most-favoured nation (MFN) treatment (Article 4). As with the Protocol on Trade in Goods, the aim is to extend preferences between State Parties on the African continent. Thus, 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. (A third country is any country that is not party to an agreement between two other countries.) The essential MFN obligation is the same as the GATS. However, Article 4 also provides for treatment in relation to pre-existing and new preferential agreements.

With pre-existing preferences, the Protocol recognizes that a State Party shall not be obliged 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. However, the State Party may afford opportunity to the other State Parties to negotiate the preferences granted therein, so long as this is on a reciprocal basis.

With regard to new preferential agreements, the Protocol provides that any State Party may enter into a new such type of agreement with a third country, provided that such agreements do not impede or frustrate the objectives of the Protocol. It further provides that such preferential treatment shall be extended to all State Parties on a reciprocal and non-discriminatory basis. It is not completely clear how this would be achieved, since the wording appears to make this an automatic, rather than a negotiated process. If it is automatic, that may actually discourage trade agreements with third countries if the preferences are automatically

extended to State Parties. Moreover, it is unlikely that another State Party will reciprocate if it is not party to the preferences agreed with the third country.

Transparency

The general transparency obligations (Article 5) – essentially the obligation to publish promptly all relevant measures in a medium that is accessible, such as through national gazettes, newsletters, Hansard or websites – are very similar to GATS. Article 6 echoes GATS by clarifying that nothing in the Protocol would require the disclosure of confidential information and data.

Special and differential treatment

Under the general obligation to provide special and differential treatment (Article 7), the Protocol obliges State Parties, in the interest of increasing beneficial participation in trade in services, to:

- provide special consideration to the progressive liberalization of service sectors commitments and modes of supply which will promote critical sectors of growth, social and sustainable economic development;
- take into account the challenges that may be encountered by State Parties and may grant flexibilities such as transitional periods, within the framework of action plans, on a case by case basis, to accommodate special economic situations and development, trade and financial needs in implementing this Protocol for the establishment of an integrated and liberalized single market for trade in services; and
- accord special consideration to the provision of technical assistance and capacity-building through continental support programmes.

This is of particular relevance to the negotiation under Part V of commitments covering market access and national treatment as well as regulatory frameworks, to which we will return below.

Domestic regulation and the right to regulate

The issue of domestic regulation goes to the heart of 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. All countries have the right to regulate services and service suppliers in order to meet national policy objectives, such as to ensure quality of services or other consumer protection reasons. In the GATS, the right is enshrined in the Preamble, whereas in the AfCFTA Protocol on Trade in Services a specific article has been adopted (Article 8). In both cases, the right to regulate is qualified in the sense that such regulations should not impair any rights or obligations arising under the Protocol.

The Protocol also provides that in sectors where specific commitments are undertaken (see progressive liberalization below) each State Party shall ensure that all ‘measures of general application’ affecting trade in services are administered in a reasonable, objective, transparent and impartial manner (Article 9). The article quotes almost word for word from GATS Article VI.

The word ‘transparent’ does not appear in the GATS, but its addition in the AfCFTA text is consistent with the obligations on transparency under Article 5. However, unlike the GATS, the AfCFTA 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. Negotiations in the WTO on this latter provision have proved to be sensitive for the African Group of WTO Members.

Mutual recognition

Article 10 deals with mutual recognition of standards or criteria for the authorization, licensing or certification of services suppliers. In particular, it provides that a State Party may recognize the education or experience obtained, requirements met, or licenses or certifications granted in another State Party, so long as this is not recognized in a manner that would constitute a means of discrimination between State Parties. Partner States of the EAC are already negotiating mutual recognition agreements for certain professional services, and SADC is expected to follow suit. Mutual recognition of professional qualifications is a key business interest for those involved in the supply of professional services. It is noteworthy that the AU Protocol relating

to Free Movement of Persons, Right of Residence and Right of Establishment, adopted in January 2018 and open for signature, includes in Article 18 a provision that State Parties shall mutually recognize academic, professional and technical qualifications of their nationals to promote the movement of persons among the AU Member States.

Anti-competitive practices

The Protocol provides for basic general obligations on State Parties to ensure that monopoly and exclusive service suppliers do not engage in anti-competitive practices, and to open consultation channels with other State Parties with a view to eliminating such practices. Articles 11 and 12 are the same as GATS Articles VIII and IX.

International transfers and payments

The Protocol obliges State Parties not to apply restrictions on international transfers and payments for current transactions relating to its specific commitments (Article 13). This is qualified by allowing State Parties to take measures that may restrict trade in services, in the event of serious balance of payments and external financial difficulties or threat thereof (Article 14). This is identical to GATS Articles XI and XII.

General exceptions

Articles 15 and 16 provide for general and security exceptions respectively. This is identical to GATS Articles XIV and XIV *bis*.

Subsidies

Finally, in this part, the Protocol provides for State Parties to maintain subsidies related to trade in services (Article 17). Unlike GATS Article XV, which provides for WTO Members to enter into negotiations with a view to developing the necessary multilateral disciplines to avoid trade-distortive effects of such subsidies, Article 17 does not go that far but rather recognizes that State Parties may use subsidies in relation to their development programmes. However, a mechanism for an information exchange and review of such subsidies is also provided for, as well as for consultations between State Parties who consider that they may be adversely affected by a subsidy of another State Party.

Progressive liberalization

This part is where the main focus of attention is now being placed by AU Member States in relation to trade in services negotiations under the AfCFTA. The Protocol (Article 18) provides that State Parties are to undertake successive rounds of negotiations leading progressively towards liberalization. This is based on the contention that AU Member States lack experience and capacity to negotiate all services sectors in a single round. It also implies that full liberalization will not be achieved in a single round either but will follow a more gradual approach in line with Member States' ability to do so. Nevertheless, Article 18 provides that 'the liberalization process shall focus on the progressive elimination of the adverse effects of measures on trade in services as a means of providing effective market access with a view to boosting intra-African trade in services.'

Priority sectors

Given that Article 18 provides for successive rounds of negotiations, it follows that some order of priority needs to be applied to the list of possible service sectors that will be subject to the liberalization process. This does not imply, as some Member States have assumed, that sectors not included amongst the priorities for the first round are not important, but rather that the negotiations will tackle all sectors in a sequence. Indeed, it will be important that the AfCFTA has 'substantial sectoral coverage' in order to meet the requirements of Article V of the GATS, which permits parties to an economic integration agreement and not to extend the preferences to all WTO Members under the MFN principle.

For the first round, AMOT have agreed that five sectors will be given priority: business services (including professional services), communication, financial, tourism and transport services. These sectors have been identified as priorities for the first round because most of the eight recognized RECs have already included

these sectors in their trade in services programmes, or because they contribute to the objectives of BIAT including the African industrialization process.

The decision of AMOT notes, however, that 'based on the principles of variable geometry and reciprocity (set out in the agreed [negotiating] modalities), those Member States that wish to liberalize more sectors than the five chosen priorities are free to do so.' Of course, Member States have always been at liberty to liberalize autonomously.

The question for the negotiations is whether Member States may request others to liberalize beyond the five priority sectors. Under the wording of the decision, it would seem that Member States that wish to limit themselves to the five priority sectors would be permitted to do so. The AMOT decision also notes that the Negotiating Forum 'should develop a Road Map for negotiation of all other services sectors not chosen as priorities in the first phase to bring the total services sectors ultimately under negotiation to all tradeable services sectors.'

Structure of negotiations

Member States agreed in the negotiating modalities for trade in services adopted in 2017 that the negotiations would cover 'Schedules of Specific Commitments' as well as regulatory frameworks for each services sector.

In the WTO, 'Schedules of Specific Commitments' provide the basis for WTO Members' commitments in relation to 'market access' and 'national treatment'. This approach, which is explained below, has also formed the basis for many other trade agreements that include trade in services. Given their membership of the WTO, most African Member States have some familiarity with the concept, although many have made only limited commitments in the WTO, some dating back to 1995 when the GATS came into force.

A further political decision, by the AU Assembly, which is linked to the priority sectors, is that Member States are to 'submit Schedules of Specific Commitments on Trade in Services in line with agreed modalities to the January 2019 Session of the Assembly for adoption.' Given that other African RECs, e.g. SADC, have taken several years to finalize schedules of commitments for adoption, and that negotiations on schedules under the AfCFTA have not yet commenced, it remains to be seen whether and how the January 2019 can be met.

Schedules of commitments

As in the GATS and other trade agreements, the main negotiation will be sector-specific as well as cross-sectoral specific obligations that will be set out in the form of national Schedules of Specific Commitments. Article 22 sets out what these schedules should contain, namely:

- terms, limitations and conditions on market access;
- conditions and qualifications on national treatment;
- undertakings relating to additional commitments; and
- where appropriate the timeframe for implementation of such commitments, including their date of entry into force.

Negotiating guidelines, currently being developed for negotiation with Member States, are expected to establish that the format used in the WTO would also be used in the AfCFTA (see Table 5 below). The reason is that it would be simpler to base schedules on an existing design that has also already been used in other RECs, e.g. COMESA and SADC, as well as individual AU Member States. This would simplify completion and aid comparison between agreements.

To arrive at this point, the Protocol sets out what must be included, as follows:

- Article 19: Limitations on market access
- Article 20: Limitations on national treatment
- Article 21: Additional commitments

In Table 5, the numbers (1) to (4) correspond to the four modes of supply described in Table 4. In each of the columns, limitations are listed. Thus, 'None' means no limitations, i.e. the subsector and mode of supply is fully liberalized. 'Unbound' means that the State Party has reserved its position entirely to introduce new, possibly more restrictive regulations, and has made no binding commitment. Where a specific limitation is listed, it is taken that the sector is liberalized except to the extent of the limitation listed.

Table 5 Format of schedules of commitments

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
A. Hotel and restaurant services (including catering) (CPC 641-643)	(1) Unbound (2) None (3) Commercial presence is allowed only in the form of a juridical person	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section.	
B. Travel agencies and tour operator services (CPC 7471)	- Foreign capital participation is limited to 49%. (4) Unbound, except as indicated in the horizontal section.		

Market access

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. The essence of the commitment is that 'like' services and services suppliers of another State Party will be treated the same. However, 'market access' does not cover treatment compared to 'like' domestic services and service suppliers – see 'national treatment' below.

The binding commitment made by a State Party (under Article 19) guarantees that access to its market will, from the entry into force of the Protocol, be no more restrictive than as set out in its Schedule of Specific Commitments. The Schedule identifies the sectors or subsectors covered, and the terms, limitations and conditions applicable in each of the four modes of supply. In granting market access on this basis, State Parties commit to according services and service suppliers of any other State Party 'treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.'

In common with the GATS and many other trade agreements, Article 19 provides that 'in sectors where market access commitments are undertaken, the measures which a State Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- 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

Generally, these are quantitative in nature, except for the second to last bullet point, which refers to types of legal entity.

National treatment

National treatment refers to the treatment a State Party will give to a service or service supplier of another State Party compared to a domestic 'like' service or service supplier.

The Protocol notes (Article 20) that 'in all sectors inscribed in the Schedule, and subject to any conditions and qualifications set out therein, each State Party shall accord to services and service suppliers of any other State Party treatment no less favourable than that it accords to its own like services and service suppliers, subject to the conditions and qualifications agreed and specified in its Schedule of Specific Commitments.'

As in the GATS, the Protocol provides that 'a State Party may meet the [national treatment] requirement by according to services and service suppliers of any other State Party either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the State Party compared to like services or service suppliers of any other State Party.'

Thus, it can be seen that the definition of national treatment can be quite wide, in that it would apply if a measure by a State Party 'modifies the conditions of competition in favour of [domestic] services or service suppliers.' Where it wishes to apply different treatment, this must be listed in the Schedule.

Additional commitments

In addition to market access and national treatment, State Parties may include additional commitments not related to those two areas of regulation (Article 21). The Protocol notes that such negotiated commitments may include but are not limited to 'measures regarding qualification, standards or licensing matters'.

In the WTO, the main use of this provision has been the adoption by certain WTO Members of a reference paper on pro-competitive commitments relating to the regulation of basic telecommunications. The central aim was to ensure that incumbent telecom operators who control access to domestic networks (referred to as major operators) do not control access to 'essential facilities' in an anti-competitive way.

Additional commitments would be those entered into by individual State Parties. They would not necessarily be entered into by all State Parties.

Regulatory frameworks

In many trade agreements, and especially in the WTO, Schedules of Specific Commitments have tended to bind existing levels of market access and national treatment. This includes AU-recognized RECs that have followed a GATS approach. There are very few examples of commitments to liberalize, either upon entry into force of the agreement or at some future date stipulated in a country's schedule.

However, in RECs such as ECOWAS and ECCAS, which have not followed a GATS approach, more regulatory coherence at a regional level has been achieved through the negotiation of regulatory frameworks, notably enshrined in directives and regulations. For this reason, State Parties agreed that the negotiating modalities should include a commitment to negotiate sector specific obligations through regulatory frameworks. The Protocol (Article 21) confirms this and provides that regulatory frameworks are to be developed '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'.

The timetable for the negotiation of regulatory frameworks is not stipulated in the Protocol or in political decisions that have been taken. Rather, the Protocol provides that 'State Parties agree that negotiations for continuing the process shall commence following the establishment of the AfCFTA, based on the work programme to be agreed by the Committee on Trade in Services.'

Forthcoming work: Annexes to the Protocol

There is much unfinished business to be carried out under the Protocol on Trade in Services. The results of the ongoing negotiations will be annexed to the Protocol, whereupon they will form an integral part of the Protocol.

At the time of adoption of the Protocol, the following were anticipated to be annexed, although this is not an exhaustive list:

- Schedules of Specific Commitments;
- MFN Exemption(s) – these would stipulate areas where a State Party wishes to maintain a preferential agreement with one or more State Parties, e.g. in the area of bilateral transport agreements;
- Air Transport Services – this is one example of a possible sectoral annex, the content of which has not been spelled out, but the Preamble to the Protocol refers to the commitment by the AU Assembly to establish a Single African Air Transport Market through the Implementation of the Yamoussoukro Decision, which is seen as boosting intra-African trade and fast-tracking the AfCFTA – although how this would fit with the exclusion of services related to traffic rights from the scope of the Protocol remains to be explained;
- List of Priority Sectors; and
- A framework document on Regulatory Cooperation – again, not spelled out and needs to be further elaborated.

The Protocol also provides that State Parties may develop additional annexes for the implementation of this Protocol for adoption by the Assembly. Upon adoption by the Assembly, such annexes shall form an integral part of this Protocol. Based on what other RECs have done, this may include other sectors as well as an annex clarifying commitments under Mode of Supply 4.

Different trade liberalization approaches

While the Protocol follows the GATS approach, the eight RECs recognized by the AU have taken substantially different approaches to the liberalization of trade in services. This will raise challenges for Member States, which have different levels of experience and a different regional *acquis* on which the AfCFTA is intended to be built. The eight RECs can be grouped into three categories (Table 6).

Table 6 Trade in services liberalization among Regional Economic Communities

RECs		Level of integration	Approach towards trade in services	
Group 1	EAC	Common market	GATS approach	Schedules/lists of commitments Sectoral protocols/initiatives
	COMESA SADC	Free trade area		
Group 2	ECOWAS ECCAS	Economic community	EU approach	Directives and regulations
Group 3	CEN-SAD	Economic and social union	No trade in services initiatives at REC level	
	IGAD	Regional cooperation		
	UMA	Free trade area and customs union		

Next steps in negotiations

Member States are now moving into the heart of the negotiations on trade in services. In order to formulate an agreed direction and road map for the negotiations, Member States will need to agree on 'negotiating guidelines'. For the WTO's Doha Development Agenda, such guidelines covered both negotiations²¹ and scheduling methodology.²² A draft set of such guidelines is under development for consideration by Member States.

Subsequently, a process and roadmap will need to be agreed with Member States for the submission of initial offers of market access and national treatment commitments in the five priority sectors, and for their negotiation. Generally, Member States are encouraged to develop their offers not just in conjunction with their regulatory authorities and sectoral line ministries, but also in consultation with their business organizations and other national stakeholders.

Given the experience of RECs, and the complexity of negotiations involving 55 AU Member States, it is understood that the AUC is considering the involvement and assistance of RECs in managing the process with their Member States (or Partner States in the case of the EAC).

Political decisions taken by AMOT also recognize the need for technical assistance to be provided to Member States, especially to those who are not WTO Members or members of any RECs. In this regard, the AUC has been requested to work in collaboration with UNCTAD and UNECA to provide such assistance and training. Given such needs and capacity constraints, it remains to be seen how achievable is the January 2019 deadline set for the adoption of finalized Schedules of Specific Commitments.

²¹ World Trade Organization. 2001. Document S/L/93. 'Guidelines and Procedures for the Negotiations on Trade in Services', adopted by the Special Session of the Council for Trade in Services on 28 March 2001, available at https://www.wto.org/english/tratop_e/serv_e/sl93.doc.

²² World Trade Organization. 2001. Document S/L/92. 'Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)', adopted by the Council for Trade in Services on 23 March 2001.

CHAPTER 5 PHASE 2 NEGOTIATIONS: INVESTMENT, INTELLECTUAL PROPERTY RIGHTS, COMPETITION POLICY

At the AU 25th Session in Johannesburg in June 2015, when the Assembly of African Heads of State and Government launched the CFTA, they adopted *inter alia* the scope and sequencing of the CFTA negotiations. The scope was to cover trade in goods, trade in services, investment, intellectual property rights (IPRs) and competition policy. The negotiations were to be conducted in two phases. The first phase was to cover negotiations on trade in goods and trade in services. The second phase would cover negotiations on investment, IPRs and competition policy.

At the Extraordinary Summit in Kigali in March 2018, the Assembly of Heads of State and Government directed AMOT to ‘conclude the negotiations on Competition Policy, Investment and Intellectual Property Rights, and submit the draft legal texts to the January 2020 Session of the Assembly for adoption through the Specialised Technical Committee on Justice and Legal Affairs.’

It is not yet clear what form these agreements may take, although it has been suggested that, as with trade in goods and services, each of these areas may be drafted as Protocols under the AfCFTA. There are no WTO reference points in these areas, apart from IPRs, which are subject to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). It is understood that work in these areas will commence in the second half of 2018.

Investment provisions

Initially, it was thought that an Agreement on Investment would form part of Phase 1 of the AfCFTA negotiations. A draft text was prepared that proposed both pre- and post-establishment investment provisions, including commitments under trade in services Mode of Supply 3 (commercial presence). However, that text was rejected by Member States in 2017 in favour of first concluding negotiations on the Protocol on Trade in Services on the basis of applying to all four modes of supply.

It was also unclear to Member States what relationship an agreement on investment under the AfCFTA would have to the parallel process under way since 2008 to develop a pan-African Investment Code (PAIC). The PAIC had its origin in a decision of the Third Conference of African Ministers of Integration (COMAI 3 III) held in Abidjan, Côte d’Ivoire, in May 2008 requesting the AUC to ‘develop a comprehensive investment code for Africa with a view to promoting private sector participation.’ The decision was subsequently endorsed by the AU Heads of State and Government at Sharm El Sheikh Summit, Egypt, in 2008. Upon the adoption of Agenda 2063, the AUC has seen development of the PAIC as part of the broader continental framework for development.

There have been various attempts to conclude the PAIC, of which the most recent was a meeting of experts held in November 2016 in Nairobi, Kenya. That meeting had been intended as the last meeting before the Code was submitted to the Special Ministerial Technical Committee on Economy, Finance and Integration Matters for subsequent submission to African ministers of economy, finance and integration at their next conference in March 2017, for adoption. However, that did not happen.

In a keynote speech in October 2017, the AUC Trade Commissioner, Mr. Albert Muchanga, noted that ‘investment, whether it is domestic inward investment or foreign direct investment, targeted at specific strategic sectors, has the potential to enable Africa to leapfrog the development ladder and catch up with some other developing and emerging market economies. [The African] continent has already embarked on [a process] to consolidate the existing [bilateral investment] agreements and adopt a more comprehensive approach to developing and agreeing on investment agreements for Africa. The development of the Pan African Investment Code is one such step forward. ... Article 2 of the PAIC stipulates that the code is a ‘guiding instrument’.

That said, the PAIC seeks to incorporate substantially all the provisions of the new generation of investment agreements. These include clauses on MFN, national treatment, expropriation, regulation in the public interest, corporate social responsibility, environment and labour standards, transparency, fair and equitable treatment of investors, etc. However, the PAIC has some shortcomings in that it has certain exclusions to

national treatment, such as the right of the state to pursue its own development goals. It does not include clauses on fair and equitable treatment and significantly it omits to have a clause on investor-state dispute settlement.

Despite these shortcomings, the PAIC is a solid foundation on which to build the new investment agreement under the CFTA. Article 3 of the PAIC specifically states 'Member States may agree that this Code could be reviewed to become a binding instrument and to replace the intra-African bilateral investment treaties (BITs) or investment chapters in intra-African trade agreements after a period of time determined by the Member States or after the termination period as set in the existing BITs and investment chapters in the trade agreements'.

The Trade Commissioner noted, however, that in launching the CFTA negotiations African Heads of State and Government envisaged the development of an overall investment agreement in the second phase of negotiations for the CFTA. 'Its most important feature would be that it would be legally binding on parties to it. It will also be a product of negotiation by the CFTA Negotiating Institutions guided by the adopted negotiating principles. Since one would expect it to build on the *acquis* of the best practices amongst the RECs as well as the PAIC, the CFTA Investment Agreement would be compatible with the multilateral commitments of the member states, including those under the Trade-Related Investment Measures (TRIMs).'

It would seem that negotiations on an AfCFTA Agreement on Investment would need to begin with a review of the relevant provisions of the PAIC, as well as the original draft Agreement on Investment presented to Member States in 2017. The WTO Agreement on Trade-Related Investment Measures (TRIMs) would also serve as a relevant reference point. Consideration of how to cross-refer to commitments under trade in services Mode 3 would also be needed.

Intellectual property rights

IPRs include such issues as copyright and related rights, trade marks, geographical indications, patents, industrial designs and protection of undisclosed information. All these areas are covered by the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs).

There have as yet been no discussions amongst AU Member States on the possible scope of a Protocol on Intellectual Property Rights. However, some commentators have published suggestions on what the scope might be. For example, Luke and MacLeod (2017) note that 'in the area of intellectual property, any approach must be considerate of the fact that innovation in Africa is different, occurring mostly in the informal sector and in the absence of strong intellectual property institutions. An agreement regarding intellectual property must address overlapping subregional IP organizations and the proliferation of IP matters in RECs, while ensuring alignment with the continent's overall development goals. This can be done by addressing the particular demands of African innovation with appropriate procedural and substantive principles.'

Picking up the point made by Luke and MacLeod (2017), it is noted that several RECs (e.g. EAC, COMESA, SADC and ECOWAS) are already working on initiatives to develop regional arrangements covering frameworks and guidelines on IPRs. In 2013, COMESA, for example, noted the importance of IPRs to economies engaging in knowledge-based or innovation-based economies, but observed that IPRs are still not well understood or appreciated in many developing countries including COMESA Member States.

Indeed, there are strong links between IPRs, innovation and inward investment. Companies are more likely to invest in an economy that protects intellectual property than one that does not. Thus, IPRs have become particularly important in international trade agreements. They already feature in the EU's Economic Partnership Agreements with African countries.

Competition policy

Similarly, discussions with AU Member States on competition policy have yet to start. Luke and MacLeod (2017) have suggested that to prevent anti-competitive practices, a regional approach is needed for dealing with cross-border cartels, mergers, acquisitions, and abuses of dominant market positions. They argue that the AfCFTA can be used as a vehicle to address such cross-border competition issues and can also help countries with no competition laws to enact some in conformity to an agreed approach as envisaged in a continental competition framework.

The WTO Working Party on Competition Policy did not develop any multilateral trade-related disciplines. However, both the GATT and GATS have general provisions relating to monopolies and anti-competitive business practices, while the Reference Paper on Basic Telecommunications²³ provides an example of trade-related pro-competitive disciplines that could be adopted on a sectoral basis.

²³ Available from https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm

CHAPTER 6 PROMOTING FREE MOVEMENT OF PEOPLE ACROSS BORDERS

One of the key freedoms that integration agreements seek to establish is the ability of people to move freely between the countries that are parties to the integration. UNECA notes that ‘the free movement of people across borders has been high on the regional integration agenda, primarily because of the prospective trade gains that are associated with it. Free movement of people across Africa represents a powerful boost to economic growth and skills development when people can travel with ease for business, tourism or education. Everyone benefits from a country that opens up their borders as well as the country whose nation is on the move, as seen in the growth in remittances in recent years.’

Mixed success within Regional Economic Communities

At the regional level, EAC and ECOWAS have achieved the most in this area. The free movement of persons was one of the key elements of cooperation under the East African Community. Under Article 104 of the EAC Treaty, the Partner States agreed to adopt measures to achieve free movement of persons, labour and services and to ensure the right of establishment and residence of their citizens within the community. Similarly, in 1979, ECOWAS adopted a Protocol relating to Free Movement of Persons, Right of Residence and Right of Establishment. In 1983, ECCAS also adopted a Protocol on Freedom of Movement and Rights of Establishment of Nationals of Member States, although free movement has still only been implemented between four Member States.

Other RECs have been less successful. In SADC, a Protocol on Facilitation of the Movement of People, which has similar aims to EAC and ECOWAS, was concluded in 2005. Nine Member States have signed the Protocol but only four have ratified it, insufficient to bring it into force. In COMESA, a Protocol on the Free Movement of Persons, Services, Labour and the Right of Establishment and Residence has been adopted but has only been signed by four Member States.

An attempt by the Tripartite to develop a free-standing Agreement on Movement of Business People, separate from the TFTA, resulted in finalization of an agreement in June 2018 by the Tripartite Sectoral Ministerial Committee. The agreement applies to citizens and residents of a Tripartite Member/Partner State who are engaged in trade as a business visitor, investor or trader. However, the agreement recognizes that Member/Partner States may maintain visa regimes and establishes a standard period of entry and stay of 90 days in a calendar year, even though some countries allow longer periods of stay. A proposal to require the issuance of visas on arrival in all Tripartite Member/Partner States was not agreed to. The original aim for the agreement had been to make it easier for business people to move between Tripartite Member/Partner States. In effect, however, the agreement mainly serves as a cooperation agreement between immigration authorities.

Enabling free movement for business people

The Protocol to the Abuja Treaty relating to Free Movement of Persons, Right of Residence and Right of Establishment²⁴ was adopted by the AU 30th Session, in Addis Ababa, Ethiopia, on 29 January 2018. It was opened for signature at the Summit in Kigali in parallel with the adoption of the AfCFTA, and 29 AU Member States have signed.²⁵

²⁴ African Union. 2018. Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement Of Persons, Right of Residence and Right of Establishment. https://au.int/sites/default/files/treaties/34244-treaty-protocol_on_free_movement_of_persons_in_africa_e.pdf.

²⁵ Angola, Burkina Faso, Central African Republic, Chad, Comoros, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, São Tomé and Príncipe, Senegal, Somalia, South Sudan, Sudan, Togo, Uganda and Zimbabwe.

The Protocol recalls that its mandate came from Article 43(2) of the Abuja Treaty. However, the Preamble notes that the free movement of persons in Africa will facilitate the establishment of the AfCFTA. Nevertheless, its objective is to facilitate the implementation of the African Economic Community by providing for the progressive implementation of the free movement of persons, right of residence and right of establishment. This is to be achieved in three phases (Article 5):

- Phase 1: Implementation of right of entry and abolition of visa requirements;
- Phase 2: Implementation of the right of residence;
- Phase 3: Implementation of the right of establishment.

No timescale is given for these phases, although annexation of a roadmap is provided for.

Non-discrimination

The Protocol provides that State Parties are not to discriminate against nationals of another Member State entering, residing or established in their territory. However, it allows for deeper integration, on a reciprocal basis, and this will not be considered to be discriminatory (Article 4).

Free movement of persons

The Protocol indicates that it applies to nationals of a Member State of the AU (Article 6). A 'national' is not defined in the Protocol, but the ordinary meaning is that nationality is conferred on a person by the place where he/she is born. (Nationality is sometimes confused with citizenship, which can be conferred by an administrative decision.) The right to move freely or stay is permitted under the Protocol for a maximum of 90 days from the date of entry, although individual Member States may grant a further period.

There are no provisions relating to visas, given the intention to abolish visa requirements. Instead, Member States are enjoined to issue valid travel documents to their nationals to facilitate free movement (Article 8). In addition, State Parties are to adopt a travel document called an 'African Passport' (Article 9). State Parties are also required to issue residence permits, work permits or other appropriate permits and passes as required by the host state (Article 15).

Free movement of workers

The Protocol provides that nationals of a Member State shall have the right to seek and accept employment without discrimination in any other Member State, and that such national may be accompanied by a spouse and dependants (Article 14).

Right of residence and right of establishment

The Protocol indicates that nationals of a Member State shall have the right of residence and the right of establishment in accordance with the laws and policies of the host Member State (Articles 16 and 17). Article 17 confirms that the right of establishment shall include the right to set up a business, trade profession, vocation or an economic activity as a self-employed person.

Mutual recognition of qualifications

The Protocol also provides that State Parties 'shall, individually or through bilateral, multilateral or regional arrangements, mutually recognize academic, professional and technical qualifications of their nationals', and 'establish a continental qualifications framework'. Quite how this will be achieved is not clear, particularly as mutual recognition of qualifications is also provided for in the Protocol on Trade in Services. In other jurisdictions, detailed provisions exist on how mutual recognition is to be achieved, e.g. EU Directive 2005/36/EC (as amended by Directive 2013/55/EC) on recognition of professional qualifications. Nevertheless, the commitment contained in the Protocol is useful and goes further than RECs have achieved.

Temporary movement of natural persons as service providers

It is noted that the Protocol on Trade in Services also covers some aspects of movement of people. Mode of Supply 4 concerns the temporary movement of 'natural persons' (a phrase developed in the WTO to distinguish services supplied by human beings from services supplied by companies, otherwise referred to

as 'juridical persons'). As with the proposal that Mode 3 (commercial presence) should be covered in the draft Agreement on Investment, so it was also proposed that Mode 4 should be addressed in a separate Agreement relating to Movement of People.

There is some overlap between Mode 4 and the Protocol on Free Movement of People, in that Schedules of Specific Commitments under the Protocol on Trade in Services include commitments relating to the permitted length of entry and stay of categories of business persons entering temporarily as service providers. Given the familiarity of trade officials with the structure and provisions contained in Schedules of Specific Commitments, Member States preferred to negotiate Mode 4 commitments under the Protocol on Trade in Services. Nevertheless, it will be necessary to ensure that Mode 4 commitments are consistent with the Protocol on Free Movement of Persons.

CHAPTER 7 ROLES AND OPPORTUNITIES FOR THE BUSINESS COMMUNITY

As key stakeholders, the role of the business community in influencing the outcomes and successful implementation of the AfCFTA is important to ensure the potential benefits to business and the wider community are realized. This chapter describes both the risks of trade liberalization and opportunities for engagement for business.

Risks of trade liberalization

It has been observed that sometimes African institutions borrow policies from other regions without examining their institutional capacities (Draper, Chikura and Drogman, 2016). Furthermore, trade liberalization on its own does not lead to lower poverty levels in the absence of financial sector development, rising education levels and strong governance structures (Le Goff and Singh, 2014). This will require focus on providing social safety nets and safeguards for any negative effects of trade liberalization resulting from implementation of the AfCFTA, such as possible loss of tariff revenue, loss of jobs and livelihoods especially in the agricultural sector (UNECA, 2016).

According to UNECA and WTO (2017), such initiatives may need intervention by development partners to ensure that tariff liberalization is implemented in tandem with trade facilitation reforms as envisaged in the BIAT and Agenda 2030 frameworks. When implementation of the AfCFTA includes trade facilitation, intra-African trade will be more sophisticated with increased share of industrial goods in total trade rather than agri-food exports or commodities (Valensisi *et al.*, 2014).

This has led some to be critical of the potential of the AfCFTA to integrate the continent given the mixed success in the achievement of integration for both goods and people at the REC level (Berthelot, 2017; Folfas and Garlinska-Bielawska, 2018; Ngqangweni, 2016). Indeed, Nigeria delayed signing the AfCFTA Agreement in March 2018 partly due to the perception that there had not been enough consultations at the national level. Consequently, the Nigerian presidency directed the Nigerian Office for Trade Negotiations to carry out a nationwide, sectoral and industry-wide consultation and sensitization exercise from 15 March to 14 June 2018 across Nigeria's geo-political zones (Ikokwu, 2018).

These concerns may be justified given that the AfCFTA Agreement has not incorporated critical measures that promote beneficial relationships between government, private sector agencies and intermediary bodies to achieve trade facilitation, specifically notification requirements as provided for in Article 1 paragraphs 1.1 and Article 4 of the TFA, and opportunity to comment on new and amended legislation, and consultations as provided for in Article 2 of the TFA.

In terms of a business approach to the AfCFTA negotiations, the business sector needs to argue in favour of outcomes that are likely to be of benefit to the private sector and the countries in which they are situated. As Andriamahatana and Chidede (2018) say, 'business communities are the actual traders and investors; responsible for moving goods and services across borders.' This makes them key stakeholders whose views should be sought during the negotiations, and whose input should be seen as critical to the success of the AfCFTA.

The AU recognizes that a partnership approach will be required for success of the AfCFTA, the reason behind the holding of the AfCFTA Business Forum in Kigali, Rwanda, a day before the signing of the AfCFTA Agreement. The forum was co-sponsored by the AU and the African Import-Export Bank, and brought together government officials, representatives of the private sector, civil society and academia.

Engagement opportunities for African business

There are opportunities for African business to engage on issues related to the AfCFTA. For example, the AfroChampions Initiative is a set of innovative public-private partnerships and flagship programmes designed to galvanize African resources and institutions to support the emergence and success of African private

sector multinational champions in the regional and global spheres.²⁶ The Pan-African Chamber of Commerce & Industry (PACCI)²⁷ is the focal point for 50 chambers of commerce and industry in the continent, which was established in 2009 to serve Africa's business by promoting policies that foster continental economic integration, competitiveness and sustainable growth. Since implementation of both Phase 1 and Phase 2 AfCFTA issues will require innovation and leveraging technology, it would be important to involve the African Alliance for Electronic Commerce (AAEC), which brings together 18 member countries to promote and share experience about Single Window initiatives in Africa. In this regard AAEC has developed Guidelines for Single Window Implementation in Africa.²⁸

At the REC level, organizations such as the East African Business Council (EABC)²⁹, the COMESA Business Council³⁰, the Association of SADC Chambers of Commerce & Industry (ASCCI) and the Federation of West African Chambers of Commerce & Industry (FEWACCI)³¹ continually engage with RECs and member chambers for inclusive dialogue to canvass private sector interests. Some organizations are specific to constituencies e.g. the Federation of National Associations of Women in Business Eastern and Southern Africa (FEMCOM).

These organizations, with the assistance of intergovernmental and international organizations such as UNCTAD, ITC, UNECA and AfDB, can help create and sustain partnerships for negotiating the AfCFTA. On issues of IPR, the two existing African IPR organizations (African Regional Intellectual Property Office, headquartered in Harare; and the Organisation Africaine de la Propriété Intellectuelle, headquartered in Yaoundé, will be expected to play an important role in addition to RECs and national intellectual property administrations.

Some of the specific ways in which African business can contribute to the AfCFTA negotiations include:

- ✓ Hiring experts (if in-house expertise is not available) to carry out reviews of draft texts and proposing new texts and amendments to existing texts using international best practice;
- ✓ Using existing national and regional business organizational structures to engage with national trade negotiators;
- ✓ Collaborating with other stakeholders involved on trade and integration issues to lobby governments and negotiators to take account of issues that may not come to the table (such as the concerns of informal cross-border traders) which nevertheless have an impact on the sustainability of the agreement and its protocols; and
- ✓ Sharing data on challenges and successes of implementation to lobby governments.

In the words of Rwanda President and AU Summit Chair for 2018 at the AfCFTA Business Forum³² to 'raise ambitions even higher by focusing on implementation of Agenda 2063 after seeing what AU Member States can achieve when they come together, ratify the agreement and its protocols in accordance with national laws, and reform laws, procedures and practices at the national level to align them to the continental framework.'

²⁶ AfroChampions Initiative, available at <http://afrochampions.com/>

²⁷ The Pan-African Chamber of Commerce & Industry (PACCI), available at <http://www.pacci.org/index.php/about-us>

²⁸ African Alliance for Electronic Commerce (AAEC), available at http://www.swguide.org/single_window/about_aaec.php.

²⁹ East African Business Council (EABC), available at <http://eabc-online.com/>.

³⁰ COMESA Business Council (CBC), available at <http://comesabusinesscouncil.org/>.

³¹ Federation of West African Chamber of Commerce and Industry (FEWACCI), available at http://www.tfa4africa.com/private_sector/west-and-central-africa/federation-of-west-african-chamber-of-commerce-and-industry/.

³² African Continental Free Trade Area. *Leveraging the power of business to drive Africa's integration*. Video available at, <https://au.int/en/newsevents/20180320/afcfta-business-forum-leveraging-power-business-drive-africa%E2%80%99s-integration> (9th July 2018).

APPENDICES

Appendix I Agreements or Documents referred to in the Preamble to the Establishment of the AfCFTA

Agreement/Document and Provision(s)	
1	<p><i>Decision of the 18th Ordinary Session of the AU Heads of State and Government on the Framework, Road Map and Architecture for Fast Tracking the Establishment of the African Continental Free Trade Area and the Action Plan for Boosting Intra-African Trade (2012)</i></p> <p>Establish the CFTA by the indicative date of 2017 with the following milestones:</p> <ul style="list-style-type: none"> ✓ Finalization of the EAC-COMESA-SADC Tripartite by 2014; ✓ Completion of FTA's by non-tripartite RECs through parallel arrangements similar to the EAC-COMESA-SADC Tripartite between 2012 – 2014; ✓ Consolidation of the tripartite and other FTA's into a CFTA initiative between 2015 and 2016; and ✓ Establishment of the CFTA by 2017 with the option to review the target date according to progress made.
2	<p><i>Launch of Negotiations for the Establishment of the Continental Free Trade Area during the 25th Ordinary Session of the AU Heads of State and Government (Johannesburg, 2015)</i></p> <p>Adopted:</p> <ul style="list-style-type: none"> ✓ The objectives and principles of negotiating the CFTA ✓ The indicative Roadmap for the Negotiation and establishment of the CFTA ✓ The Terms of Reference for the CFTA Negotiating Forum ✓ The institutional arrangements for the CFTA negotiations ✓ The Draft Declaration on the launch of negotiations for the establishment of the CFTA
3	<p><i>Constitutive Act of the African Union (Lomé, 2000)</i></p> <p>Established the African Union, as a successor organization to the Organization of African Unity (established 1963) with objectives including:</p> <ul style="list-style-type: none"> ✓ Accelerate the political and socioeconomic integration of the continent; ✓ Promote and defend African common positions on issues of interest to the continent and its peoples; ✓ Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;

	<ul style="list-style-type: none"> ✓ Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies; ✓ Coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.
4	<p><i>Treaty Establishing the African Economic Community (Abuja, 1991)</i></p> <p>Provides modalities for gradual establishment of the African Economic Community (AEC) through six (6) stages of variable duration not exceeding thirty-four (34) years by</p> <ol style="list-style-type: none"> a) First: strengthening existing Regional Economic Communities, and within a period not exceeding five (5) years, establish RECs where such organizations do not exist; b) Second: at the level of each REC and within a period not exceeding eight (8) years, stabilize tariff barriers and non-tariff barriers, customs duties and internal taxes existing at the date of entry into force of the treaty, and prepare and adopt a timetable for the gradual removal of tariff barriers and non-tariff barriers to regional and intra-community trade and for the gradual harmonization of Customs duties in relation to third states; c) Third: at the level of each REC and within a period not exceeding ten (10) years, establishment of a Free Trade Area through the observance of the timetable for 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; d) Fourth: within a period not exceeding two (2) years, coordination and harmonization of tariff and non-tariff systems among the various Regional Economic Communities with a view to establishing a Customs Union at the continental level by means of adopting a common external tariff; e) Fifth: within a period not exceeding four (4) years, establishment of an African Common Market through adoption of common policies in several areas including agriculture, transport and communications, industry, energy and scientific research; harmonization of monetary, financial and fiscal policies; application of the principle of free movement of persons, rights of residence and establishment; and constitute proper resources for the community; f) Sixth: within a period not exceeding five (5) years, consolidate the structure of the African Common Market, integrate all the sectors, set up the African Monetary Union and African Central Bank, Single African Currency, set up Pan African Parliament etc.
5	<p><i>Marrakesh Establishment of the World Trade Organization (1994)</i> which established the WTO with a new <i>General Agreement on Tariffs and Trade (GATT) 1994</i> distinct from GATT 1947:</p> <ul style="list-style-type: none"> ✓ Functions include to facilitate the implementation, administration and operation of multilateral trade agreements, a forum for trade negotiations among its members, a mechanism for settlement of disputes among its members, and administration of the trade policy review mechanism for its members; ✓ Annexes of multilateral agreements on trade in goods (Annex 1A) covering (a) Agriculture (b) application of sanitary and phytosanitary measures (c) textiles and clothing (d) technical barriers to trade (e) trade-related investment measures (f) Anti-Dumping measures (g) Customs Valuation (h) Pre-Shipment Inspection (i) Rules of Origin (j) Import Licensing Procedures (k) Subsidies and Countervailing Measures (l) Safeguards. ✓ Annex 1B: General Agreement on Trade in Services and Annexes ✓ Annex 1C: Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) ✓ Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

<p>6</p>	<p><i>African Union Agenda 2063: The Africa We Want (2015):</i></p> <ul style="list-style-type: none">✓ Rededication to the Pan African vision of <i>an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena</i>✓ Aspirations for the Africa we want:<ol style="list-style-type: none">(1) A prosperous Africa based on inclusive growth and sustainable development(2) An integrated continent, politically united and based on the ideals of Pan Africanism and the vision of Africa's renaissance(3) An Africa of good governance, democracy, respect for human rights, justice and the rule of law(4) A peaceful and secure Africa(5) An Africa with a strong cultural identity, common heritage, shared values and ethics(6) An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children(7) Africa as a strong, united and influential global player and partner
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Appendix II GDP by economic activity in Africa

Economy	GDP		Agriculture		Industry		Manufacturing		Services, value added	
	\$ billion		% of GDP		% of GDP		% of GDP		% of GDP	
	2010	2017	2010	2017	2010	2017	2010	2017	2010	2017
Algeria	161.2	170.4	8	12	50	36	5	5	..	44.1
Angola	82.5	124.2	..	..	..	..	..	..	..	..
Benin	7	9.3	23	22	22	21	14	12	44.7	46.9
Botswana	12.8	17.4	2	2	32	30	6	5	47.5	58.7
Burkina Faso	9	12.9	33	28	21	21	7	6	38.8	42
Burundi	2	3.5	37	36	15	15	9	9	..	..
Cabo Verde	1.7	1.8	8	6	18	19	5	8	61.2	61.3
Cameroon	26.1	34.8	14	15	27	24	14	15	52.1	52.7
Central African Republic	2	1.9	50	40	13	15	6	7	29.7	39.3
Chad	10.7	10	52	49	12	15	1	3	33.4	33.5
Comoros	0.5	0.6	40	34	12	11	5	8	48.6	55.7
Congo, Dem. Rep.	21.6	37.2	21	20	39	42	16	20	35.4	34.1
Congo, Rep.	12	8.7	4	7	75	54	4	8	20.8	38.5
Côte d'Ivoire	24.9	40.4	25	20	22	27	13	13	53.1	41.6
Djibouti	1.1	1.8	..	2	..	16	..	4	..	71.9
Egypt	218.9	235.4	13	11	36	34	16	16	..	..
Equatorial Guinea	16.3	12.5	1	2	75	56	21	25	23.9	40.7
Eritrea	2.1	..	14	..	22	..	5	..	..	..
Ethiopia	29.9	80.6	41	34	9	23	4	6	41.8	36.9
Gabon	14.4	14.6	4	5	55	45	4	3	..	..
Gambia, The	1	1	29	17	12	12	5	5	53.1	65.8
Ghana	32.2	47.3	28	17	18	24	6	4	48.2	52.2
Guinea	7	10.5	17	16	32	33	..	11	44.4	40.7
Guinea-Bissau	0.9	1.3	45	49	13	13	11	11	39.4	32.3
Kenya	40	74.9	25	32	19	17	11	8	48.1	45.4
Lesotho	2.4	2.6	5	5	30	33	13	16	56.5	52.6
Liberia	1.3	2.2	45	34	5	12	4	3	50.2	53.6
Libya	74.8	51	2	..	78	..	4	..	..	..
Madagascar	8.7	11.5	26	21	15	17	13	..	51.4	48.4
Malawi	7	6.3	30	26	15	14	10	9	47.9	52.4
Mali	10.7	15.3	33	38	23	17	..	..	35.5	36.7
Mauritania	4.3	5	20	23	39	29	8	6	36.1	35.4
Mauritius	10	13.3	4	3	22	18	14	12	62.9	66.9
Morocco	93.2	109.1	13	13	26	26	16	16	51	49.5
Mozambique	10.2	12.3	27	22	18	18	10	9	49.6	54.2
Namibia	11.3	13.2	9	7	28	28	12	11	57.2	58.4
Niger	5.7	8.1	41	40	16	16	5	6	..	..
Nigeria	369.1	375.8	24	21	25	22	6	9	50	55.8
Rwanda	5.8	9.1	29	31	15	16	6	6	49.4	46.4
Sao Tome and Principe	0.2	0.4	11	11	17	15	8	7	67.1	71.4
Senegal	12.9	16.4	15	15	20	21	12	11	53.9	53.8
Seychelles	1	1.5	2	2	14	11	8	6	68.5	71
Sierra Leone	2.6	3.8	53	60	8	5	2	2	35.3	32.4
Somalia	..	7.4	..	..	..	..	..	..	..	..
South Africa	375.3	349.4	2	2	27	26	13	12	61	61.5
South Sudan	17.3	2.9	..	..	..	..	..	..	..	..
Sudan	65.6	117.5	23	30	27	2	6	..	44.5	46.8
Swaziland	4.4	4.4	10	9	38	35	33	31	49.6	51
Tanzania, United Rep. of	31.4	52.1	30	30	20	27	7	6	44.2	37.5
Togo	3.2	4.8	31	41	16	17	8	4	52.8	29.8
Tunisia	44.1	40.3	8	9	29	24	17	15	..	..
Uganda	20.2	25.9	26	25	18	20	9	8	48.5	47.1
Zambia	20.3	25.8	9	7	32	36	8	8	52.8	52.7
Zimbabwe	10.1	17.8	11	10	24	22	11	8	50.3	56.3

Source: World Development Indicators, 2018

Appendix III Export of commercial services in Africa

Economy	Commercial services exports		Transport		Travel		Insurance and financial services		ICT and other commercial services	
	\$ million		% of total		% of total		% of total		% of total	
	2010	2017	2010	2017	2010	2017	2010	2017	2010	2017
Algeria	3 442	3 143	22	21	6	7	9	12	63	60
Angola	857	711	5	5	84	88	0	0	11	8
Benin	348	317	29	45	43	39	2	4	26	12
Botswana	671	947	5	5	76	74	0	2	18	19
Burkina Faso	265	428	16	15	27	28	5	18	51	38
Burundi	7	18	10	13	24	11	22	14	44	63
Cabo Verde	487	634	35	15	57	69	1	1	6	16
Cameroon	1 240	1 573	39	31	13	32	4	6	45	31
Comoros	55	..	8	..	63	..	0	..	28	..
Congo, Dem. Rep.	291	85	31	76	4	5	16	5	50	15
Congo, Rep.	389	386	27	18	7	12	2	2	64	68
Côte d'Ivoire	1 026	789	23	26	20	48	10	0	48	26
Djibouti	149	184	77	66	12	18	..	..	11	16
Egypt	23 618	19 110	34	48	53	41	1	2	12	10
Ethiopia	1 911	2 755	62	80	27	13	0	0	11	7
Gabon	423	..	8	..	20	..	20	..	52	..
Gambia, the	131	137	29	13	56	85	0	0	14	3
Ghana	1 344	6 470	27	7	46	13	1	1	26	79
Guinea	61	53	6	17	3	29	16	31	74	23
Guinea-Bissau	42	20	1	1	31	57	11	6	57	36
Kenya	3 016	3 787	55	43	27	24	5	16	14	17
Lesotho	42	31	9	2	55	75	1	0	35	23
Liberia	40	61	56	0	31	75	12	..	13	25
Libya	410	86	64	39	15	..	18	42	3	20
Madagascar	902	1 162	33	21	34	65	0	0	32	14
Malawi	75	130	44	18	41	24	1	20	14	38
Mali	356	405	2	1	58	52	2	2	38	45
Mauritania	128	133	7	42	38	17	2	2	53	39
Mauritius	2 656	2 981	14	13	48	59	3	4	34	25
Morocco	14 329	16 524	15	19	47	45	1	1	37	35
Mozambique	245	658	35	68	44	23	2	2	20	7
Namibia	650	500	27	17	49	38	4	5	20	40
Niger	119	183	1	7	89	42	5	2	6	49
Nigeria	2 619	4 541	75	29	22	56	1	8	3	7
Rwanda	244	729	12	27	83	60	..	4	5	9
Sao Tome and Principe	13	72	1	1	85	92	3	0	10	6
Senegal	936	1 162	5	13	48	36	2	2	45	48
Seychelles	440	982	30	24	62	49	0	0	8	27
Sierra Leone	56	270	45	7	46	15	1	1	8	77
South Africa	15 676	15 376	20	15	58	57	7	7	15	21
South Sudan	..	178	..	0	..	13	..	53	..	34
Sudan	212	1 477	2	8	39	70	7	1	52	21
Swaziland	250	94	8	42	20	14	16	6	55	38
Tanzania, United Rep. of	2 001	3 571	23	29	63	60	2	2	13	9
Togo	289	443	45	46	23	26	4	1	28	27
Tunisia	5 298	3 068	29	31	50	40	3	4	18	25
Uganda	1 034	1 372	4	11	76	68	3	3	17	18
Zambia	571	865	8	6	86	75	1	10	5	9
Zimbabwe	263	349	30	26	47	51	..	..	23	23

Source: World Development Indicators, 2018

Appendix IV Import of commercial services in Africa

Economy	Commercial service exports		Transport		Travel		Insurance and financial services		ICT and other commercial services	
	\$ million		% of total		% of total		% of total		% of total	
	2010	2017	2010	2017	2010	2017	2010	2017	2010	2017
Algeria	11 489	10 396	26	35	5	5	2	2	67	58
Angola	16 028	12 123	19	26	1	5	7	5	73	64
Benin	503	657	62	67	11	10	5	2	22	21
Botswana	794	818	11	26	37	34	4	3	47	38
Burkina Faso	817	1 228	44	47	8	9	12	18	35	25
Burundi	156	181	71	68	13	15	3	3	14	13
Cabo Verde	297	362	34	27	43	21	6	6	16	46
Cameroon	1 717	2 190	36	38	11	28	7	8	46	26
Comoros	93	..	62	..	21	..	12	..	6	..
Congo, Dem. Rep.	2 497	1 548	61	56	6	4	14	25	19	15
Congo, Rep.	3 299	3 698	23	21	6	9	4	4	66	67
Côte d'Ivoire	2 740	2 755	59	50	13	13	8	3	20	33
Djibouti	104	180	67	66	8	13	11	11	14	10
Egypt	12 991	16 050	51	46	17	13	11	11	21	29
Ethiopia	2 534	5 162	65	62	6	9	4	4	25	25
Gabon	1 744	..	38	..	22	..	6	..	34	..
Gambia, the	77	132	47	36	19	57	7	6	27	1
Ghana	2 444	8 478	46	25	24	8	5	1	25	66
Guinea	387	709	59	69	2	2	7	15	32	14
Guinea-Bissau	101	82	28	36	29	41	5	5	38	19
Kenya	1 890	2 848	49	36	11	9	10	12	30	43
Lesotho	410	316	16	18	66	60	4	4	14	18
Liberia	234	290	54	38	27	52	1	..	18	10
Libya	5 251	2 377	45	38	39	30	12	31	4	1
Madagascar	1 036	886	41	63	10	16	0	1	49	20
Malawi	205	301	42	31	30	29	4	9	24	32
Mali	1 007	1 174	61	60	11	12	5	3	23	25
Mauritania	968	698	36	34	6	4	1	1	57	61
Mauritius	1 951	2 231	28	28	20	30	8	5	44	37
Morocco	5 660	8 686	47	46	21	20	4	2	28	31
Mozambique	1 176	2 962	32	18	18	6	4	22	45	54
Namibia	646	526	22	26	5	11	7	4	65	59
Niger	845	801	64	61	11	9	5	1	20	28
Nigeria	19 868	17 973	43	26	28	32	3	8	26	35
Rwanda	442	904	79	44	17	33	..	3	3	20
Sao Tome and Principe	22	59	91	41	0	29	7	2	1	28
Senegal	1 076	1 415	50	56	15	10	11	10	24	23
Seychelles	259	548	50	38	15	11	5	2	30	49
Sierra Leone	242	440	49	30	5	7	3	8	43	55
South Africa	19 158	15 762	37	40	29	21	3	4	30	35
South Sudan	..	335	..	40	..	3	..	38	..	20
Sudan	2 406	1 260	42	72	47	2	9	1	2	24
Swaziland	652	293	11	50	9	12	6	4	74	34
Tanzania, United Rep. of	1 843	2 081	39	46	45	40	4	1	12	13
Togo	395	372	62	71	12	10	11	11	15	8
Tunisia	3 054	2 702	52	48	18	28	9	9	20	15
Uganda	1 774	2 029	60	56	18	11	4	3	19	30
Zambia	849	1 467	56	61	12	15	4	11	28	13
Zimbabwe	1 326	1 228	54	30	10	27	36	43

Source: World Development Indicators, 2018

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