



CONCEPT NOTE

Assessing Regional Integration in Africa IX

Next steps for the African Continental Free Trade Area

1. Background

The African Continental Free Trade Area (AfCFTA) is a tool for driving African industrialization, economic diversification and development. It helps to promote the type of trade that produces sustainable growth, creates jobs for Africa's youth, and fosters opportunities for nurturing Africa's businesses and entrepreneursⁱ.

Negotiations for establishing the AfCFTA were launched in June 2015 by the Heads of State and Government of the African Union (AU) at the 26th Ordinary Session of the AU Assembly. Ten rounds of negotiations concluded with the signing of the AfCFTA Agreement on 21 March, at the 10th Extraordinary Session of the AU Assembly, in Kigali, Rwanda, by 44 AU Member States. A further 6 Member States signed the 'Kigali Declaration', reaffirming their commitment to the AfCFTA and their intention to signing it after undergoing the required domestic review processes of their respective legislaturesⁱⁱ. There remain 5 AU Member States who have not yet signed either the AfCFTA or the Kigali Declaration; several of these are, however, expected to do so later in 2018.

With the vast majority of the continent committed to the AfCFTA, the agreement will enter into force after the 22nd instrument of ratification has been deposited with the African Union Commission (AUC)ⁱⁱⁱ. State Parties to the agreement must also conclude its implementation roadmap, including the finalization of schedules of commitments and rules of origin.

Yet this concludes just the phase I negotiations of the AfCFTA. Aspiring to establish a 'deep' trade agreement between African countries, the Heads of State and Government of the AU also agreed that the AfCFTA should address 'behind the border' trade issues. The AfCFTA was hence structured with phase II negotiations on three topics: a) competition policy, b) intellectual property rights, and c) investment^{iv}. Across these topics, the AfCFTA will harmonize and align policy to reduce trade costs, promote integration and realize sustainable and inclusive development across Africa.

Beyond these specific topics, digital trade and e-commerce has been further mooted as a new area in which dedicated policy alignment in Africa could be of value^v. The mode of trade is increasingly digital; this is appreciated in regional approaches to the digital economy in several other parts of the world, including with ASEAN's Coordinated Committee on E-Commerce or the single digital market in the EU. Such policies seek to address not just the opportunities of digital trade, such as reduced information costs and information asymmetries, but also the challenges, such as threats to industrialization and data ownership.

2. Main themes and conceptual approach

The aspiration is for the research to be highly applied: the knowledge gathered and produced should match the issues to be negotiated in the AfCFTA phase II negotiations and strive, wherever possible, to inform the content of the negotiations going forward. As such, the intention is for the research to form the intellectual groundwork underpinning the phase II negotiations. While this ensures that the report is meaningful and relevant, it is also intended that its content be timeless: to the greatest extent possible, the work will consider issues that are relevant not just to the AfCFTA now, but to future African negotiations with other trading partners and negotiations elsewhere in the world.

The topics addressed by the AfCFTA are not new. Other regional groupings, from Asia to South America and indeed sub-regions in Africa, have taken regional approaches to such issues as intellectual property rights, competition policy, investment, and digital trade and e-commerce. Drawing from this, the adopted methodology will be anchored on a combined case study and comparative analysis method, but will also draw from existing relevant research material.

The four main themes to be addressed by the report are:

- Competition policy
- Investment
- Intellectual property rights
- Digital trade and e-commerce

Across each of the four themes of the report will be two-to-three main case studies consisting of analysis in different world regions or sub-regions of Africa. These will build a discussion on the existing types of possible policies and their characteristics in each of the four subjects, as well as their developmental potential. Concluding each theme will be a comparative analysis of the case studies from which recommendations will be drawn for the specific African continental context.

3. Organization of the report

Foreword

Key Messages and Recommendations

Chapter 1 – Status of regional integration in Africa

Lead: Wafa Aidi

This is the traditional first chapter in the ARIA series providing an update and analysis of current trends in regional integration in Africa.

- Presentation and highlights of the African Regional Integration Index
- Overview of integration across the following areas:
 - Economic context,
 - Overall integration,
 - Other areas of regional cooperation: mining, health, peace and security,
 - Financial integration,
 - Free movement of persons and the right of establishment,
 - Infrastructure integration, and
 - Trade integration.

Chapter 2 – The African Continental Free Trade Area: where we stand

Lead: Melaku Desta, Guillaume Gerout, Jamie MacLeod and Joy Kategekwa

This chapter takes stock of the phase I negotiations. It is split into two halves: the first analyses what was achieved in these negotiations and the technical implications of the concluded texts. The second considers and proposes the next steps to take full advantage of the current agreement.

- Part 1: Analysis of the key provisions of the concluded first phase of the negotiations and their technical implications:
 - Updated computable general equilibrium modelling results of the impact of the AfCFTA,
 - Disentangles and interprets the interaction between continental preferences and Most Favoured Nation (MFN) provisions subject to the discipline of reciprocity,
 - Implied implications for RECs,
 - Implications of decision making by state parties (not member states),
 - Potential of the rendezvous mechanism, and
 - The institutional arrangements and financing.

- Part 2: Proposes measures to take full advantage of phase I: National AfCFTA Strategies, simplified trade regimes (specifically targeting MSMEs and ICBTs), monitoring and evaluation mechanisms (Country Business Index), taking services commitments forward, and implementing an NTB mechanism.
- Part 3: Proposes a productive capacity development agenda for the CFTA providing perspectives as to how sectors vibrant in intra-African trade can be supported to develop, strengthen and scale productive capacity. This is key in ensuring we are not only creating markets for the strong African players, but that we have thought through how SMEs can produce for AfCFTA markets.

Chapter 3 – The AfCFTA – external and internal challenges

Lead: Melaku Desta and Joy Kategekwa

This chapter critically evaluates the potential challenges faced by the AfCFTA. These include external challenges such as establishing a coherent trade policy with third parties and internal challenges such as possible delays or reversals in implementation.

- African trade policy coherence - the AfCFTA in the context of:
 - EU Post-Cotonou 2020
 - Beyond AGOA 2025
 - UK post-Brexit
 - Trade with emerging economies
- Challenges to the short term objective of establishing a functioning free trade area
- Challenges to the long-term objective of fostering an African customs union

Chapter 4 – Competition policy

Lead: Elizabeth Gachuri (UNCTAD) and Jamie MacLeod

This chapter draws from examples around the world and in Africa to identify desired principles of an AfCFTA competition protocol.

Today's globalized world is characterised by multinational and transboundary business models. This affects competition: mergers, cartels, and abuse of dominant positions now often affect competition across several markets. This in turn can affect household welfare as it impacts inequality, poverty and unemployment^{vi}. As the AfCFTA integrates the African economic market it will be important to have a common framework for competition policy to preserve well-functioning and competitive markets, while ensuring that such a regime works for Africa's SMEs and large informal economies and is appropriate for the diversity of competition expertise across African countries^{vii}. However, Africa already has a number of regional competition institutions at the REC level. The challenge is to craft the AfCFTA provisions in such a way as to leverage and bridge the various competition initiatives at the REC level.

- Case study: EU Competition Law – the EU has arguably the most advanced and well-functioning regional competition policy in which EU law is set at the regional level and applied by national competition authorities and courts who cooperate via a European Competition Network.
- Case study: COMESA Competition Commission - the most established and developed regional competition authority in Africa operating a regime for merger control and as an antitrust enforcer.

- Case study: SADC Treaty – a more ‘light touch’ approach, comprising cooperation in the application of national competition law rather than a regional competition law.
- Case study: other relevant regimes such as from CARICOM, ASEAN, and the Tripartite
- Elements of an AfCFTA competition protocol expected to be considered include:
 - Regional approaches to barriers to entry, market structure, cartels, mergers and dominance abuse,
 - Relevant competition policy for the digital age,
 - Ensuring consistency and complementarity with sub-regional competition authorities,
 - Enforcement and dispute settlement methods,
 - Harmonization in the context of the AfCFTA.
 - The consumer protection dimension.
 - Capacity building for development of competition laws and policies in Africa.

Chapter 5 – Investment

Lead: Martin Kohout (ECA) and Hamed El Kady (UNCTAD)

The goal of this chapter is to identify principles that would inform a development-oriented AfCFTA protocol on investment aspiring to boost productive international and intra-African investment. This protocol should ultimately promote the Agenda 2063 of the African Union and the 2030 the United Nations and advance the development objectives of African countries in a sustainable and inclusive manner. The implications of investment and the new investment regime for gender equity should also therefore form part of the key considerations.

The chapter features an overview of the existing investment agreements on the continent, capturing intra-African treaties as well as treaties with non-African partner countries. Following the overview, a vision for a transformative change in the legal landscape as well as the key tenets of the reform are outlined. The chapter also puts forward a blueprint for the new investment chapter of the AfCFTA and concludes with wider policy recommendations.

The AfCFTA protocol on investment could provide a valuable opportunity to harmonize the continent’s investment regime into one with more transparent, consistent and predictable investment rules, regulations, policies and procedures. The investment policy regime should take into account and be consistent with national development plans and objectives. However, it is critical that such a protocol strikes the balance between protecting the investor and giving African governments sufficient policy space to pursue sustainable development objectives. In this sense, it should strive for an equilibrium between rights and responsibilities of investors and States. At the same time, the Protocol should aim to level the playing field between domestic and international investors and to promote intra-African investment flows without alienating or discouraging investors from other parts of the world. Consequently, the chapter of the report ponders how the investment chapter of the AfCFTA, or the new investment legal environment at large, should relate to current and future treaties with, and the legal obligations contained therein, towards third countries. This chapter draws on the common and distinctive elements of existing investment agreements in Africa at both regional and bilateral levels, and uses these to identify key principles for the AfCFTA protocol on investment. These instruments are to be presented in the form of a series of case studies and comparisons. Particular attention will be paid to the Pan-African Investment Code as well as to the work of UNCTAD, e.g. WIR 2015: Reforming International Investment Governance.

- Two or three case studies may be drafted on the basis of the following: SADC Finance and Investment Protocol (amended), SADC Model Bilateral Investment Treaty Template, ECOWAS

Common Investment Rules for the Community, COMESA Investment Agreement or East African Model Investment Code.

- Case study: Morocco-Nigeria BIT (2016)
- One or two case studies on recent treaties from different regions (e.g. ASEAN, CPTPP, MERCOSUR)
- Case study: EU investment policy (i.e. the relationship between the Single Market and intra-EU and external investment protection)
- Key areas of an African regional investment protocol expected to be considered include:
 - Scope of applicability (e.g. definitions of investor and investment, denial of benefits, pre vs post-establishment)
 - Host state obligations on investor protection (e.g. expropriation, most-favoured nation treatment and national treatment, fair and equitable treatment and full protection and security, repatriation of funds, umbrella clause, consideration of performance requirements)
 - Obligations and duties of investors (e.g. including pre and post-investment, environmental and social impact assessments including on gender equity and women's empowerment, human rights, corruption, transparency, and labour standards)
 - New, emerging and other issues and obligations (e.g. the right to regulate, harmonisation of investment laws and policies, state obligations in refraining from competing in lowering standards; general exceptions; these issues may feed into other parts of the blueprint)
 - Dispute settlement (e.g. type, access, transparency, claims and counterclaims brought by the States, dispute prevention)
 - Promotion and facilitation of investment
 - Consideration of and relation to other policy areas, such as taxation, competition policy and intellectual property rights

Chapter 6 – Intellectual property rights

Lead: UNCTAD and CDD

Intellectual property is an important driver for innovation, investment and growth. In Africa, two frameworks for intellectual property (IP) exist: the African Regional Intellectual Property Organization (ARIPO) and Organisation Africaine de la Propriété Intellectuelle (OAPI), with the former catering more to anglophone countries and the latter francophones. This chapter will consider whether, and how, an AfCFTA protocol on intellectual property rights can provide a platform for harmonizing, cooperating over, and developing upon IP regimes in Africa.

- Case study: African Regional Intellectual Property Organization (ARIPO) framework and Organisation Africaine de la Propriété Intellectuelle (OAPI) focusing on critical export sectors for the AfCFTA
- Case study: ASEAN Framework Agreement on Intellectual Property Cooperation – with a focus on cooperation between national IP institutions.
- Fostering innovation for start-ups and the private sector: drawing from the WIPO Global Innovation Index and the NEPAD African Science and Technology and Innovation Indicators
- Elements of an AfCFTA intellectual property protocol expected to be considered include:
 - Protecting policy space from erosion, including limitations and exceptions that suit countries at various stages of development

- Commitments to technology transfer and access to technology, including through competition complementarities
- Management of regional cooperation
- Balanced coverage of copyright, patents, trademarks, traditional knowledge
- Enhancing the policy space that is available to African countries under agreements like TRIPS (possibly drawing from successes here by the ANDEAN Community)
- Possible exemption to some countries/regions from implementing enhanced IP protections
- Enforcement/dispute mediation mechanisms
- PAIPO and its possible role in harmonizing IP regimes

Chapter 7 – Digital trade and e-commerce

Lead: Torbjorn Fredriksson (UNCTAD) and Ify Ogo

Digital trade is growing rapidly globally and in Africa, presenting significant policy opportunities as well as challenges. While many aspects of e-commerce facilitation and regulation should remain within the remit of national policy, there are certain elements that can be addressed by trade rules and frameworks for cooperation to support cross-border e-commerce. This is why modern Regional Trade Agreements (RTAs) are increasingly incorporating e-commerce provisions. As of May 2017 there were 47 North-South RTAs and 25 South-South RTAs that contained provisions on e-commerce^{viii}. This chapter we consider examples of regional policy approaches to digital trade with a view to identifying principles for an AfCFTA digital trade protocol that could aid the long-term development of Africa’s e-commerce enterprises.

4. Case study: The EU’s single digital market and/or ASEAN Coordination Committee on E-Commerce.
5. High-level mapping of existing legal frameworks that govern e-commerce/digital trade in Africa, including the AU Data Protection Guidelines, and consideration of how these could be operationalised through the AfCFTA.
6. Elements of an AfCFTA digital protocol expected to be considered include:
 - a. Data policy – ownership, interoperability, and access to data
 - b. ICT standards and interoperability
 - c. Parcel delivery
 - d. E-commerce




7. Timeline

Publication is scheduled for February 2019 to coincide with the advancement of the AfCFTA Phase II negotiations. The timeline involves an Experts Group Meeting (EGM) in July to review and refine the conceptual approach and themes. Three months are then accorded to the preparation of the first draft of the chapters of the report in time for a quality panel EGM in November. The remainder of November and December will focus on revisions emanating from the quality panel EGM and a joint internal review. Finally, January and February 2019 are dedicated to editing, infographics, translation and printing.

Table. ARIA IX: Gantt Matrix of Scheduling

Chapter	Inputs	July	Aug	Sep	Oct	Nov	Dec	Jan	Feb
Report conceptualization	Experts Group Meeting								
	Conceptual revisions								

Key messages and recommendations / foreword	Collated								
Ch1: Status of regional integration in Africa	First draft								
	Final revisions					*			
Ch2: AfCFTA - where we stand	First draft								
	Final revisions								
Ch3: The AfCFTA – internal and external challenges	First draft								
	Final revisions								
Ch4: Competition policy	Case studies								
	First draft								
	Final revisions								
Ch5: Investment	Case studies								
	First draft								
	Final revisions								
Ch6: Intellectual property rights	Case studies								
	First draft								
	Final revisions								
Ch7: Digital trade and e-commerce	Case studies								
	First draft								
	Final revisions								
Report finalization	Quality panel								
	Final draft								
	Internal review								
	Editing and infographics								
	Translation and printing								

Key milestones:  report conceptualization,  quality panel review of first draft,  printed report

* Noting that progress on certain subsections of Chapter 1 will depend on the advancement of the African Regional Integration Index (ARII).

Sources consulted

ⁱ ECA, AUC and AfDB. 2017. *Assessing Regional Integration in Africa VIII: Bringing the CFTA About*. Addis Ababa: ECA.

ⁱⁱ AU. *Indication of legal instruments signed at the 10th Extraordinary Session of the Assembly on the launch of the AfCFTA*, available: https://www.uneca.org/sites/default/files/uploaded-documents/ATPC/AfCFTA-2018/34033-pr-afcfta_indication_of_signing_authority_.pdf, accessed 10/05/18.

ⁱⁱⁱ AUC and ECA. 2018. *AfCFTA Questions & Answers*. Available: <https://au.int/en/documents/20180315/afcfta-questions-answers>, accessed 10/05/18.

^{iv} AU. 2018. *Decisions on the draft agreement establishing the African Continental Free Trade Area (AfCFTA)*, Assembly of the Union, Tenth Extraordinary Session (Ext/Assembly/AU/Dec.1(X)), Kigali, Rwanda.

^v Tralac. 2018. *The African Continental Free Trade Area (AfCFTA) and the Sustainable Development Goals (SDGs)*, available: <https://www.tralac.org/discussions/article/12762-the-african-continental-free-trade-area-afcfta-and-the-sustainable-development-goals-sdgs.html>, accessed 10/05/18.

^{vi} ACF and World Bank. 2016. *Breaking down barriers: unlocking Africa's potential through vigorous competition policy*, Washington, D.C. : World Bank Group.

<http://documents.worldbank.org/curated/en/243171467232051787/Breaking-down-barriers-unlocking-Africas-potential-through-vigorous-competition-policy>.

^{vii} ECA, AUC and AfDB, *Op cit*.

^{viii} WTO Economic Research and Statistics Division. 2017. Provisions on Electronic Commerce in Regional Trade Agreements, WTO Working Paper ERSD-2017-11