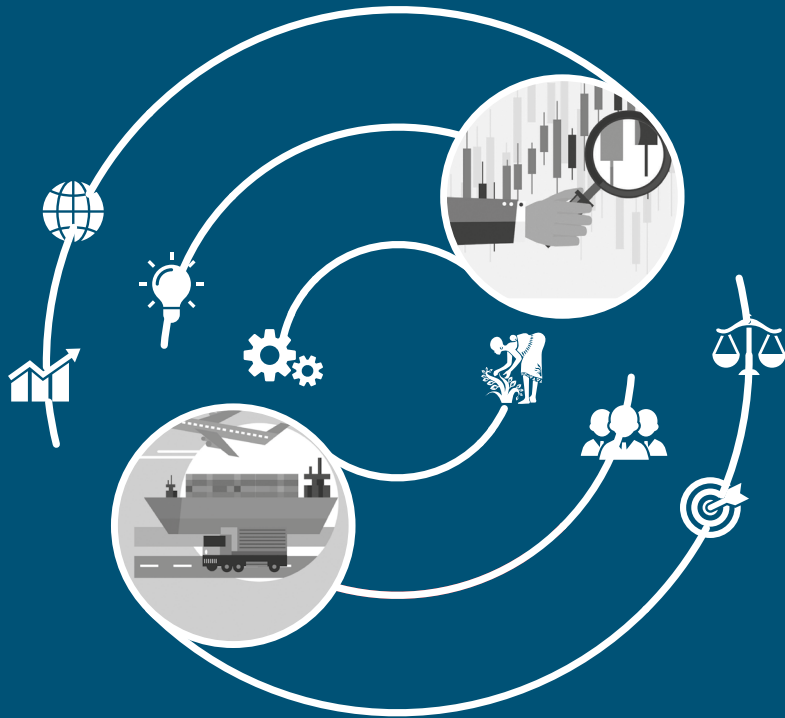


Report

# Human Rights and the African Continental Free Trade Area

Taking Stock and Navigating the Way Forward



# Foreword

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Almost seven years ago, the Office of the United Nations High Commissioner for Human Rights, the Friedrich-Ebert-Stiftung (FES) Geneva Office and the United Nations Economic Commission for Africa (UNECA) embarked on a joint process to assess the possible human rights impacts of the African Continental Free Trade (AfCFTA), which was then at an early stage of negotiations. This process resulted in the publication of an ex-ante Human Rights Impact Assessment of the AfCFTA in 2017. The research involved the collaboration of a multi-disciplinary team of human rights and trade experts from the three organizations as well as broad consultations with specialized UN agencies, academics, and civil society actors.

The assessment identified priority areas where the AfCFTA could promote or undermine human rights, and provided human rights-based recommendations to negotiators on the contents of the agreement and its monitoring and implementation mechanisms. The work highlighted the interdependence and interrelationship between human rights, trade and sustainable development, by focussing on possible impacts on specific sets of rights (right to work, social security, adequate standard of living and right to food) and populations (women, youth, small-scale farmers and informal cross-border traders) which were identified through initial screening and scoping exercises, and consultations with key stakeholders.

The assessment made visible the situation of populations who would be left behind if trade negotiators only considered estimated economic growth without evaluating the potential distribution of the impacts and benefits of AfCFTA. We highlighted the need for disaggregated data, for instance, on women in informal cross-border trade, and to understand the differentiated impacts of trade liberalization on different populations. A rights-based approach to trade must take into consideration the contributions and specific needs of all people, including women and girls. We argued that AfCFTA must ensure policy coherence and policy space so that its implementation and trade liberalization in the African continent would advance a people-centred Africa Agenda 2063.

Today, AfCFTA is a reality. The agreement has been signed by all countries in the region with one exception and ratified by 41 countries. As a flagship project of the implementation of Africa Agenda 2063: The Africa We Want, AfCFTA is designed as a multi-stage process. The first phase of goods and services trade started in January 2021. More negotiations are planned from 2022 onwards on intellectual property rights, investment, competition policy and E-Commerce.

The recommendations from our human rights impact assessment of the AfCFTA are as relevant as ever, particularly for the initial implementation of the free trade agreement and in the context of the response to and recovery from the socioeconomic impacts of the

COVID-19 pandemic. Friedrich-Ebert-Stiftung and the Office of the High Commissioner for Human Rights decided to review the extent to which the recommendations of the assessment were taken into consideration in the negotiations and the final text of the agreement, as well as to update the recommendations based on developments since 2017.

The Update “Human Rights and the African Continental Free Trade Area – Taking stock and Navigating the Way Forward” reviews the recommendations formulated in the ex-ante Human Rights Impacts Assessment of the AfCFTA and assesses their implementation by using colour-score cards. This method illustrates in a quick and straightforward way areas where human rights may be overlooked or where implementation of recommendations was still needed. This illustration is important for both, policymakers interested and/or involved in the AfCFTA as well as for human rights advocates. Policy areas “qualified” as red need to be addressed urgently while those marked as “green” may illustrate practices that can guide improved integration of human rights in other areas. Policy areas marked as “amber” require further implementation efforts. Whether flagged in red, amber or green, the report offers guidance and recommendations for further action related to each sub-section.

It goes beyond revisiting the recommendations developed in 2017 to address new developments like the COVID-19 pandemic, climate change, Phase II of the AfCFTA negotiations and human rights considerations that require further analysis in the context of the ongoing negotiations.

Human Rights Impact Assessments are a critical tool for the advancement of people-centred and human rights-based development, including through trade agreements. Human Rights Impact Assessment can help ensure that the rights of people whose needs may otherwise be overlooked or poorly addressed are protected in trade negotiations. If human rights obligations are respected and protected in trade policy measures, people will equitably benefit from trade. In the context of the AfCFTA, human rights have the potential to ensure that the ambition to “promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties” (AfCFTA: Art 3) will be achieved for all.

We are grateful to the author of this study, Jamie MacLeod, and to our colleagues, Maria Andrea Echazu Aguero (OHCHR) and Yvonne Bartmann (FES Geneva) for their support.

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# Executive summary

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## Background

In 2017, the United Nations Economic Commission for Africa, the Office of the High Commissioner for Human Rights and the Friedrich-Ebert-Stiftung office in Geneva developed an ex ante human rights impact assessment (HRIA) of the African Continental Free Trade Area (AfCFTA). Prepared at the outset of the negotiation process for the AfCFTA Agreement, this HRIA sought to provide an evidence base and policy recommendations to ensure the design and implementation of the AfCFTA align with human rights and development commitments and priorities.

The present report evaluates the extent to which the 2017 HRIA recommendations are reflected in the legal text of the Agreement, in the AfCFTA negotiations, and in the broader policy ecosystem of activities, institutions and initiatives. The result is a series of scorecards that provide interpretable high-level performance markers describing the progress being made against these recommendations. Though each point is necessarily far more complex than can be expressed by a traffic-light score, the intention here is to raise red flags where human rights may be being overlooked, while celebrating areas where they are being considered and respected. Finally, the report extends the perspective of human-rights analysis to new and emerging issues, including trade developments at the global and regional levels, as well as the upcoming Phase II of the AfCFTA protocols.

The summary scorecards cover recommendations from each area addressed in the 2017 HRIA. In total, 36 issues were reviewed: 7 have been accorded a green flag (recognising commendable achievements); 16 have received an amber flag (recognising progress but requiring further efforts); and 8 have been given a red flag (drawing attention to the risk of human rights being overlooked). Lastly, 5 have been scored grey, meaning insufficient information is available or evaluation was not possible.

## Summary Scorecard 1: Informal cross-border traders

|   |      |       |       |
|---|------|-------|-------|
| 1. Acknowledge and develop understanding about the informal cross-border trade sector |      | Amber |       |
| 2. Support the employment-creating role of cross-border trade                         |      |       | Green |
| 3. Ensure adequate labour and social protections                                      | Red  |       |       |
| 4. Facilitate free movement of persons  | Red  |       |       |
| 5. Develop a continent-wide Simplified Trade Regime                                   | Red  |       |       |
| 6. Address Non-Tariff Barriers  |      |       | Green |
| 7. Set up infrastructure in border areas  | Grey | Grey  | Grey  |
| 8. Promote gender sensitisation and women's rights                                    |      | Amber |       |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

## Summary Scorecard 2: Small-scale farmers and the right to food

|   |      |       |       |
|---|------|-------|-------|
| 1. Consider the right to food when negotiating tariff lines and exclusion lists | Grey | Grey  | Grey  |
| 2. Trade remedies and safeguards  | Red  |       |       |
| 3. Maintain and develop domestic production                                     |      | Amber |       |
| 4. Maintain policy space  |      |       | Green |
| 5. Collect data about the needs of the most vulnerable                          |      | Amber |       |
| 6. Provide capacity building  |      | Amber |       |
| 7. Ensure consultations, participation and transparency                         |      | Amber |       |
| 8. Address concerns about climate change and environmental degradation          |      |       | Green |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

## Summary Scorecard 3: The right to work and the agro-manufacturing sector

|  |      |       |       |
|--|------|-------|-------|
| 1. Engage in paced, layered, targeted liberalisation                       |      |       | Green |
| 2. Establish complementary measures  | Red  |       |       |
| 3. Create inclusive value chains   | Grey | Grey  | Grey  |
| 4. Support connectivity of small-scale producers with agro-manufacturing   |      | Amber |       |
| 5. Avoid favouring large enterprises to the detriment of small-scale firms |      | Amber |       |
| 6. Protect the right to work and rights at work                            | Red  |       |       |
| 7. Prioritise training, vocational guidance and reskilling                 |      | Amber |       |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

## Summary Scorecard 4: Ensuring a human rights-consistent negotiating process

|  |      |        |      |
|--|------|--------|------|
| 1. Spread awareness and disseminate information about AfCFTA processes and proposed content; publish draft texts   | Red  |        |      |
| 2. Ensure national consultations involve close coordination between national ministries and a broad range of stakeholders, including representatives from vulnerable groups  | Grey | Grey   | Grey |
| 3. Conduct gender analysis, carry out consultations with women's groups, and include women in negotiating delegations  |      | Yellow |      |
| 4. Create entry points and mechanisms for ensuring transparency, consultation and participation, particularly for non-state actors, so they can be informed of progress and provide suggestions on the draft agreement | Red  |        |      |
| 5. Inform and allow the participation of specialised agencies, such as the African Commission on Human and Peoples' Rights, FAO, ILO, UNDP and UNICEF  |      | Yellow |      |
| 6. Ensure that there is sufficient funding to enable information-sharing about, and participation in, the negotiations   |      | Yellow |      |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

## Summary Scorecard 5: Monitoring and evaluation

|   |      |      |      |
|---|------|------|------|
| 1. Ensure human rights indicators are included in the monitoring and evaluation of the AfCFTA | Grey | Grey | Grey |
|---|------|------|------|

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

## Summary Scorecard 6: Institutional and structural mechanisms

|   |  |        |       |
|---|--|--------|-------|
| 1. Dialogue and consultation                |  | Yellow |       |
| 2. Data collection and monitoring           |  | Yellow |       |
| 3. Coordination                             |  | Yellow |       |
| 4. Adjustment and compensatory arrangements |  |        | Green |
| 5. Capacity building                        |  | Yellow |       |
| 6. Judicial Redress Mechanism               |  |        | Green |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

# Contents

|   |           |
|---|-----------|
| <b>Executive Summary .....</b>  | <b>04</b> |
| Summary Scorecard 1: Informal cross-border traders .....                          | 05        |
| Summary Scorecard 2: Small-scale farmers and the right to food .....              | 05        |
| Summary Scorecard 3: The right to work and the agro-manufacturing sector.....     | 05        |
| Summary Scorecard 4: Ensuring a human rights-consistent negotiating process ..... | 06        |
| Summary Scorecard 5: Monitoring and evaluation .....                              | 06        |
| Summary Scorecard 6: Institutional and structural mechanisms .....                | 06        |
| <b>I. Background and introduction .....</b>                                       | <b>08</b> |
| <b>II. Methodology .....</b>  | <b>10</b> |
| <b>III. Updated HRIA recommendations .....</b>                                    | <b>12</b> |
| Informal cross-border traders .....   | 12        |
| Summary Scorecard 1: Informal cross-border traders .....                          | 21        |
| Small-scale farmers and the right to food.....                                    | 22        |
| Summary Scorecard 2: Small-scale farmers and the right to food.....               | 30        |
| The right to work and the agro-manufacturing sector .....                         | 31        |
| Summary Scorecard 3: The right to work and the agro-manufacturing sector .....    | 37        |
| Ensuring a human rights-consistent negotiating process .....                      | 38        |
| Summary Scorecard 4: Ensuring a human rights-consistent negotiating process.....  | 44        |
| Monitoring and evaluation.....  | 45        |
| Summary Scorecard 5: Monitoring and evaluation .....                              | 46        |
| <b>IV. Institutional and structural mechanisms .....</b>                          | <b>54</b> |
| Summary Scorecard 6: Institutional and structural mechanisms .....                | 61        |
| <b>V. New and emerging issues from a human rights perspective .....</b>           | <b>63</b> |
| New developments at the regional and global level since 2017 .....                | 63        |
| The Covid-19 pandemic .....   | 63        |
| Climate change.....   | 65        |
| Phase II AfCFTA negotiations .....  | 67        |
| Competition Protocol .....  | 67        |
| Investment Protocol .....   | 68        |
| Intellectual Property Rights Protocol.....  | 70        |
| E-Commerce Protocol.....  | 72        |
| Women and Youth Protocol.....   | 75        |
| Summary.....  | 76        |
| <b>VI. Conclusions .....</b>  | <b>80</b> |

# I. Background and introduction

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In The Agreement Establishing the African Continental Free Trade Area (AfCFTA) was concluded on 21 March 2018.<sup>1</sup> On 1 January 2021, after some years of effort following the launch of the negotiations in June 2015, trading under the Agreement officially commenced. Much hope has been pinned upon the AfCFTA initiative as a vehicle for diversifying, industrialising and transforming the economies of African countries and contributing to their sustainable development.

The purpose of a human rights impact assessment (HRIA) is to prioritise human rights in policy-making, thus strengthening accountability and empowering rights-holders. In the context of trade agreements, human rights impact assessments can be utilised as tools to gather evidence to advocate for and positively influence policy changes during negotiations and throughout the implementation of these agreements. All African countries have, through their adoption of the Constitutive Act of the African Union, expressed their commitment to “to promote and protect human and peoples’ rights”.<sup>2</sup>

In 2017, at the outset of the negotiation process and based on research carried out by a multi-disciplinary team, the United Nations Economic Commission for Africa, the Office of the High Commissioner for Human Rights and the Friedrich-Ebert-Stiftung office in Geneva undertook an ex ante human rights impact assessment of the AfCFTA. The aim was to provide an evidence base and policy recommendations to be integrated into the design and implementation of the AfCFTA, ensuring it align with human rights and development commitments and priorities. The 2017 HRIA acknowledged that all human rights are interrelated and interdependent, but chose to focus especially on the rights to work, to social security and to an adequate standard of living and food. Particular attention was accorded to women, small-scale farmers and informal cross-border traders, who were identified as potentially vulnerable groups within the trade liberalisation reforms expected by the AfCFTA.

This update of the 2017 HRIA does not seek to re-justify the choice of vulnerable groups or human rights on which to focus, but rather takes these as an established set. The report evaluates the extent to which the 2017 HRIA recommendations are reflected in the legal text of the AfCFTA Agreement, in the AfCFTA negotiations, and in the broader policy ecosystem of activities, institutions and initiatives.



The result is a series of scorecards that provide interpretable high-level performance markers describing the progress being made against the recommendations from the 2017 HRIA. The intention is to raise red flags where human rights may be being overlooked, while celebrating areas where they are being considered and respected. It further identifies areas where more information is needed to better monitor and evaluate human rights risks.

This report also takes the opportunity to go beyond the 2017 HRIA by extending the human rights impact assessment to new and emerging issues of relevance to the AfCFTA, including the Covid-19 pandemic and the necessity of increased action to tackle the consequences of climate change and environmental degradation. It further extends its scope to consider priorities, from a human rights perspective, for Phase II of the AfCFTA negotiations on competition policy, investment, intellectual property rights and e-commerce, as well as the recently announced discussions on a protocol for women and youth.

The authors are hopeful that the updated human rights recommendations can be incorporated into the ongoing AfCFTA negotiations, the implementation of the agreement, and the complementary support provided within the wider AfCFTA ecosystem, all in order to ensure that the AfCFTA delivers its transformative potential to those in Africa who need it most.

After outlining the methodological processes undertaken in the course of the analysis, the report turns to providing updates on the 2017 HRIA recommendations. The progress made against these recommendations is evaluated in five areas: informal cross-border traders, small-scale farmers and the right to food, the right to work and the agro-manufacturing sector, ensuring a negotiation process consistent with human rights, and monitoring and evaluation. Next, the recommendations are assessed and updated with regard to the AfCFTA institutional mechanisms and their mandates. The second part of the report concerns new and emerging issues from a human-rights perspective, focusing on new developments at regional and global levels since 2017 and Phase II of the AfCFTA negotiations. Finally, the conclusion summarises the authors' general findings.

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<sup>1</sup> AU. 2018. Agreement Establishing the African Continental Free Trade Area. Kigali, Rwanda.

<sup>2</sup> AU. 2000. Constitutive Act of the African Union. [https://au.int/sites/default/files/pages/34873-file-constitutive-act\\_en.pdf](https://au.int/sites/default/files/pages/34873-file-constitutive-act_en.pdf).

## II. Methodology

The methodological technique applied to updating the human rights impact assessment of the AfCFTA can be considered in two parts: approach and scope. These shape the content and contours of the present report.

The approach involves a desk-based review and evaluation of the official AfCFTA documentation. Where gaps exist in this documentation, in instances where further explanation is important or as a means of cross-checking and buttressing the available documentation, interviews with key stakeholders are used. Information gathered from the documentation and interviews is cross-referenced against the 2017 Human Rights Impact Assessment, which forms the basis for the updates made in this report.

Particular attention is paid to addressing what has been achieved since the 2017 HRIA, and in which areas further action and care is required to ensure a human rights-based AfCFTA. In practice, this means evaluating how and to what extent the AfCFTA negotiations and their outcomes meet the recommendations of the 2017 HRIA. Human rights achievements are credited, gaps are flagged and recommendations are reviewed and updated. In each instance, a traffic-light score is accorded to provide an interpretable high-level performance marker showing which appropriate and proportionate steps are being taken to address the recommendations. The intention is to raise red flags wherever human rights may be being overlooked, while celebrating areas where they are being considered and respected.

Figure 1. Scoring performance on the 2017 HRIA recommendations

|  |  |  |  |
|--|--|--|--|
| Commendable achievements               |  |  |  |
| Progress but requiring further efforts |  |  |  |
| Human rights being overlooked          |  |  |  |
| Insufficient evidence for assessment   |  |  |  |

In terms of scope, this report considers the AfCFTA not merely a piece of legal text but a broader ecosystem of activities, institutions and initiatives. The AfCFTA Agreement, including its protocols, annexes and appendices, forms the central focus of the updated human rights impact analysis. However, looking at the process through which decisions for the AfCFTA were reached is important for insight into the intentions and trade-offs inherent in the initiative, and so the scope here includes the negotiations behind the concluded Agreement. Furthermore, the ecosystem approach to understanding the AfCFTA also means that the latter is placed within a broader context. It extends the evaluation to cover the formal African Union

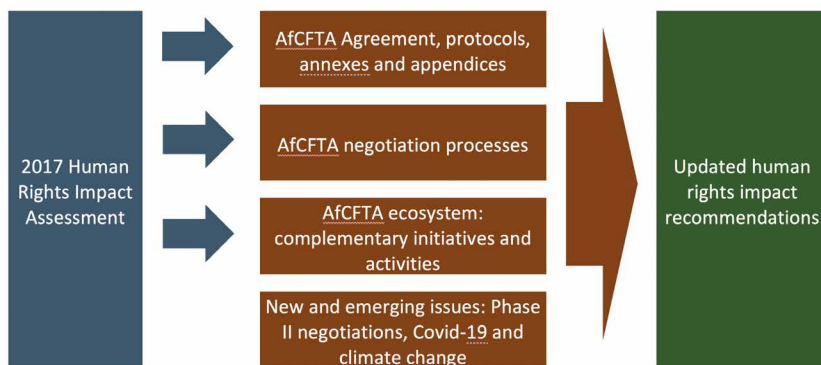
“operational instruments” governing the AfCFTA, including the African Trade Observatory, a digital payments system and the online negotiating forum, as well as other but related country- and donor-led initiatives, such as the AfCFTA national strategies, the AfCFTA Country Business Index, trade data collection, policy research, and advocacy and outreach campaigns. Finally, the scope of this report draws in new and emerging elements that have arisen since the 2017 HRIA. Some of these are Phase II of the AfCFTA negotiations, and regional and global developments ranging from the Covid-19 pandemic to climate change.

Across each of these areas, an analytical lens is cast to evaluate the AfCFTA and its related activities not merely as they stand on paper but within the context of real-world constraints and opportunities that may alter their effectiveness. This involves consideration of political economy and institutional and economic capacity limitations. In effect, emphasis is placed on appreciating the difference between what the AfCFTA may say on paper and what it may mean in practice.

Together, the approach and scope entail the following specific methodological steps and activities, which are detailed sequentially in Figure 1:

- A review of the text of the AfCFTA Agreement, its protocols, annexes and appendices, and an evaluation of progress against the recommendations of the HRIA 2017
- A review of the meeting reports, press statements and advocacy events surrounding the AfCFTA negotiations to understand the process
- An appreciation of the AfCFTA within its broader ecosystem of institutions, complementary initiatives, activities and operational instruments

Figure 2. A methodological process map for updated recommendations leading towards a human rights-based African Continental Free Trade Area



### III. Updated HRIA recommendations

#### Informal cross-border traders

The informal trade sector was prioritised in the 2017 HRIA due to its significance to the livelihoods of some of Africa’s most vulnerable people, particularly youth and women. The latest estimates are that informal cross-border trade accounts for 7 to 16 per cent of total official intra-African exports (equivalent to around \$10 billion to \$24 billion).<sup>3</sup> This is even more noteworthy for the fact that the goods traded in this manner tend to be “low-value” consignments such as foods, basic manufactured goods (cloth, electronics, car parts) and services (provided by hairdressers, construction workers and housekeepers).<sup>4</sup> Informal trade contributes – both directly and indirectly – to income-earning opportunities for approximately 43 per cent of Africa’s population,<sup>5</sup> and up to 70 per cent of informal cross-border traders in many African countries are women. Yet this sector can easily fall outside the gaze of official trade negotiators, among whom there is sometimes a perception that informal trade is equivalent to illegal shadow trade, which should be discouraged.

The 2017 HRIA presented eight recommendations that negotiators could pursue to ensure that individuals who sought a living through cross-border trade would be supported in their right to work, their right to freedom of movement, and their right to be safeguarded from risks stemming from abuse, discrimination or lack of social protection.

|   |  |  |  |
|---|--|--|--|
| 1. Acknowledge and develop understanding about the informal cross-border trade sector |  |  |  |
|---|--|--|--|

The significance of informal cross-border trade, and its status as a prominent aspect of intra-African trade overall, could have been acknowledged in the Preamble of the AfCFTA Agreement or among its General or Specific Objectives (Articles 3 and 4). However, no explicit mention of informal cross-border trade is made within the texts of the AfCFTA or its annexes, with the tangential exception of a provision in the Protocol on Trade in Services agreeing, “where possible, to mobilise resources, in collaboration with development partners, and implement measures ..., with a view to, inter alia: ... improving the export capacity of both formal and informal service suppliers”<sup>6</sup>. Nevertheless, considerable time and space has been allocated to informal cross-border trade in the narratives surrounding and advocating for the AfCFTA.

References to the importance of informal cross-border trade have become more frequent in high-level and technical-level speeches at conferences, in negotiation forums and, indeed, at AU summits on the topics of the AfCFTA. These include, among many others, the speech given by Vera Songwe, Executive Secretary of the ECA, at the 10th Extraordinary Summit (on the AfCFTA) of the AU Assembly in March 2018; the statement made by Pamela Coke-Hamilton, then representative of the Secretary-General of UNCTAD, at the 7th Meeting of the African Union Ministers of Trade (AMOT) in December 2018;<sup>7</sup> the speech given by UN Deputy Secretary-General Amina Mohammad at the 12th Extraordinary Summit (on the AfCFTA) of the AU Assembly in July 2019; and the formal statement submitted by Afreximbank at the Trade in Services Signalling Conference in September 2019.<sup>8</sup> In a speech given in December 2019, Ambassador Albert Muchanga, the AUC Commissioner for Trade and Industry, spoke of using the AfCFTA “as an instrument of solving the attendant issues of the informality of small-scale traders”.<sup>7</sup> To quote the ECDPM, a think tank specialising in the political economy of trade policy, based on fieldwork and discussions with traders and with state and border officials, the “relevance of informal cross-border trade (ICBT) is increasingly appreciated”.<sup>8</sup>

Recognition of the relevance of ICBT in Africa may be propelled by recent efforts to gain a deeper understanding of these trade flows and their drivers. Notable contributions include the Afreximbank *African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA*,<sup>9</sup> and the support provided by Afreximbank through the African Trade Policy Centre of the ECA. The ATPC’s goal here is to collect and assess data from the West African informal trade corridor to better gauge and understand informal cross-border trade.<sup>10</sup> Similar work led by the ATPC and supported by the Organisation of African, Caribbean and Pacific States (OACPS) has built upon this research.<sup>11</sup> The Eastern Africa Grain Council,<sup>12</sup> TradeMark East Africa,<sup>13</sup> and Sauti East Africa<sup>14</sup> have also contributed continuing research and primary data collection to measure and understand informal cross-border trade in East Africa, including how it has been affected by Covid-19. Likewise, there is a growing body of research on the scale and nature of ICBT in Southern Africa.<sup>15</sup> The data and research assessing ICBT in North and Central Africa tends to be more limited, as is research related specifically to the impact of the AfCFTA on such trade.<sup>16</sup>

All these efforts seem to be starting to pay off in discussions at the technical level of AfCFTA implementation. The AfCFTA Sub-Committee on Trade Facilitation, Customs Cooperation and Transit, at their first meeting in August 2021, recommended that their work plan be amended to consider the informal sector.

*Recommendation:* Though an explicit reference to informal cross-border trade in the AfCFTA Agreement would have been welcome, efforts are now being made in the implementation phase of the AfCFTA to acknowledge and understand informal traders. Nevertheless, more data collection and deeper analysis is needed for the Central and North African regions in particular. Further, think tanks and researchers need to do more to ensure that data and analysis in this area is shared with policymakers and integrated into negotiations, for instance, through a designated working group or coordinated opportunities to present recent findings to negotiators.

|  |  |  |  |
|--|--|--|--|
| <b>2. Support the employment-creating role of cross-border trade</b> |  |  |  |
|--|--|--|--|

The 2017 HRIA recommended further research be conducted to understand the employment-creating role of informal cross-border trade, and specifically to analyse movement between the formal and informal trade sectors. Continuing research efforts are being made to understand the nature and forms of informal cross-border trade in Africa, as well as the employment it sustains. These efforts are more frequently funded by donors and implemented by policy research organisations, but sometimes they are directly commissioned by regional African economic communities. Knowledge generated through these initiatives is disseminated through policy publications and advocacy documents, events and conferences. One example is the ECO ICBT programme run by ECOWAS, which includes capacity-building initiatives based on data on informal cross-border traders.<sup>17</sup>

In 2021, COMESA conducted an EU-funded study on formalising the informal economy, focusing on informal trade. They analysed the drivers of informality and the impacts of informality on the economy, and identified policies that COMESA members could use to ease traders into the formal sector.<sup>18</sup> Their recommendations included providing support services to informal traders to build trust, improving the efficiency of border-compliance procedures, and simplifying trade and business registration processes. Currently, COMESA is reportedly engaging with its Member States to identify subsequent activities to be carried out on the basis of the study's findings.<sup>19</sup>

Since 2016, UNCTAD's Borderline project has analysed the "micro-entrepreneurial reality" of informal cross-border trade and its significance as a vital source of employment and livelihood for the poor in border districts.<sup>20</sup> The project focuses on cross-border trade experiences in three East African countries, namely Malawi, Tanzania and Zambia.

Meanwhile, other recent research, conducted by ECDPM in 2021, has argued that policy efforts to formalise informal cross-border trade are confronted by a breadth of complexity and border idiosyncrasies that mean that incentives for informality are likely to persist in the immediate term.<sup>21</sup>

*Recommendation:* The continued research on formal and informal employment in cross-border trade is commendable. Nevertheless, efforts should be extended to unpick this tricky aspect of cross-border trade in Africa even further, and to continually reassess policies and actions made in this area. Research should aim to focus on concrete actions by either the Regional Economic Communities (RECs) or governments to better address the challenges faced by the informal sector.

|  |  |  |  |
|--|--|--|--|
| 3. Ensure adequate social and labour protections |  |  |  |
|--|--|--|--|

The 2017 HRIA recommended that the AfCFTA include an article on labour issues in reference to ILO *Recommendations* 202 and 204, which point out that social protection is an important tool to promote social inclusion and gender and racial equality, as well as to support the transition from informal to formal employment. The AfCFTA Agreement does not contain any specific article on labour issues or social protection, though it does recognise human rights in the Preamble.

It is likely that the Investment Protocol to the AfCFTA Agreement, when it is negotiated, will include an article on labour issues. The Investment Protocol will be informed by – and probably amount to – updating and providing a legally enforceable basis for the 2016 Draft Pan-African Investment Code, which prohibits regulatory arbitrage regarding labour rights as a means to attract investment.<sup>22</sup> Such provisions tend not to be legally binding but rather to help articulate commitments to labour and social protection rights and discourage policies that would undermine these rights.

*Recommendation:* It is regrettable that the framework Agreement Establishing the African Continental Free Trade Area does not express a commitment to labour or social protection rights, particularly in its Preamble or General Objectives. Negotiators should take advantage of the opportunity to address these shortcomings by including an article on labour issues in the Investment Protocol to the AfCFTA.

|  |  |  |  |
|--|--|--|--|
| 4. Facilitate free movement of persons |  |  |  |
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Free movement of people is the fourth flagship project included in the African Union Agenda 2063, after the establishment of the AfCFTA.<sup>23</sup> The fourth preambular paragraph of the AfCFTA Agreement explicitly recognises the “aspirations” for the free movement of persons, in addition to capital, goods and services, in Africa.<sup>24</sup> The Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment (also known as the Protocol on Free Movement)<sup>25</sup> was adopted in January 2018 and launched in March 2018, alongside the AfCFTA, at the 10th Extraordinary Summit of the AU Assembly in Kigali. Thirty of the 55 AU Member States signed the Protocol on Free Movement at its launch.<sup>26</sup> As of the end of 2021, 33 countries have signed the Protocol but only four have ratified it<sup>27</sup> (of the 15 required for entry into force).<sup>28</sup>

Thus far, the focus has been on implementing the AfCFTA, with less political attention (and perhaps appetite) for the Protocol on Free Movement.<sup>29</sup> The latter, since its launch in 2018, has been mentioned in two AU summit issuances of decisions and declarations. At the 12th Extraordinary Summit, in July 2019, the AU Assembly stated they:

COMMIT to the full implementation of the Protocol to the Treaty Establishing the AEC Relating to Free Movement of Persons, Right of Residence and Right of Establishment. To this end, CALL UPON all Member States to sign and ratify this Protocol, which will bring the AfCFTA closer to the African people, who are the most important stakeholders in this process of continental integration<sup>30</sup>.

The AU’s 13th Extraordinary Summit (on the AfCFTA) in January 2021 “encouraged” Member States to sign and ratify the Protocol on Free Movement, while the Johannesburg Decision on the Start of Trading Under the AfCFTA, issued at that summit, explicitly mentions the Protocol on Free Movement.<sup>31</sup>

In practice, free movement within the continent is currently led by Africa’s multiple and overlapping Regional Economic Communities, as well as by unilateral efforts at the country level. Sub-regional free movement initiatives are underway, to various degrees, in the EAC, COMESA, ECOWAS, SADC, ECCAS and AMU.<sup>32</sup> While meritorious, these regional organisations create arbitrary barriers between countries in different regional groups. In terms of unilateral efforts, 16 African countries have all decided to relax their visa restrictions to allow either entry without a visa or visas on arrival for fellow Africans.<sup>33</sup>



*Recommendation:* Build on regional successes to promote the adoption of the Protocol on Free Movement at the continental level, while also learning from the challenges encountered with free movement at that level. Continue, and ideally increase, advocacy for the Protocol on Free Movement to be ratified by more than the 15 countries required for its entry into force. In the meantime, encourage unilateral visa-easing efforts. Ensure that the negotiations for specific commitments regarding trade in services are designed to facilitate small-scale cross-border service providers.

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| <b>5. Develop a continent-wide Simplified Trade Regime</b> |  |  |
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The text of the AfCFTA Agreement and its annexes do not establish a Simplified Trade Regime (STR), nor do they create a mandate for the eventual formulation of such a regime.

Earlier drafts of the AfCFTA text included elements of a trade simplification system for traders. Article 28 of Annex 2 to the Protocol on Trade in Goods elaborates which goods may be traded without the burden of furnishing proofs of origin, namely small packages from private persons to other private persons (with a value threshold of \$500) and items for personal use (with a value threshold of \$1,200).<sup>34</sup> The language used here derives closely from that used in 2015 for the Tripartite Free Trade Area (TFTA). However, earlier drafts of the AfCFTA Agreement expanded these exemptions beyond the TFTA text to include commonly traded goods imported by cross-border traders endorsed by adjacent customs authorities. Such a provision, while not explicitly creating an STR, would have provided a basis and an opening for subsequent efforts to simplify trade requirements by customs authorities.

Nevertheless, since the AfCFTA Agreement was concluded in March 2018, a willingness – and indeed commitment – to develop an STR has been expressed at the highest levels of African policymaking. At the 12th Extraordinary Summit (on the AfCFTA) in July 2019, the AU Assembly stated they would

COMMIT to broaden inclusiveness in the operation of the AfCFTA by catering for the Small to Medium cross border traders. To this end, will collaborate with the Regional Economic Communities to develop a simplified trade regime fully meeting the needs of our hardworking people.

While the Johannesburg Decision on the Start of Trading under the AfCFTA, issued at the 13th Extraordinary Summit (on the AfCFTA) of the AU Assembly in December 2020, noted

that the Assembly would COMMIT to broaden inclusiveness in the operation of the AfCFTA through ... integrating informal cross border traders into formal economy by implementing the simplified trade regime.<sup>35</sup>

A basis for justifying an AfCFTA-anchored STR exists: in 2007, the EAC and COMESA adopted STRs for small cross-border traders for selected commodities. Simplified customs documents and a simplified certificate of origin were permitted in establishing duty-free entry for consignments not exceeding \$1,000 (COMESA) and \$2,000 (EAC).<sup>36</sup> ECOWAS does not have a formal STR, but does not, in practice, require proof of origin for agricultural and live-stock products, as well as hand-made articles or articles produced with or without the use of tools, instruments or implements directly operated by the craftsman.

*Recommendation:* While the opportunity to create an STR was missed in the establishment of the AfCFTA, commitments to an eventual STR have recently been expressed at the highest policymaking levels. The first step in supporting the realisation of those commitments is for the AUC and the Regional Economic Communities, with research partners, to deepen the research base, advance analytical justification, and encourage the sharing of best practices on existing STRs in Africa.

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| <b>6. Address Non-Tariff Barriers</b> |  |  |  |
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The progressive elimination of non-tariff barriers (NTBs) is one of the specific objectives listed in the AfCFTA Agreement (Article 4.a). Annex 5 to the Protocol on Trade in Goods is devoted to the issue of NTBs, aiming to identify, categorise, monitor and eliminate NTBs in intra-African trade under the AfCFTA.<sup>37</sup>

At the 12th Extraordinary Summit (on the AfCFTA), in July 2019, the AU Assembly launched a Continental Online Mechanism for Monitoring, Reporting and Elimination of Non-Tariff Barriers (NTBs) as part of the operational phase of the AfCFTA, and in line with Annex 5 of the AfCFTA Agreement.<sup>38</sup> The AfCFTA NTB mechanism was closely modelled on a pre-existing template created within the ambit of the Tripartite Free Trade Area (TFTA), which covered non-tariff barriers in COMESA, EAC and SADC.<sup>39</sup>

Under the mechanism, NTBs are reported online by individuals when they consider themselves to have faced a barrier in trading (mobile reporting functionalities are under development). Reporting is open to anyone, including drivers, travellers, business people or informal cross-border traders. When someone reports a non-tariff barrier, focal points appointed at the

national level (NFPs) work with NTB Units in the Regional Economic Communities and the NTB Coordination Unit in the AfCFTA Secretariat to resolve the reported problem.<sup>40</sup>

As of November 2021, three active and one resolved NTB complaints had been registered using the AfCFTA NTB mechanism.<sup>41</sup> This compares to 67 active and 741 resolved complaints reported using the TFTA equivalent (which has existed and been publicised for several years).<sup>42</sup> Improving uptake of the AfCFTA NTB tool is now the issue of concern, central to which are awareness, information and accessibility. Negotiators are already conscious of the need to ensure the latter. The 16th meeting of the Negotiating Forum, held in June 2019, specifically recommended State Parties enable members of the informal sector to report NTBs to the AfCFTA system in their local languages.

In addition to setting up the NTB mechanism, the AfCFTA Annex on Non-Tariff Barriers established the AfCFTA NTB Sub-Committee, which met for the second time on 17-18 November 2021. The Sub-Committee's work involves harmonising NTB categorisation to ensure consistent identification; cooperating on building mutual capacity; and promoting awareness and use of the AfCFTA NTB mechanism, thus improving its effectiveness. The latter also includes developing a mobile reporting function.

*Recommendation:* While the implementation of the AfCFTA mechanism is commendable, its widespread uptake must now be promoted. Efforts are required to improve awareness, develop informational resources, and increase accessibility, in particular to small-scale cross-border traders. In the meantime, the AfCFTA NTB Sub-Committee should continue its work on identifying NTBs, harmonising responses, and building cooperation on related customs procedures.

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| <b>7. Set up infrastructure in border areas</b> |  |  |  |
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Security and safety in border areas can be improved significantly by providing designated infrastructure for cross-border traders, including markets, storage facilities, lodging, water and sanitation. However, thousands of crossing points exist on the 107 unique land borders that separate African countries, so a comprehensive evaluation of infrastructure development at those borders is difficult. Consequently, this category is scored as having 'insufficient evidence for assessment' (grey).

Even so, there are many instances where improvements to border infrastructure are clear. Since 2015, the World Bank-financed Great Lakes Trade Facilitation Project (GLTFP)

has pushed investments in border facilities, cross-border markets and pedestrian lanes, with a specific focus on women-sensitive infrastructure such as solar lighting for greater security and gender-differentiated toilets.<sup>43</sup> Payment-free storage facilities and 24-hour security have reportedly been introduced at the important Busia border crossing between Kenya and Uganda.<sup>44</sup> TradeMark East Africa are very active in the East, Southern and Horn of Africa regions, working especially with governments to invest in border markets and one-stop border posts.<sup>45</sup>

Notwithstanding these developments, supportive infrastructure for cross-border trade is still considered inadequate. An UNCTAD survey conducted in Malawi, Tanzania and Zambia found an overall lack of trade facilitation and border infrastructure.<sup>46</sup> Similarly, poor infrastructure was found to be one of the main challenges cited in interviews with West African fish traders between Ghana, Togo and Benin.<sup>47</sup>

*Recommendation:* Increase investment in border infrastructure to promote secure and safe cross-border trade. Border markets, storage facilities, one-stop border posts, lodging and sanitation can all contribute to supporting cross-border traders. Learn from good practices deployed in exemplary border crossings and share knowledge and information.

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| <b>8. Promote gender sensitisation and women’s rights</b> |  |  |  |
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In most African regions, informal cross-border trade tends to be disproportionately carried out by women (a frequently cited estimate is, in fact, that women comprise 70 per cent of informal cross-border traders). Alongside the difficulties inherent in ICBT itself, women traders are further confronted by their own set of challenges, including gender-based violence and harassment. But, as the text of the AfCFTA does not consider informal cross-border trade in general, the specific needs of women in informal cross-border trade (WICBT) are not explicitly recognised either.

Nevertheless, much of the recent data and research on ICBT, including the information cited in the preceding sub-sections of this report, is cognisant of attendant gender-specific concerns. One example of fresh analysis in this area is the 2020 UNDP report *Making the AfCFTA Work for Women and Youth*.<sup>48</sup> Such research improves policy appreciation of the particular issues affecting women cross-border traders, which in turn leads to (sometimes simple) actions like improving night-time security and lighting at border posts.<sup>49</sup>

One of the recommendations made by the 2017 HRIA was for the AfCFTA to explicitly consider gender issues (of a broader scope than those faced by WICBT). The Agreement

acknowledges gender equality in the Preamble and names “gender equality” as an explicit objective (Article 3.e.). These provisions, though not binding, help to articulate a commitment to recognising and accounting for gender-specific issues in trade. Another instance of such a provision is Article 27 (2.d.) of the Protocol on Trade in Services, where State Parties promise to muster resources to improve the export capacity of small and medium-sized enterprises (SMEs) and women and youth service suppliers. This is a best practice example, as designating or mobilising funds for gender-related commitments is fundamental to their implementation.<sup>50</sup>

More recently, deliberations have begun for the consideration of a Phase II AfCFTA protocol on Women and Youth.<sup>51</sup> Meanwhile, in May 2021, the AfCFTA Council of Ministers decided, at their fifth meeting, to establish a committee on Women and Youth.

*Recommendation:* The proposed AfCFTA Protocol on Women and Youth offers a great opportunity to foster actionable commitments to address gender-specific issues in intra-African trade, and in informal trade specifically. Trade-policy research institutions, think tanks and technical partners have a role to play in refining the research base, using existing evidence, to provide negotiators with a rich palette of information from which to draw. Negotiators may also find inspiration in the large number of gender-related provisions already included in the treaties formalised by Africa’s Regional Economic Communities and in human rights acts.

### Summary Scorecard 1: Informal cross-border traders

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| 1. Acknowledge and develop understanding about the informal cross-border trade sector |      | Amber |       |
| 2. Support the employment-creating role of cross-border trade                         |      |       | Green |
| 3. Ensure adequate social and labour protections                                      | Red  |       |       |
| 4. Facilitate free movement of persons  | Red  |       |       |
| 5. Develop a continent-wide Simplified Trade Regime                                   | Red  |       |       |
| 6. Address Non-Tariff Barriers  |      |       | Green |
| 7. Set up infrastructure in border areas  | Grey | Grey  | Grey  |
| 8. Promote gender sensitisation and women’s rights                                    |      | Amber |       |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

The assessment of the rights of informal cross-border traders has indicated red flags in three areas. These are ensuring adequate labour and social protections, facilitating the free movement of persons, and developing a continent-wide simplified trade regime. This is not to say that attention at the policy-making level has been entirely absent: the AU Assembly

continues to encourage ratification of the Protocol on Free Movement and call for a continent-wide STR to be established. In the future, there will be an opportunity to bring up labour protection during AfCFTA negotiations on the planned Investment Protocol.

Further efforts are also required in the two areas flagged amber. There are signs that the importance of informal cross-border trade is increasingly recognised, particularly by researchers, agencies and donors. However, it would be helpful to see such trade formally enshrined in the AfCFTA. In addition, more work is needed to ensure adequate social protections and to promote gender sensitisation and women's rights in ICBT. It is regrettable that the AfCFTA does not yet include provisions on either labour or social protections, but there will be occasion to tackle these in the Investment Protocol. Similarly, the proposed Protocol on Women and Youth offers the AfCFTA a chance to acknowledge and address the particular challenges faced by these groups.

Commendable achievements are visible in two areas: supporting the employment-generating role of cross-border trade and addressing non-tariff barriers. The ever-growing breadth of research on the former issue must be translated into actionable policies. Meanwhile, the AfCFTA NTB mechanism is fully operational. It now needs to be promoted in order to build awareness and accelerate its uptake by traders, in particular small-scale border traders.

Where comprehensive data to evaluate progress against the 2017 HRIA recommendations was not available, namely with respect to infrastructure set up to support cross-border traders across the continent, improvements are nevertheless notable in a range of countries (if not verifiable at the continental level).

### **Small-scale farmers and the right to food**

For the workforce in Africa, agriculture is the single most important sector, and the majority of it happens on small-scale farms. An estimated 580 million Africans relied on agriculture for their livelihoods in 2020, with half of all new entrants to Africa's working population turning to the same sector.<sup>52</sup>

Unfortunately, food security remains a critical issue in African countries. An estimated 282 million people in Africa were undernourished in 2021.<sup>53</sup> The world is not on track to meet Sustainable Development Goal 2: Zero Hunger, with the largest regional share of world hunger persisting in Africa.<sup>54</sup> The continent remains a large net food importer, annually spending approximately \$20 billion more on food imports than exports. This is despite Africa having 62 per cent more arable land per capita than the world country average.<sup>55</sup>

Agriculture currently comprises a large share of intra-African trade, and the AfCFTA is forecast to increase Agrifood trade gains by \$27.3 billion by 2045.<sup>56</sup> Yet agricultural trade continues to face the highest average tariffs, not just in Africa but worldwide. It also bears the brunt of many specific non-tariff barriers, particularly sanitary and phytosanitary (SPS) requirements.<sup>57</sup> The AfCFTA has the potential to make a significant impact on African agriculture and the right to food. However, this impact is complex and multi-faceted; agricultural liberalisation can offer both opportunities and challenges in terms of ensuring the right to food. The 2017 HRIA identified eight recommendations to consider in this area.

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| 1. Consider the right to food when negotiating tariff lines and exclusion lists |  |  |  |
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Tariff negotiations under the AfCFTA permit countries to treat 10 per cent of their intra-African imports more sensitively during liberalisation.<sup>58</sup> Of this 10 per cent, 7 per cent may be designated as “sensitive products” and accorded a longer tariff phase-down period (10 years for non-LDCs and 13 years for LDCs), while the other 3 per cent may be excluded from liberalisation altogether. The latter are, however, subject to review after five years.<sup>59</sup> The modalities for tariff negotiations explicitly identify the following “criteria” for designating sensitive products: food security, national security, fiscal review, livelihoods, and industrialisation. These criteria were adopted at the 32nd Ordinary Session of the AU Assembly, in February 2019.<sup>60</sup>

Food security in Africa has deteriorated in the course of the Covid-19 crisis. According to FAO, 21 per cent of the population was facing hunger in 2020. This was more than double the proportion of any other region and marked an increase of 3 percentage points in a year.<sup>61</sup> Ensuring the right to food while establishing tariff schedules and exclusion lists is not a straightforward task. In some instances, excluding agricultural products might protect the right to food by reducing the amount of food traded out of a country. In other instances, protectionism could exacerbate issues of food security by increasing domestic prices. Equally, these decisions might, within a single country, have different impacts on different sub-populations, some of which may be more vulnerable than others. With the AfCFTA tariff schedules<sup>62</sup> still unpublished, as of November 2021, their consideration of food security is difficult to assess formally. Improved transparency around this information would allow researchers to better examine AfCFTA tariff schedules and identify potential risks and opportunities.

Anecdotal evidence, from discussions with negotiators<sup>63</sup> and expectations expressed by the ECA, AUC and AfDB,<sup>64</sup> suggests that the political economy tends to influence policy de-

cisions around sensitive products and exclusion lists. Sometimes, these align firmly with the right to food. Sierra Leone, for example, is known to waive the ECOWAS common external 10 per cent tariff on rice, owing to its status as a vital food-security crop.<sup>65</sup> In South Africa, the National Economic Development and Labour Council (a labour and business group) holds considerable sway over the objectives and red lines of their representative negotiators.<sup>66</sup> Preliminary findings from DNA Economics, based on the limited information that is publicly available, indicate that agriculture is likely to be the most protected sector in the initial AfCFTA tariff offers for the EAC and ECOWAS regional groups.<sup>67</sup>

*Recommendation:* State Parties must urgently adopt a coherent approach to weighing tariff schedules with food security. This is exceptionally important given the severity of the challenges facing food security in Africa, which have only been exacerbated by the Covid-19 pandemic. Assessing how tariffs and exclusion lists align with the right to food is not easy, especially while tariff schedules remain unpublished. These should be disclosed as soon as feasibly possible to ensure transparency and awareness of the impacts of impending liberalisation under the AfCFTA. Researchers will then also be able to better and more precisely analyse the liberalisation process, particularly with regard to food security. At the same time, negotiators should be commended for explicitly identifying food security as a critical element among the criteria for designating sensitive products.

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| <b>2. Trade remedies and safeguards</b> |  |  |  |
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It is a known fact, of which AfCFTA negotiators are aware, that a rules-based application of trade remedies and safeguards is prohibitively difficult for many (if not most) African countries, and for the continent's least developed countries in particular.<sup>68</sup> Only four African countries (Egypt, Morocco, South Africa and Tunisia) have functional trade-remedy mechanisms,<sup>69</sup> and trade-remedy cases are capacity- and resource-intensive to launch, investigate and defend.

Following the approach taken in the Tripartite Free Trade Agreement (TFTA), AfCFTA negotiators have opted against including more “flexible” remedies that would be easier to trigger. Instead, they have chosen to assist countries through their Guidelines on Implementation of Trade Remedies.<sup>70</sup> The AfCFTA Guidelines will outline the steps and procedures countries must undertake when formally requesting and applying trade remedies, but they have yet to be finalised, adopted and published. Meanwhile, Annex 9 of the AfCFTA Protocol on Trade in Goods mandates the AfCFTA Secretariat (in collaboration with partners) to provide State



Parties with technical assistance in implementing trade remedies (Article 10), and to develop related training and capacity-building programmes (Article 11).

Even with guidelines, technical training and support, however, implementing formal trade remedies will remain problematic for Africa's LDCs.<sup>71</sup> Due at least in part to these difficulties, African countries frequently take action to protect sensitive or struggling sectors through informal measures and derogations.<sup>72</sup> Examples include Nigeria's recent and unilateral closure of the Benin border to tackle smuggling<sup>73</sup> and the non-implementation of various EAC liberalisation efforts in Tanzania.<sup>74</sup> Neither decision should be surprising, as these countries face pressing policy and political challenges to trade but lack the institutional capacity to pursue formal, rules-based trade governance.

*Recommendation:* The AfCFTA aims to provide guidelines, technical assistance and capacity building to help less-capacitated countries apply trade remedies. These aspects of the Agreement need to be urgently and comprehensively implemented – not left behind – to ensure that AfCFTA State Parties can seek redress through rules-based trade remedies wherever they face challenging trade situations.

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| <b>3. Maintain and develop domestic production</b> |  |  |  |
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The 2017 HRIA recommended that the AfCFTA Agreement maintain policy space to promote agricultural development, protect small-scale agricultural production, and strengthen domestic capacity for food production. Accordingly, the Preamble and General Objectives of the AfCFTA Agreement give specific regard to the promotion of agricultural development and food security.<sup>75</sup> At the seventh meeting of the AfCFTA Council of Ministers, in October 2021, the Secretary-General of the AfCFTA Secretariat recalled these objectives by identifying agriculture and agro-processing as priority value chains on the continent.

Nothing in the AfCFTA Agreement inhibits state support for agriculture, nor does it block marketing boards or exporting state trading enterprises (STEs). This is significant, as agricultural STEs are a prominent feature of African agricultural markets, for example, the Ghana Cocoa Board (COCOBOD) and the Ivorian Cotton and Cashew Council. Article 25, Transparency and Notification Requirements for State Trading Enterprises (in Part VII of the AfCFTA Protocol on Trade in Goods, Complementary Policies), merely requires State Parties to notify each other of STEs. This provision is rather soft, as it does not place any actual restrictions on STEs, and so amply retains policy space in this area.

With tariff schedules remaining unpublished (until post-production of this report in January 2022), it was difficult to assess the extent to which protective tariffs may be kept to shield small-scale agricultural production from excessive competition, which could form a policy component of developing domestic production. However, as we saw earlier, preliminary findings suggest that agriculture is likely to be the most protected sector in the initial AfCFTA tariff offers for several Regional Economic Communities.<sup>76</sup>

*Recommendation:* Negotiators should ensure that their AfCFTA tariff offers provide sufficient protection to shield vulnerable small-scale agricultural production from excessive competition; that monitoring is in place to identify adverse implications for small-scale production; and that trade-defence mechanisms are in place in case such implications are identified.

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| <b>4. Maintain policy space</b> |  |  |  |
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The AfCFTA does not erode national policy space for governments to invest in research and development, agricultural extension services, or infrastructure; nothing in the text of the Agreement creates an impediment against such efforts. As mentioned in the previous point, the AfCFTA – in its Preamble and General Objectives – commendably articulates a commitment to agricultural development in Africa.

*Recommendation:* When they engage in discussions with third parties and in other negotiation forums, negotiators may wish to use the AfCFTA Agreement as a template to express a common interest in maintaining space for agricultural policy.

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| <b>5. Collect data about the needs of the most vulnerable</b> |  |  |  |
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Better data allows better trade-policy design, implementation, monitoring and evaluation. In turn, this leads to more sustainable and inclusive social and economic development. Adequate data-collection is essential to assess the needs of marginalised populations with regard to the right to food. Disaggregated data can do more to ensure that women’s participation in agricultural trade is understood and accounted for in policy.

At their 12th Extraordinary Summit (on the AfCFTA), in July 2019, the AU Assembly launched the African Trade Observatory (ATO), one of the five operational instruments for the “operational phase” of the AfCFTA. The ATO is to function as the official African Union AfCFTA monitoring system to facilitate trade and economic integration in Africa. It is built on a data-transfer system that collects and processes data sourced from Member States, which

is then compiled with data from other sources. The data available through the ATO will eventually include merchandise trade flows, customs duties, rules of origin, non-tariff measures, implemented trade remedies, internal taxes (such as VAT and excise duties), commodity prices and exchange rates, as well as trade-related performance indicators.<sup>77</sup> It will not, however, collect data related to the impacts of the AfCFTA on vulnerable populations. The ATO project is led by the AU in technical cooperation with the International Trade Centre, and with support from the EU. Coordination between the ATO and other trade data-collection initiatives and dissemination portals in the Regional Economic Communities in Africa can better ensure that the information is complementary and uniform, while avoiding effort duplication.

The AfCFTA Country Business Index (ACBI), which the ECA is currently developing, also seeks to collect data directly from businesses engaged in trade in Africa.<sup>78</sup> The ACBI, unlike the ATO, assesses the impact of the AfCFTA through its effect on businesses trading across African borders. Data collected through the ACBI is disaggregated according to traders' gender and age, and by business size and sector. It does not specifically address issues of food security .

Beyond the AfCFTA ecosystem, data on food security is collected by a wide variety of partners and technical institutions. Examples include the Agricultural Market Information System;<sup>79</sup> the Food Security Information Network;<sup>80</sup> the monthly AGRA Food Security Monitor;<sup>81</sup> the WFP Food Security Analysis;<sup>82</sup> and the FAO Domestic Price Warnings monitoring and analysis tool (FPMA),<sup>83</sup> among others.

*Recommendation:* The African Trade Observatory and the AfCFTA Country Business Index collect data to monitor the impact of the AfCFTA, while data is collected elsewhere about food security and the needs of the most vulnerable populations. Coordination should be ensured between these continent-wide initiatives and data-collection efforts at the regional level. The task of bringing these two disparate sources together will likely fall to research and policy-analysis institutions in their own assessments of the AfCFTA. The AfCFTA Agreement includes a five-year review clause (Article 28): negotiators should ensure that food-security issues and the needs of the most vulnerable are reflected in these reviews and accounted for in subsequent amendments to the AfCFTA.

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| <b>6. Provide capacity building</b> |  |  |  |
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Many agricultural producers would benefit from training and capacity building to improve productivity and learn how to take advantage of opportunities created under the AfCFTA.

Such support would have to occur at the national level, through the accompanying measures states employ to utilise the AfCFTA. The ECA is currently working with 40 African countries (or their RECs) on preparing AfCFTA strategies, 13 of which have now been completed.<sup>84</sup> The *Guidelines for developing African Continental Free Trade Area national strategies*<sup>85</sup> require capacity and skills gaps to be gauged in both the public and private sectors, including any that need to be addressed in order for businesses to benefit from market opportunities under the AfCFTA. The guidelines also suggest that the OHCHR's *Guiding Principles on Business and Human Rights*<sup>86</sup> be incorporated into this analysis.

Even if it is already considered in national strategies, capacity building still needs to be financed. The 2017 HRIA recommended using adjustment and compensatory funds to pay for it. The AfCFTA Adjustment Facility, developed by Afreximbank, aims to contribute to AfCFTA implementation and mitigate disruptions, compensating for tariff revenue losses and funding project support, economic restructuring and trade-related infrastructure. It does not bring up capacity-building efforts for potentially vulnerable groups such as small-scale farmers.

*Recommendation:* Policymakers should ensure that supportive measures are in place to build capacity among agricultural producers, and small-scale producers in particular, to improve productivity, and to spread knowledge about how to fully utilise the opportunities presented by the AfCFTA. National AfCFTA strategies create the ideal framework to strategically identify and deliver this support; now, the financing to implement it must be arranged.

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| <b>7. Ensure consultations, participation and transparency</b> |  |  |  |
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Multi-stakeholder consultations, participation and transparency in negotiations can ensure that the interests that the negotiators purport to represent are respected in the outcomes. In the course of the AfCFTA negotiations, negotiators frequently postponed committing to decisions in order to first seek consultations with domestic stakeholders. This was actively encouraged by the AUC and the AfCFTA Secretariat, with frequent meeting reports noting requests for negotiators to consult on the issues with national stakeholders.

Stakeholder consultations are also a critical part of the AfCFTA national-strategies process, in which 40 countries (or their RECs) are now participating.<sup>87</sup> It is very difficult, however, to assess the extent to which these stakeholder-engagement practices adequately involve poor food-consumer groups, small-scale producers, and women's interest groups.

Trade negotiations are known to struggle to balance the interests of transparency with the consensus among negotiators that they require a degree of confidentiality. The rationale is that full disclosure is thought to subvert negotiators’ ability to effectively manage trade-offs, and to undermine the efficiency of the negotiating process in general.<sup>88</sup> The AfCFTA has, overall, been no different. Important components – such as the draft Rules of Origin and Schedules of Tariff Concessions – were still, as of November 2021, unpublished. Participation has also been limited, with few opportunities for vulnerable groups to have their voices and perspectives expressed in the negotiations by representatives other than the negotiators themselves.

*Recommendation:* In the course of ongoing and upcoming negotiations, consider where transparency can be improved, including through the publication of preliminary draft texts. Continue to engage thoroughly in multi-stakeholder consultations throughout the process of AfCFTA implementation. Ensure that groups facing issues of food security as well as populations who might be affected by trade liberalisation have ample opportunity to participate.

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| 8. Address concerns about climate change and environmental degradation |  |  |  |
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The AfCFTA Agreement does not include explicit exemptions safeguarding climate policies from AfCFTA trade obligations. The Preamble, however, reaffirms State Parties’ rights and “flexibility” to regulate with regard to achieving environmental objectives. Such policies might be considered to fall under the General Exceptions (Article 26) of the Protocol on Trade in Goods and of the Protocol on Trade in Services (Article 15). These exceptions closely mirror the General Exceptions and Security Exceptions laid out by the WTO’s General Agreement on Tariffs and Trade (GATT),<sup>89</sup> which have been used in the past to protect environmental policies and regulations relating to sustainable fishing practices, retreaded tyres, asbestos, and air pollution, among others.<sup>90</sup>

*Recommendation:* Ensure that State Parties are aware of their right to pursue environmental (and, by extension, climate) policies and ideally coordinate these through continent-wide, aligned policy frameworks.

## Summary Scorecard 2: Small-scale farmers and the right to food

|   |       |       |       |
|---|-------|-------|-------|
| 1. Consider the right to food when negotiating tariff lines and exclusion lists | Grey  | Grey  | Grey  |
| 2. Trade remedies and safeguards  | Red   | White | White |
| 3. Maintain and develop domestic production                                     | White | Amber | White |
| 4. Maintain policy space  | White | White | Green |
| 5. Collect data about the needs of the most vulnerable                          | White | Amber | White |
| 6. Provide capacity building  | White | Amber | White |
| 7. Ensure consultations, participation and transparency                         | White | Amber | White |
| 8. Address concerns about climate change and environmental degradation          | White | White | Green |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

A lack of published information on AfCFTA tariff-concession schedules and rules of origin undermines any ability to effectively assess how far the right to food has been incorporated into tariff negotiations.<sup>91</sup> The unconscionable persistence of hunger in Africa, exacerbated by the Covid-19 pandemic, requires negotiators to urgently ensure that food security is protected in tariff liberalisation processes. Better transparency allows stakeholders and researchers to contribute to this imperative.

Trade remedies and safeguards remain a red-flag concern: it is critical that negotiators conclude guidelines to support trade officials, particularly from less-developed African countries, in utilising the mechanisms created under the AfCFTA. Until such guidelines are issued, and less-developed African countries are capacitated to apply trade remedies and safeguards, this will continue to be an at-risk area for human rights.

Four recommendations have been accorded amber flags. Policies are in place to develop domestic production, but they must be implemented effectively and complemented with well-considered tariff offers that provide protection, or enable market access, where appropriate. Data is being collected to monitor the impacts of the AfCFTA, though further efforts are needed to ensure that it adequately reflects the needs of the most vulnerable and food insecure; that such data collection is coordinated with other efforts at the regional level; and that the findings are then addressed in amendments to the AfCFTA through the five-year review clause (Article 28). Many countries are identifying and providing for capacity-building needs in their national AfCFTA strategies but will require sources of finance. The secretariat to the AfCFTA negotiations (formerly the AUC, and now the AfCFTA Secretariat) has continually reiterated the need for negotiators to engage in national-level consultations, which have been

realised throughout the national-AfCFTA-strategies process. However, much more work is required in terms of transparency and participation in the AfCFTA negotiating process, starting with the publication of preliminary draft texts and liberalisation schedules.

Firm commitments have already been made to maintain policy space and provide exemptions allowing countries to adopt climate-change and environmental policies. Negotiators may wish to use the AfCFTA Agreement to articulate their policy preferences in these areas when negotiating with third parties or multilaterally.

## **The right to work and the agro-manufacturing sector**

While the previous chapter looks at agriculture through the lens of food security, small-scale production and vulnerable populations, this section expands upon the topic of agriculture per se. The focus here is on livelihoods in the agro-manufacturing sector, as well as on the right to work and social security. As mentioned earlier, agriculture is the most important sector for employment and work in Africa, much of it currently comprising subsistence and small-holder labour in rural areas. Agriculture is, moreover, where Africa's incidence of poverty is greatest and, with the African population set to more than double from 1.3 billion in 2020 to 2.9 billion by 2060, demands on food production will likely balloon.<sup>92</sup> At the same time, agriculture has long been considered to have significant latent potential for development in Africa; to quote the *World Development Report 2008*, it has "special powers in reducing poverty."<sup>93</sup>

The AfCFTA has the capability to increase agricultural trade within Africa by improving market opportunities for African producers, processors and traders. Recent estimates are that the AfCFTA could increase intra-African trade by as much as \$27.3 billion.<sup>94</sup> Agriculture also has an important role to play in Africa's structural transformation towards a more diversified and industrialised economy. Intra-African agricultural exports include a far larger share of processed goods, with greater value added, than do Africa's agricultural exports outside the continent, which are predominantly unprocessed.<sup>95</sup>

The 2017 HRIA made seven recommendations regarding the right to work and the agro-manufacturing sector, with particular attention paid to small-scale and household-level producers. These recommendations focus on protecting rights in the context of possible adverse impacts of the AfCFTA, including jobs displacement, transitioning and precarious employment, affected working conditions, and competition pressures on small-scale agro-manufacturing jobs and wages, as well as on the implications of intra-African trade liberalisation.

The Preamble and Specific Objectives of the AfCFTA Agreement explicitly direct goods and services to be liberalised “progressively”. The modalities for tariff liberalisation provide for tariffs to be phased down in equal annual instalments over a period of five years, with a more gradual phase-down period of 10 years permitted for Africa’s least-developed countries. The Agreement also lays the groundwork for a layered approach: as we saw earlier, Member States may treat 10 per cent of their intra-African imports more sensitively. Of this 10 per cent, 7 per cent may be designated as “sensitive products” and accorded a more gradual liberalisation phase-down period of 10 years, or 13 years for LDCs. The other 3 per cent may be named on an “exclusion list”, exempt from liberalisation commitments under the AfCFTA, though this list is subject to review after five years.

Services liberalisation is also assigned a targeted and layered process. Under the AfCFTA, it is initially based on a list of five priority sectors: (1) financial services; (2) transport; (3) telecommunications/information technology; (4) professional services; and (5) tourism. These sectors were chosen due to a focus on infrastructure (transport, communication); the priority sectors for liberalisation identified in the BIAT plan;<sup>96</sup> high-growth services; autonomously liberalised sectors (tourism, telecom and finance); and prior commitments by Member States at the WTO and in negotiations with the EU for the Economic Partnership Agreements. Other sectors will be considered subsequently. In each instance, the schedules of individual commitments specifying Member States’ liberalisation efforts may include timeframes for implementation.<sup>97</sup>

The AfCFTA Agreement includes provisions for the protection of infant industries (Article 24 of the Protocol on Trade in Goods). These allow a State Party to impose additional protective measures in instances where they have taken “reasonable steps to overcome the difficulties related to such infant industries”.<sup>98</sup> Further guidelines are to be provided to instruct how the AfCFTA’s protections for nascent industries should be implemented. As of November 2021, however, these are yet to be concluded by negotiators and adopted by the AfCFTA Council of Ministers.

*Recommendation:* Negotiators must conclude the guidelines for the implementation of the AfCFTA’s provisions to protect infant industries. Such guidelines should establish criteria for identifying infant industries and detail which provisions are warranted, and for how long they may be implemented, to protect such industries as they develop. The definition of infant



industries included within the guidelines should respond to the needs of small-scale producers and the informal agro-manufacturing industry.

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| 2. Establish complementary measures |  |  |
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Trade liberalisation is no panacea, in itself, for transforming intra-African trade. The removal of trade barriers should be complemented with measures to improve trade-related hard and soft infrastructure, advance trade finance, and support capacity development. Particular attention needs to be paid to small-scale producers and to gender equality in terms of accessibility. This need has long been understood: the decision taken by the AU Assembly at their 18th Ordinary Session in January 2012 to endorse the AfCFTA, effectively launching the negotiations to establish it, was made as part of a broader strategy that included the Boosting Intra-African Trade (BIAT) Action Plan.<sup>99</sup> The latter focuses on activities specifically designed to bolster trade liberalisation.

Unfortunately, implementation of the BIAT Action Plan has lagged behind the AfCFTA negotiations. This is due to a lack of designated institutional structures, the absence of monitoring and evaluation, and poor resources for BIAT initiatives.<sup>100</sup> Nevertheless, many elements covered by the BIAT are, in practice, progressing at the national and regional levels.

The BIAT Action Plan is complemented, with regard to agriculture, by the Programme for Infrastructure Development in Africa (PIDA) and the Comprehensive Africa Agriculture Development Programme (CAADP). These initiatives are both making headway. The *PIDA Progress Report 2019/2020* identified 329 PIDA projects at various stages of implementation across four sectors. According to the report, almost half of the ICT projects had been completed and were at the Operations stage. In contrast, only 6 per cent of the Energy, 19 per cent of the Transport and 11 per cent of the Water projects were keeping the same pace.<sup>101</sup> The 2014 Malabo Declaration on Accelerated Agricultural Growth provides direction for Africa's agricultural transformation within the CAADP. In 2019, the second biennial review of the Declaration's implementation found that, while 49 AU Member States had reported progress, only four were on track to achieve the CAADP Malabo commitments by 2025.<sup>102</sup>

*Recommendation:* Complementary measures to accompany trade liberalisation under the AfCFTA, set up through the BIAT Action Plan, PIDA and the CAADP, are lagging behind schedule. Considerable efforts are required to improve implementation and support African production to take better advantage of the AfCFTA. Again, this is particularly the case with measures that can assist small-scale producers and women in agriculture, and can contribute

to improving the employment-generating potential of the agro-manufacturing sector and the livelihoods of those dependent upon it.

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| <b>3. Create inclusive value chains</b> |  |  |  |
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The 2017 HRIA recommended developing regional value chains to advance the trade in food and crops envisioned by the AfCFTA. Regional, rather than global, value chains have been found to be more important for key African food-security staples, such as maize, cassava and sorghum.<sup>103</sup> Developing regional value chains involves growing broader market elements to support agriculture, including production and distribution, processing and product storage, trade, wholesaling, retail, and research and development. This can furnish farmers with better inputs and technology to boost production, as well as expanded regional markets to sell their produce.

As of November 2021, commercially meaningful trade flows under the AfCFTA had not yet developed (owing to implementation delays). Consequently, the early growth of regional value chains was impossible to assess. Nevertheless, to quote a recent IFPRI report, “for [the] AfCFTA to be a success, it must allow the development of an important and dynamic local market”.<sup>104</sup>

*Recommendation:* Further research is required to better understand the potential and opportunities for developing regional agricultural value chains under the AfCFTA, including priority value chains. The development of regional value chains should continue to be encouraged and monitored, including within the forthcoming tariff liberalisation schedules.

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| <b>4. Support connectivity of small-scale producers with agro-manufacturing</b> |  |  |  |
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Two-way connections between agriculture and agro-industry are key for technology spill-over and productivity growth, particularly among Africa’s small-scale producers. Developing these links can involve government support for infrastructure such as storage, refrigeration and cooling facilities, extension services, credit, capital and access to technology. Governments can also encourage large-scale and commercial farms to subcontract small-scale producers or directly engage with small-scale producers through state-owned producer marketing organisations.

The text of the AfCFTA Agreement itself does little to drive these recommendations, but it does not inhibit governments from engaging with small-scale producers either, including through state-owned marketing boards. Across Africa, governments are already involved in a breadth of activities to support small-scale producers while connecting them with agro-processes. These activities range from efforts to establish nucleus farmer-outgrower schemes in northern Ghana<sup>105</sup> and contracting in Malawi’s paprika value chain,<sup>106</sup> to outgrower cotton farming in Zambia<sup>107</sup> and many others.

*Recommendation:* Governments should increase support to connect small-scale producers to agro-manufacturing. This can be done by providing storage, refrigeration and cooling facilities, extension services, credit, capital and access to technology, but also by encouraging large-scale and commercial farms to subcontract small-scale producers.

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| 5. Avoid favouring large enterprises to the detriment of small-scale firms |  |  |  |
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Large-scale firms are naturally more adept at utilising the preferences established under trade regimes like the AfCFTA. This is not only because they are more aware of such agreements and have more capacity and experience to deal with customs and standards documentation, but also because they are better able to understand and penetrate export-market consumer tastes and preferences.<sup>108</sup>

The 2017 HRIA recommended AU Member States mitigate the growing concentration of global agri-businesses through local content requirements and encouraging international firms to hire locally. This strategy could include appropriate competition policy frameworks and immigration laws that would give priority to nationals. The AfCFTA competition protocol will provide an opportunity to address cross-jurisdictional anti-competitive practices affecting markets for small-scale firms, including those for agricultural inputs. The 2017 HRIA also recommended removing barriers that discriminate against smaller producers, such as onerous and costly business registration processes.

*Recommendation:* During negotiations for a Phase II AfCFTA protocol on competition policy, negotiators should ensure that the protocol is designed to address cross-jurisdictional cases of anti-competition in agriculture. Agricultural services can be included in the next phase of priority service sectors to ensure that African nationals are accorded more favourable staffing preferences in large-scale agricultural investments.

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| 6. Protect the right to work and rights at work |  |  |  |
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Research conducted by the ILO has found that trade agreements with labour provisions have had a positive impact on “raising awareness and improving laws and legislation with respect to workers’ rights, increasing stakeholder involvement in negotiation and implementation phases, and developing domestic institutions to better monitor and enforce labour standards.”<sup>109</sup> However, the text of the AfCFTA Agreement does not currently include any labour provisions or protections for rights at work, nor does it contain any specific reference to the right to work.

On the other hand, negotiations for the upcoming Investment Protocol, to the extent that they build on the Pan-African Investment Code (PAIC), are likely to involve discussions of states’ responsibilities with regard to upholding labour rights. In the PAIC, these are addressed in Article 34, “Labor Issues”, which urges Member States not to relax domestic labour legislation for the sake of incentivising investments.

*Recommendation:* The absence of labour provisions in the AfCFTA is a concern that should be revisited in amendments to the Agreement and when building on the PAIC in the AfCFTA Investment Protocol. Countries should recognise their responsibility to honour and protect the right to work when implementing the AfCFTA, as well as in national implementation strategies.

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| 7. Prioritise training, vocational guidance and reskilling |  |  |  |
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Retraining and upskilling can help those adversely affected by trade liberalisation to find alternative vocations, and it can do much to prepare a workforce for new opportunities that may arise under AfCFTA-enabled trade. Training can also assist in the process of labour reallocation to allow the AfCFTA to contribute to the sustainable development of African countries.

Retraining and upskilling must necessarily happen at the national level. The *Guidelines for developing AfCFTA national strategies* encourages countries to identify skills gaps in AfCFTA priority sectors as constraints that require strategic action to overcome.<sup>110</sup> As mentioned earlier, these guidelines further emphasise that the OHCHR’s Guiding Principles on Business and Human Rights should be incorporated into such analysis.<sup>111</sup>

*Recommendation:* Countries should ensure that skills gaps are identified in their AfCFTA national strategies, with particular concern for vulnerable or marginalised groups. Investments should be made in retraining and upskilling to address those gaps.

### Summary Scorecard 3: The right to work and the agro-manufacturing sector

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|--|------|-------|-------|
| 1. Engage in paced, layered, targeted liberalisation                       |      |       | Green |
| 2. Establish complementary measures  | Red  |       |       |
| 3. Create inclusive value chains   | Grey | Grey  | Grey  |
| 4. Support connectivity of small-scale producers with agro-manufacturing   |      | Amber |       |
| 5. Avoid favouring large enterprises to the detriment of small-scale firms |      | Amber |       |
| 6. Protect the right to work and rights at work                            | Red  |       |       |
| 7. Prioritise training, vocational guidance and reskilling                 |      | Amber |       |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

Two red flags have been recorded in this area, namely complementary initiatives and protecting the right to work and rights at work. The key complementary initiatives for the AfCFTA should be the Action Plan for Boosting Intra-African Trade (BIAT), the Programme for Infrastructure Development in Africa (PIDA), and the Comprehensive Africa Agriculture Development Programme (CAADP). According to recent evaluations, all of these are behind schedule. The absence of labour provisions in the AfCFTA is lamentable, and should be revisited in amendments to the Agreement and by building on the provisions on labour issues in the Pan-African Investment Code (PAIC). It should also be addressed in the implementation of the AfCFTA, including through national strategies.

Most of the recommendations filed under “The right to work and the agro-manufacturing sector” have been flagged amber. Progress has been made, but further efforts are required to connect small-scale producers with agro-manufacturers. The scheduled – but as yet uncompleted – negotiations on the AfCFTA Phase II issues of competition policy and investment will provide an opportunity to ensure that large-scale enterprises do not compete unfairly with small-scale firms. National AfCFTA strategies should identify skills gaps, and investments need to be made to provide relevant training, particularly for vulnerable or marginalised groups.

The AfCFTA process for liberalising goods and services is commendable, as it allows flexibility and a layered and targeted approach based on tools such as sensitive-product and exclusion lists for goods and priority service sectors.


## Ensuring a human rights-consistent negotiating process

Human rights require attention both to the process and to the outcome of policymaking. A human rights-consistent negotiating process is based on States' human rights obligations: it is participatory, inclusive and transparent, with appropriate accountability and oversight. As a result, the broadest range of perspectives, including those of vulnerable or marginalised groups, is more effectively heard in the process and better reflected in the outcome.

The importance of participation is explicitly recognised in Agenda 2063: The Africa We Want. Aspiration 6 explains that the goal of an "Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children" requires that "All the citizens of Africa will be actively involved in decision making in all aspects of development, including social, economic, political and environmental."<sup>112</sup> The same notion is also present in the Abuja Treaty, where Article 3 states that "Parties solemnly affirm and declare their adherence to ... accountability, economic justice and popular participation in development."<sup>113</sup>

In order for it to be meaningful, participation must be broad, free and informed. It must take place in an environment that respects freedom of expression and access to information both on- and offline, and ensures freedom of association and physical security for those who speak and assemble peacefully. The views and perspectives of groups that have historically been marginalised or left behind in policymaking must now be sought. While chambers of commerce and industry may be a natural focal point for trade negotiators in their national consultations, additional input should be drawn from agricultural producers and farming associations, industry-specific associations, professional associations, women's groups, national human-rights institutions, academia and NGOs.<sup>114</sup>

The following five recommendations were raised in the 2017 HRIA in relation to ensuring a human-rights consistent AfCFTA negotiating process.

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| <b>1. Spread awareness and disseminate information about AfCFTA processes and proposed content; publish draft texts</b> |  |  |  |
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Encouraging participation is only meaningful when the participating stakeholders have prior access to information about the decisions that will be made on their behalf. They must also have the capacity to judge the implications of those decisions. However, transparency is frequently sacrificed in international trade negotiations, with negotiators often erring on the

side of confidentiality. They might argue that confidentiality improves the efficiency of the negotiating process.<sup>115</sup>

The 2017 HRIA recognised that this approach erodes accountability, transparency and the effective solicitation of a wide range of views and perspectives on potentially impactful decisions. According to the UNDP's *Human Development Report 2000*, "Economic policy-making behind closed doors violates the right to political participation – and is susceptible to the corrupting influences of political power and big money."<sup>116</sup>

Unfortunately, the preference for confidentiality has been upheld in the AfCFTA negotiations. In general, the pertinent texts and meeting reports have remained unpublished at best and actively restricted at worst.<sup>117</sup> Limited access to this information can lack proportionality, with meeting reports often entailing little that might be considered sensitive to the negotiating interests of State Parties, such as general updates on work programmes, or that would be helpful to stakeholders in understanding the workings of the AfCFTA. Impactful components still under negotiation, including draft Rules of Origin and Schedules remain, as of November 2021, unpublished. However, provisional schedules of tariff concessions were published for a number of countries in January 2022.<sup>118</sup> The public have usually had access only to general information,<sup>119</sup> including press releases that coincide with significant negotiation meetings (such as ministerial-level forums), or second-hand information relayed through conferences and public events.

The secrecy surrounding critical inputs such as tariff schedules – and even preliminary drafts – severely limits the ability of research and policy institutions to analyse and distil the likely impacts into digestible information that can be more meaningful, and accessible, to affected interest groups, such as industry associations and civil society organisations. For instance, impact assessments of the AfCFTA carried out by UNCTAD, the ECA, and the World Bank<sup>120</sup> have all so far relied on broad assumptions about the products that would be liberalised under the AfCFTA.

*Recommendation:* Negotiators must do much more to stamp out secrecy and ensure transparency in the AfCFTA negotiating process. This involves increasing the range of information that is publicly available, including progress reports, descriptions of the decisions that have been made, the objectives in committee terms of reference, and the draft texts under negotiation. The AfCFTA framework should comprise inclusive consultations, with proactive measures in place to share all of this information. Participation in current and upcoming negotiations should be broadened to allow access to the decisions by a wide variety of

affected stakeholders, with special efforts accorded to ensuring the involvement of marginalised groups.

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| 2. Ensure national consultations involve close coordination between national ministries and a broad range of stakeholders, including representatives from vulnerable groups |  |  |  |
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Unsurprisingly, the forms and frequency of national consultations vary among AfCFTA State Parties. Some countries engaged in thorough consultations before AfCFTA negotiations began in order to pre-identify offensive interests and weigh possible concessions.<sup>121</sup> Others have been more reactive, reverting to national consultations only when required to do so. In the course of the AfCFTA negotiations, as mentioned earlier, negotiators have often delayed announcing decisions for the purpose of first seeking consultations with domestic stakeholders. Such an approach has been encouraged: many Negotiating Forum meetings have concluded with requests from the Secretariat for negotiators to consult on the issues with national stakeholders. Most significantly, the Manufacturers Association of Nigeria (MAN) and the Nigeria Labour Congress (NLC) effectively exercised their influence to postpone the Nigerian signature and ratification of the AfCFTA Agreement while they sought further information and guarantees from the Nigerian government on the impact of the AfCFTA and possible complementary measures. Nevertheless, it is still clear in some instances that stakeholders have felt overlooked.

An important avenue through which consultations have occurred relatively rigorously is in the process of developing AfCFTA national strategies. Currently, these have been finalised or are under development in 40 countries (or their RECs).<sup>122</sup> As well as individual meetings with a variety of stakeholders, government ministries, departments and agencies, and industry associations, the process of developing AfCFTA national strategies usually involves a number of formal meetings held to solicit inputs and review drafts of the strategies.

*Recommendation:* Negotiators should increase the frequency and depth of national-level consultations, as well as coordination across government institutions and with a breadth of stakeholders. This is particularly relevant as the Phase II AfCFTA negotiations commence, because they inherently touch upon a wider range of issues than traditional trade concerns. National AfCFTA committees, which have been established in a number of countries, form a natural focal point for consultation and coordination responsibilities. These committees should ensure a participatory process in the implementation of the AfCFTA reforms and country-level complementary initiatives.



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| <b>3. Conduct gender analysis, carry out consultations with women's groups, and include women in negotiating delegations</b> |  |  |  |
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It is difficult to comprehensively assess the degree to which gender analysis and consultations with women's groups have informed the delegations' positions when negotiating for the AfCFTA. To some extent, this may be verified indirectly by the existence of certain outcomes. The AfCFTA Agreement does contain some gender-related ideas: "gender equality" is one of the AfCFTA's explicit objectives (Article 3.e) and capacity building is urged for "women ... service suppliers" (Protocol on Trade in Services, Article 27.2.d). More recently, discussions have begun for an additional protocol specifically related to women and youth.<sup>123</sup> Yet there are also areas where the opportunity to recognise gender issues has been missed. The option to reflect considerations of gender in sensitive-product and exclusion lists was discussed in Negotiating Forum meetings in 2017 and 2018, but they were omitted from the final criteria. In general, women traders and their organisations are often excluded from trade-policy-making processes.<sup>124</sup>

Gender analysis has been incorporated into some of the research conducted by think tanks and agencies complementing the AfCFTA initiative. Case studies are used in the UNDP's Futures Report to elaborate the challenges faced particularly by women entrepreneurs and traders, and to identify potential solutions and priorities.<sup>125</sup> One of the few papers able to connect gender-disaggregated data with AfCFTA impact analysis is "Trade, Growth, and Welfare Impacts of the CFTA in Africa" by Chauvin et al. (2016). This links modelled results to household survey data for a selection of African countries to identify how the AfCFTA might differentially affect the consumption baskets and revenues of female-represented households.<sup>126</sup> The authors found the AfCFTA to have an asymmetric but positive effect on both matriarchal and patriarchal households in all instances, with variance in degree between countries. The AfCFTA Country Business Index (ACBI), which is being developed by the ECA, will collect gender-disaggregated data from an alternative angle, assessing how businesses involved in intra-African trade are constrained or aided by various regulatory and policy issues. Most AfCFTA national strategies that have been developed thus far include a specific focus on issues of gender and inclusivity, with gender mainstreaming reportedly "central in the design of these strategies".<sup>127</sup> One example is the Senegalese *Stratégie nationale de mise en œuvre de l'Accord sur la ZLECAf* (National Strategy for the Implementation of the AfCFTA Agreement, or NS-AfCFTA), which gave oversight to the ministry responsible for gender and youth when it was being formulated, and comprises specific actions geared towards women and youth.<sup>128</sup>

It is no secret that the international trade negotiating profession does not reflect gender balance. This seems to be echoed in AfCFTA negotiations: in one two-week series of negotiation meetings, women accounted for 28 per cent of participants.<sup>129</sup>

*Recommendation:* A “whole agreement approach”<sup>130</sup> is required to ensure gender considerations are adequately reflected in the AfCFTA. This will involve consulting to integrate the perspectives of women traders, businesses and representative associations into the ongoing negotiations and the implementation of the AfCFTA, as well as further upstream in trade policy design. Further, complementary efforts must be made to improve the proportion of women among trade negotiators, to include gender-disaggregated analysis in studies on the AfCFTA, assessments and evaluative tools, and to better involve women’s interest groups in national-level trade policy consultations.

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| <b>4. Create entry points and mechanisms for ensuring transparency, consultation and participation, particularly for non-state actors, so they can be informed of progress and provide suggestions on the draft agreement</b> |  |  |  |
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There is little direct scope for non-state actors to contribute to AfCFTA negotiations: stakeholder participation is afforded only through national consultations in the hope that these voices are then reflected in negotiators’ positions. The negotiation forums are open only to accredited negotiators, the Regional Economic Communities, technical partners, and other specifically invited groups and organisations.

At times, the AfCFTA negotiation process has confronted roadblocks. Examples include determining specific requirements in Rules of Origin negotiations with regard to fisheries, sugar, edible oils, automobiles, and textiles and apparel. Industry voices in some of these sectors have connected with negotiators, usually through workshops arranged on the sidelines. This kind of approach, however, gives only a small number of privileged stakeholders the chance to be informed of pending decisions and to put forward suggestions. Such possibilities should be extended to others whose participation is necessary, including representatives for labour and trade unions as well marginalised groups such as small-scale producers.

*Recommendation:* Create platforms and entry points to better ensure inclusive transparency, consultation, and the participation of non-state actors in AfCFTA negotiations. Increase the frequency of sideline workshops that invite stakeholders to provide informed perspectives, with care to ensure that such events involve a broad range of voices particularly from marginalised groups.

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| 5. Inform and allow the participation of specialised agencies, such as the African Commission on Human and Peoples' Rights, FAO, ILO, UNDP and UNICEF |  |
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Decision Assembly/AU/Dec.569(XXV) of 15 June 2015 of the Assembly of the Heads of State and Government of the African Union, which launched the AfCFTA negotiations, specifically called upon the ECA, UNCTAD, the African Development Bank, and the African Export-Import Bank (Afreximbank) to provide support to the Member States, Commission and RECs in the AfCFTA negotiations. This call was recently reaffirmed and expanded to include support to the AfCFTA Secretariat in the resolutions of the African Ministers of Finance, Planning and Economic Development at their 53rd Conference on 23 March 2021. These partners have observer status in the AfCFTA negotiations and respond to specific requests from negotiators, including technical notes and presentations on issues. The AUC also signed a Memorandum of Understanding with the International Trade Centre on 15 July 2015, agreeing to provide a framework for cooperation on trade issues more broadly.<sup>131</sup> In March 2021, UNDP and the AfCFTA Secretariat signed a new partnership deal to bring in UNDP expertise to support the implementation of the AfCFTA.<sup>132</sup>

Other technical partners are involved in workshops – and, occasionally, presentations to negotiators in negotiation forums – on request and usually on the basis of speciality areas of expertise. Examples include the International Centre for Trade and Sustainable Development (ICTSD), which has been invited to AfCFTA capacity-building workshops for the Investment Protocol, as well as the African Intellectual Property Organisation (OAPI) and the African Regional Intellectual Property Organization (ARIPO).

*Recommendation:* Expand the pool of specialised agencies invited to contribute knowledge and research to the AfCFTA process, particularly agencies or regional organisations with experience related to vulnerable populations and human rights.

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| 6. Ensure that there is sufficient funding to enable information-sharing about, and participation in, the negotiations |  |
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Support to improve information-sharing and participation in the AfCFTA negotiations can easily be sought by governments through the Aid for Trade framework or other donor-funded initiatives. Various international groups are very willing to encourage the AfCFTA, which has received backing from a crowd of partners including the EU,<sup>133</sup> GIZ,<sup>134</sup> the French Development Agency (AFD),<sup>135</sup> Global Affairs Canada,<sup>136</sup> and the UK's FCDO,<sup>137</sup> to name a few. Other

organisations and agencies such as the ECA, ITC, UNDP, the World Bank, and UNCTAD have also contributed time, research and resources.

Some of this support has contributed specifically to stakeholder involvement through programmes devised to spread information and awareness about the AfCFTA, or to include stakeholders in complementary initiatives such as the design and implementation of national AfCFTA strategies. Given the limitations mentioned earlier, however, there has been no aid to facilitate stakeholders' direct participation in the negotiations.

*Recommendation:* Governments should seek further backing to spread awareness, improve informational resources, and finance better participation in AfCFTA processes, particularly with regard to marginalised groups.

#### Summary Scorecard 4: Ensuring a human rights-consistent negotiating process

|  |      |        |      |
|--|------|--------|------|
| 1. Spread awareness and disseminate information about AfCFTA processes and proposed content; publish draft texts   | Red  |        |      |
| 2. Ensure national consultations involve close coordination between national ministries and a broad range of stakeholders, including representatives from vulnerable groups  | Grey | Grey   | Grey |
| 3. Conduct gender analysis, carry out consultations with women's groups, and include women in negotiating delegations  |      | Yellow |      |
| 4. Create entry points and mechanisms for ensuring transparency, consultation and participation, particularly for non-state actors, so they can be informed of progress and provide suggestions on the draft agreement | Red  |        |      |
| 5. Inform and allow the participation of specialised agencies, such as the African Commission on Human and Peoples' Rights, FAO, ILO, UNDP and UNICEF  |      | Yellow |      |
| 6. Ensure that there is sufficient funding to enable information-sharing about, and participation in, the negotiations   |      | Yellow |      |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

Two red flags have been identified here. The dearth of publicly available information about AfCFTA processes and proposed content, including draft texts, has been a serious concern throughout the negotiations. As is the case with trade negotiations in general, the AfCFTA processes have tended to exhibit a preference for confidentiality. Critical texts, including the Rules of Origin and tariff schedules remain undisclosed, even in preliminary form (though provisional schedules of tariff concessions have been published now for some countries). A second red-flag concern is the lack of entry points for non-state actors to be informed of progress and to give feedback on the draft agreement. Given the fact that the negotiating

texts have typically remained private, sharing information and perspectives between the negotiators and other stakeholders has been infrequent and limited. Better and more open consultative platforms could help non-state actors to contribute more to the AfCFTA before it is finalised. Meanwhile, several consultative processes within the framework of the AfCFTA negotiations have taken place at the national level, with some countries demonstrating considerable engagement with a breadth of stakeholders (including marginalised groups).

Amber flags have been accorded to three areas where progress is visible but requires further efforts. Some degree of gender-analysis has been conducted on the AfCFTA, but a “whole agreement approach” is necessary to ensure that gender considerations are adequately reflected in the ongoing negotiations and the consequent implementation. This involves increasing consultations to integrate the perspectives of women traders, businesses and representative associations into the trade-policy design, negotiation and implementation phases. The proportion of women negotiators, which remains low, could also be addressed. More effort should be accorded to increasing the variety of agencies brought in to support the AfCFTA negotiations, particularly with regard to agencies specialising in human-rights issues and representing vulnerable groups. At the same time, governments could seek further funding to improve information-sharing and participation in the AfCFTA process, particularly with regard to marginalised groups.

## Monitoring and evaluation

Monitoring and evaluation form a critical component of the policy cycle. In itself, monitoring is actually a human rights obligation. It contributes to policy accountability and transparency, while also helping to identify necessary adjustments and compensatory mechanisms to address human rights risks.

The 2017 HRIA focused on recommendations for the different types of human rights indicators<sup>138</sup> that the monitoring and evaluation of the AfCFTA should cover. Examples are general human rights obligations, including the consideration of human rights by negotiators and officials responsible for trade policy, specific indicators for vulnerable groups, including informal cross-border traders and women traders, and indicators related to the right to food and the right to work.

|   |  |  |  |
|---|--|--|--|
| 1. Ensure human rights indicators are included in the monitoring and evaluation of the AfCFTA |  |  |  |
|---|--|--|--|

The text of the AfCFTA Agreement contains provisions on “Implementation, Monitoring and Evaluation” (Article 31 of the Protocol on Trade in Goods and Article 26 of the Protocol

on Trade in Services). Both articles require the AfCFTA Council of Ministers to prepare annual reports to facilitate the related processes.

The impact of the AfCFTA has yet to be felt in Africa. Though trading formally commenced in January 2021, technical issues that have remained unresolved in the negotiations have, in practice, constrained the emergence of meaningful AfCFTA-driven results. In other words, there is currently (as of November 2021) little to monitor or evaluate, and correspondingly few formal reports that can be considered with regard to how they address human rights.

As a consequence, the seven meetings of the AfCFTA Council of Ministers that have occurred thus far have not considered the issues of monitoring and evaluation. Understandably, their focus has been on establishing the requisite committees and sub-committees needed for the AfCFTA Secretariat to operate, adopting the terms of reference and rules of procedure to govern those institutions, and offering ministerial-level leadership to conclude the persisting technical issues.

*Recommendation:* The Council of Ministers' annual evaluation of the AfCFTA could be a powerful tool for ensuring that human rights are upheld in its implementation. Time and resources should be invested to build a monitoring and evaluation framework with inputs from a broad range of technical experts. Determining such a framework now can influence the types of data that will be collected, through initiatives such as the African Trade Observatory and others, to better monitor the AfCFTA's impact on human rights.

### Summary Scorecard 5: Monitoring and evaluation

|   |  |  |  |
|---|--|--|--|
| 1. Ensure human rights indicators are included in the monitoring and evaluation of the AfCFTA |  |  |  |
|---|--|--|--|

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

Monitoring and evaluation have not yet begun in earnest due to delays in finalising certain components and establishing meaningful trade flows under the auspices of the AfCFTA. The text of the Agreement does, however, place emphasis on implementation, monitoring and evaluation. Effort should be put into developing an appropriate framework now, so that baseline data can be collected to enable various initiatives to adequately measure the AfCFTA's contribution to human rights in Africa, and to ensure coordination among such initiatives.

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## IV. Institutional and structural mechanisms

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The formal AfCFTA institutions are outlined in Part III of the Agreement Establishing the AfCFTA, Article 9, which stipulates a framework comprising:

1. The Assembly of Heads of State and Government (Assembly)
2. The Council of African Ministers of State Parties responsible for Trade (Council of Ministers)
3. The Committee of Senior Trade Officials
4. The Secretariat

The Assembly is the highest authority within the AfCFTA infrastructure. It provides political and strategic guidance, makes decisions on legal, financial or structural issues, and ensures strategic alignment with other African Union initiatives.

The Council of Ministers is the main decision-making body for the AfCFTA. It considers reports by the Secretariat and the various AfCFTA committees and supervises their work. When negotiating issues cannot be resolved at the technical level, the Council of Ministers gives direction for the conclusion of those issues.

The Committee of Senior Officials serves as a “clearing house” for reports and technical decisions before they are addressed by the Council of Ministers.<sup>139</sup> It also ensures the latter’s resolutions are implemented and, where necessary, may create additional committee-level structures.

The Secretariat serves the decision-making bodies of the AfCFTA and takes primary responsibility for the practical issues of implementation and administration. It is a functionally autonomous institution within the African Union system, equivalent in status to institutions such as the Pan-African Parliament and the African Court. In practice, the Secretariat is a powerful organism in the AfCFTA ecosystem, giving recommendations to negotiators and ministers, coordinating with donors to design support programmes, and working with heads of state on advocacy for AfCFTA implementation.

The different protocols and annexes of the Agreement have also created various additional committees and working groups. These include the following:

1. Committee for Trade in Services
2. Committee for Trade in Goods
3. Sub-Committee on Trade Facilitation, Customs Cooperation and Transit<sup>140</sup>
4. Sub-Committee on Rules of Origin
5. Sub-Committee for Technical Barriers to Trade
6. Sub-Committee for Non-Tariff Barriers (NTBs)
7. Sub-Committee on Trade Remedies
8. Sub-Committee on SPS Measures
9. Dispute Settlement Body

Having taken over from the Negotiating Forum, the Committees are now the main negotiating bodies of the AfCFTA. Negotiators in the Committees propose and debate the legal texts of the AfCFTA, as well as oversee the implementation of those texts. Sub-Committees comprise the most granular components of the AfCFTA institutions. They engage in technical-level negotiations and, where relevant, realise the plans concluded in those negotiations. The Dispute Settlement Body is tasked with administering the provisions of the Protocol on Rules and Procedures on the Settlement of Disputes. It is mandated to establish ad-hoc dispute-settlement panels and an Appellate Body.

Beyond these formal institutions, the broader AfCFTA ecosystem includes the African Trade Observatory (ATO), the AfCFTA Adjustment Facility, the Pan-African Payment and Settlement System (PAPSS), and the annual Intra-African Trade Fair (IATF).

Implementation of the AfCFTA occurs primarily at the national level. The Trade Facilitation Annex and the Annex on Non-Tariff Barriers require State Parties to establish and maintain national committees and focal points as part of their obligations under the Agreement. Most countries have charged a specific organisation or group with coordinating these focal points and leading the local AfCFTA programme. For example, Kenya has the National AfCFTA Committee, Ghana has set up the National AfCFTA/BIAT Steering Committee, and Sierra Leone has its National Trade Facilitation Committee, which implements the AfCFTA alongside other initiatives, including the African Growth and Opportunity Act (AGOA).

The 2017 HRIA highlighted the significant role played by institutions and structures in ensuring an inclusive, sustainable and human-rights consistent AfCFTA.

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| 1. Dialogue and consultation |  |  |  |
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The rights to information and participation in decision-making are human rights. Dialogue and consultation mechanisms should facilitate contributions not only from the private sector but also from trade unions, civil society, social movements and all other relevant stakeholders.

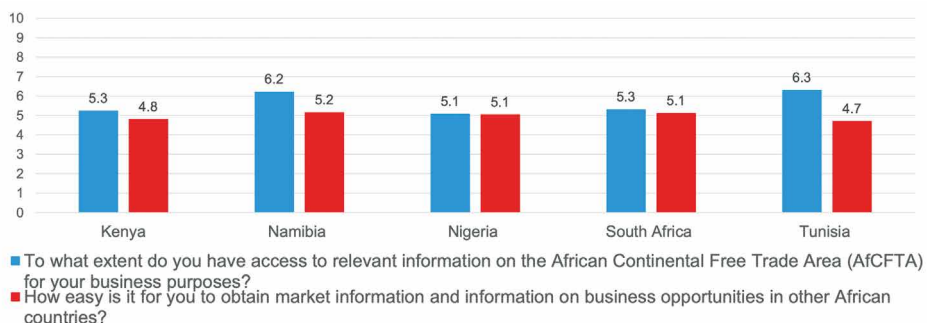
As mentioned in the previous section, there are no formal mechanisms to allow direct dialogue and consultation with the decision-making bodies of the AfCFTA. Rather, negotiators engage in consultations at the national level and then reflect the inputs from those dialogues in their positions in the negotiations. The involvement of local stakeholders is thus an essential component of the national AfCFTA strategies.

A key part of dialogue and consultation is ensuring that national and international AfCFTA-related institutions deliver relevant information through accessible media, particularly to groups whose voices might otherwise go unheard. It is very difficult, however, to assess the extent to which this has been achieved. The AfCFTA Country Business Index (ACBI), an ECA project, attempts to gauge AfCFTA information accessibility. Preliminary data from the ACBI, collected through surveys with over 500 firms, indicates that access to information on the AfCFTA is neither particularly easy nor impossibly difficult (see Figure 3). On the other hand, one of the main findings of the separate *PAFTRAC Africa CEO Trade Survey Report*, which involved more than 400 business leaders, was that a majority (62.3%) of respondents did not know where or how to find information about the AfCFTA.<sup>141</sup>

The evidence is mixed, which is why progress against this 2017 HRIA recommendation has been flagged amber. Some dialogue is taking place, and information is being shared, yet it is certainly not enough. As mentioned elsewhere in this report, the content of the AfCFTA negotiations has tended to remain confidential and transparency has been lacking, which necessarily hampers any consultation. There is much room for improvement here, and AfCFTA institutions should consider ways to make information more readily available.



Figure 3. Ease of accessibility to information on the AfCFTA, on a scale where 10 is very easy and 0 is very difficult



Source: Preliminary data collected by the ACBI

Note: This data is preliminary and should be considered merely indicative while awaiting publication of the final ACBI. The number of responses is Kenya 101, Namibia 101, Nigeria 113, South Africa 137, and Tunisia 101.

**Recommendation:** Improve the accessibility of information on the AfCFTA by, among other things, persistently consulting with national stakeholder groups throughout the AfCFTA implementation. Particular attention should be paid to vulnerable groups, whose perspectives may otherwise be lost. Improve publication of AfCFTA-related materials and information and involve representative groups in workshops and conferences where the AfCFTA is deliberated.

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| <b>2. Data collection and monitoring</b> |  |  |  |
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Data collection is essential for accountability. It allows impacts to be understood and measured, and contributes directly to monitoring and evaluation. The African Trade Observatory (ATO), which is one of the AfCFTA's operational instruments, can be considered its formal data-collection vehicle. Other, complementary initiatives include the ACBI and ad-hoc projects carried out by different partners.

The ATO gathers predominantly customs data. While most of this is not disaggregated by social or economic groupings, it can be useful for understanding broader trade flows. Meanwhile, the ecosystem surrounding the AfCFTA incorporates efforts to collect data about vulnerable groups such as informal cross-border traders. Through the ECA's African Trade Policy Centre, Afreximbank is collecting and assessing data from the West African informal-trade corridor to better estimate and understand informal cross-border trade.<sup>142</sup> In East Africa, the Eastern Africa Grain Council,<sup>143</sup> TradeMark East Africa,<sup>144</sup> and Sauti East Africa<sup>145</sup> are doing similar work. These initiatives supplement official AfCFTA data to measure the impact of the AfCFTA more comprehensively, especially with regard to the human rights of vulnerable groups.

*Recommendation:* Expand the ATO's remit to collect data that would help assess the AfCFTA's impact on vulnerable groups. At the same time, work with partners to align ongoing complementary data-collection initiatives with the AfCFTA's own programmes.

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| 3. Coordination |  |  |  |
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Implementing the AfCFTA involves many entities participating at various levels. Effective coordination between these entities is essential to ensuring that the AfCFTA's full potential is realised while simultaneously avoiding effort duplication and conflicting activities.

At the national level, a number of agencies and ministries have to work together to change laws and train officials to fulfil the provisions of the AfCFTA. For example, customs authorities must issue and recognise Rules of Origin certificates, while regulators need to ensure that the rules and procedures governing different sectors are consistent with the agreements made in Trade in Services negotiations. National AfCFTA steering committees have a crucial role to play in leading coordination between government departments.

At the regional level, the AfCFTA incorporates the RECs into its institutions so that they are aware of developments at the continental level and can contribute to discussions and negotiations in their areas of expertise. The Regional Economic Communities have observer status in the Committee of Senior Officials.

At the continental level, coordination is supervised by the AU Assembly. As the highest decision-making body within the AfCFTA architecture, the Assembly can guarantee that its various institutions are firmly aligned with the African Union.

*Recommendation:* Establish national AfCFTA steering committees to harmonise AfCFTA implementation at the national level and to coordinate with human rights organisations, such as the African Commission on Human and Peoples' Rights.

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| 4. Adjustment and compensatory arrangements |  |  |  |
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Adjustment and compensatory funds can support people and groups adversely affected by the structural and regulatory changes brought about by the AfCFTA. This is particularly essential in the African context, where tax collection remains weak and customs duties form a relatively important source of government revenue. Adjustment funds represent a vital instrument for redistributing the gains of trade liberalisation so that these do not remain concentrated in too few hands.

Afreximbank is supporting the AfCFTA in the development of a designated Adjustment Facility, an initiative conceived in the AfCFTA negotiations. The objectives of the Facility are to help realise the AfCFTA and to mitigate disruptions, compensating for tariff revenue losses and funding project support, economic restructuring and trade-related infrastructure. It will also be open to private entities seeking assistance in areas related to AfCFTA implementation, including business retooling, restructuring, strategic investments and diversifying to participate in regional value chains.

*Recommendation:* The Afreximbank Adjustment Facility is a welcome initiative to ease AfCFTA implementation and should be resourced and implemented without delay. Care should be taken that the Facility's funds are used to support those more adversely affected by the AfCFTA, potentially including small-scale farmers, informal cross-border traders, and women traders.

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| 5. Capacity building |  |  |  |
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Capacity building is imperative for all African countries and stakeholders to be able to understand the AfCFTA and take full advantage of the opportunities it creates. Among those who require capacity building are officials, particularly those from less-developed countries with fewer resources at their disposal, as well as youth, women, informal cross-border traders, and rural food producers.

Traders need assistance to understand how to utilise the AfCFTA, to appreciate rules of origin and how they function, to follow the technical and sanitary standards needed to export to partner countries, and to transition to new trading environments. Capacity building is a key tool for delivering such assistance, which can include training to reskill or to adjust production methods.

Part IX of the Agreement Establishing the AfCFTA focuses specifically on technical assistance, capacity building and cooperation. It mandates the AfCFTA Secretariat to coordinate with State Parties, Regional Economic Communities and partners to provide technical assistance and capacity building. The AfCFTA Secretariat has already put considerable effort into this, with capacity-building workshops held for negotiators throughout 2020 and 2021. Topics included services negotiations, competition policy, rules of origin and investment treaties. The need now is to extend these programmes to potentially vulnerable groups within the context of the AfCFTA, including small-scale producers, women, youth and informal cross-border traders.

*Recommendation:* Complement the capacity building that has been accorded to negotiators with specific support for businesses, including those run for or by youth, women, informal cross-border traders and rural food producers. Ensure that these organisations and groups are helped to understand and utilise the provisions of the AfCFTA, as well as adjust to new trading contexts.

|                               |  |  |  |
|-------------------------------|--|--|--|
| 6. Judicial Redress Mechanism |  |  |  |
|-------------------------------|--|--|--|

Accountability and access to remedy are fundamental tenets of human rights law. The AfCFTA includes a Dispute Settlement Mechanism under Part VI of the Agreement, which is elaborated in the Protocol on Rules and Procedures on the Settlement of Disputes.

Following the practice in COMESA and other African trade arrangements, the AfCFTA prioritises non-litigious dispute resolution. Where a dispute arises between State Parties, the first recourse is consultation in pursuit of an amicable resolution.<sup>146</sup> The AfCFTA Agreement specifically provides for good offices, conciliation and mediation to be available on request to State Parties to a dispute. In each instance, the non-litigious stages of dispute settlement are time-bound (for example, consultations are limited to a period of 60 days) to prevent them from being abused to delay a timely resolution. When alternative methods fail, State Parties may resort to formal litigation through the AfCFTA Dispute Settlement Mechanism.

Negotiators considered the option of hosting the AfCFTA Dispute Settlement Mechanism in the African Court of Justice and Human Rights (ACJHR). While that could have ensured deeper alignment with human rights concerns, negotiators eventually decided against going that route. Instead, they preferred the Dispute Settlement Mechanism stand alone in the dedicated AfCFTA Dispute Settlement Body. Negotiators also kept the AfCFTA Dispute Settlement Mechanism open only to Member States: individuals or businesses do not have direct access, but must instead petition their government to pursue a dispute on their behalf.

*Recommendation:* Ensure that individuals are able to effectively petition their representative State Parties to pursue non-litigious or, if necessary, litigious dispute resolutions through the AfCFTA Dispute Settlement Mechanism. This could involve creating National Focal Points to receive and act upon disputes raised by individuals.

## Summary Scorecard 6: Institutional and structural mechanisms

|   |  |       |       |
|---|--|-------|-------|
| 1. Dialogue and consultation                |  | Amber |       |
| 2. Data collection and monitoring           |  | Amber |       |
| 3. Coordination                             |  | Amber |       |
| 4. Adjustment and compensatory arrangements |  |       | Green |
| 5. Capacity building                        |  | Amber |       |
| 6. Judicial Redress Mechanism               |  |       | Green |

Notes: **Green** (commendable achievements), **amber** (progress but requiring further efforts), **red** (human rights being overlooked), **grey** (insufficient evidence for assessment)

As the AfCFTA's principal executive body and secretariat to the ongoing negotiations, the AfCFTA Secretariat is critical to effectively implementing the institutional human-rights recommendations.

No red flags were identified when assessing the AfCFTA institutions for potential human rights concerns; progress against most of these recommendations has been flagged amber. Dialogue and consultation in the AfCFTA processes occur at the national level, but further efforts are required to ensure that adequate information is reasonably accessible. In 2019, the AU Assembly launched the African Trade Observatory, the main data-collection vehicle for the AfCFTA. This should be expanded to incorporate more data relevant to human rights. National Steering Committees – or equivalent working groups – are the main institutions charged with coordinating AfCFTA entities and activities. They have been established in many African countries as part of their national AfCFTA strategies, but need to become more widespread and do more to coordinate with human rights organisations. Though it is sufficiently addressed in the AfCFTA Agreement, capacity building remains an ongoing requirement, particularly with regard to supporting businesses run by and for marginalised groups to fully utilise the AfCFTA.

Green flags have been accorded in two areas, namely compensatory measures and mechanisms for judicial redress. The Afreximbank-led AfCFTA Adjustment Facility is a welcome initiative to support AfCFTA implementation. Meanwhile, establishing the AfCFTA Dispute Settlement Mechanism has been a priority for the AfCFTA Secretariat throughout 2021, and it includes appropriate recourse to formal dispute resolution.

<sup>139</sup> Sodipo, B. 2019. "Governance for an effective AfCFTA." In *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective*, edited by David Luke and Jamie MacLeod, 120–133. London and New York: Routledge.

<sup>140</sup> Initial iterations of the AfCFTA texts envisaged individual sub-committees being established to cover customs co-operation, trade facilitation, and transit, in line with their specific annexes. To simplify administration, and to harmonise the functions of the various sub-committees, the Member States decided to merge these three sub-committees.

<sup>141</sup> PAFTRAC. 2021. PAFTRAC Africa CEO Trade Survey Report: Assessing the Impact of the AfCFTA on African Trade. [https://mcusercontent.com/82a1c769b4c9e47f2566f4d40/files/f062d4ef-84cd-6d1c-c251-3c2eacc433a0/Africa\\_CEO\\_Trade\\_Survey\\_Report\\_Pre\\_Release.pdf](https://mcusercontent.com/82a1c769b4c9e47f2566f4d40/files/f062d4ef-84cd-6d1c-c251-3c2eacc433a0/Africa_CEO_Trade_Survey_Report_Pre_Release.pdf).

<sup>142</sup> ECA. 2019. "West Africa: Afreximbank Announces Grant to UNECA for Data Collection on West Africa's Informal Trade." Press release, July 2019. <https://archive.uneca.org/stories/west-africa-afreximbank-announces-grant-uneca-data-collection-west-africas-informal-trade>.

<sup>143</sup> Gaarder, Luke and Sommer. 2021. Towards an estimate of informal cross-border trade in Africa. Addis Ababa: ECA Publications. <https://repository.uneca.org/bitstream/handle/10855/46374/b11996523.pdf?sequence=5&isAllowed=y>

<sup>144</sup> TMEA, EASSI, Global Affairs Canada. 2021. The Effects of Covid-19 on Women Cross Border Traders in East Africa. [https://www.trademarka.com/wp-content/uploads/dlm\\_uploads/2021/03/The-Effects-of-COVID-19-on-Women-Cross-Border-Traders-in-East-Africa-\\_TMEA\\_EASSI-FINAL.pdf](https://www.trademarka.com/wp-content/uploads/dlm_uploads/2021/03/The-Effects-of-COVID-19-on-Women-Cross-Border-Traders-in-East-Africa-_TMEA_EASSI-FINAL.pdf).

<sup>145</sup> Sauti East Africa. 2020. Sauti Trade Insights Covid-19 Bulletin: How has cross-border trade behaviour changed during the Covid-19 pandemic? <https://sautiafrica.org/wp-content/uploads/2020/12/TradeInsightsQ22020.pdf>.

<sup>146</sup> AU. 2018. Agreement Establishing the AfCFTA. Kigali, Rwanda: Protocol on Rules and Procedures on the Settlement of Disputes, Article 7, Consultations. [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf).

## V. New and emerging issues from a human rights perspective

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### **New developments at the regional and global level since 2017**

Negotiations, at their best, can be dynamic processes that respond to emerging policy priorities and developments. Doing so ensures their continued relevance, but also harnesses social momentum on specific issues. A good example is the waiver on patents for Covid-19 vaccines. This garnered considerable international attention, as the human rights to health and life are dependent on an equitable distribution of vaccines and medicine. On the other hand, socio-economic developments can undermine trade arrangements, with adverse implications, and emergent or resurfacing conflicts and political instability have threatened livelihoods and obstructed basic human rights in a number of countries.

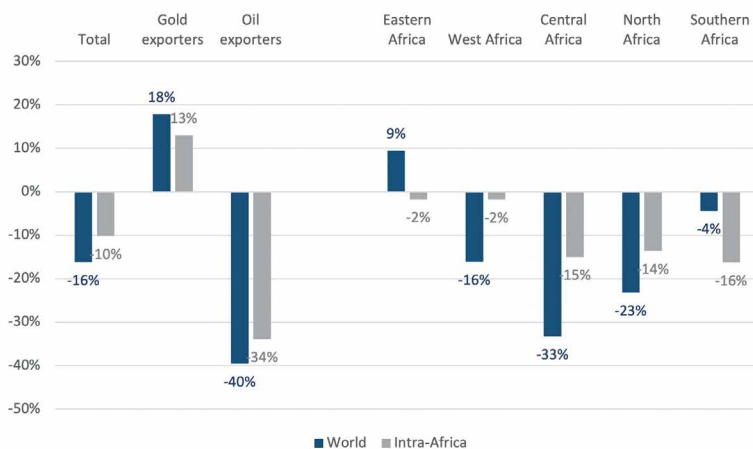
Since the publication of the 2017 HRIA, the two emerging issues most relevant to the AfCFTA that can be considered from a human rights perspective are the Covid-19 pandemic and the increasing prominence and urgency of action on climate change.

### **The Covid-19 pandemic**

The Covid-19 pandemic has had a profound effect on African trade in five ways: i) commodity price fluctuations, ii) lockdowns, iii), cross-border trade obstructions, iv) supply-chain disruptions, and v) services trade impacts.

In recent years, petroleum oils, metals and ores, and gold have all continued to account for a significant share of total exports from African countries, namely 40 per cent, 12 per cent, and 7 per cent respectively. The Covid-19 pandemic dramatically affected these commodities.<sup>147</sup> Petroleum oil prices collapsed 70 per cent from December 2019 to their nadir in April 2020, and remained subdued throughout the rest of that year before recovering to their pre-Covid-19 levels in early 2021. Metal and ore prices, captured by the London Metal Exchange Index, initially fell 20 per cent, recovered as early as July 2020, and then climbed in excess of 50 per cent higher than their pre-Covid-19 values by April 2021. Gold, a typically counter-cyclical asset, reached its highest-ever price in August 2020. The collective impact was volatility in African exports, and the limited capacity of policymakers to predict and account for revenues and investments. This differentiated effect is shown in Figure 4.

Figure 4. “African country groupings, annual change in exports, 2020 as compared to 2019, percentage change.”



Source: MacLeod, J. and Luke, D. 2021. “The impact of Covid-19 on trade in Africa.” Based on IMF data, 2021. “Notes: Gold and Petroleum Oil concentration categorisations calculated using CEPI BACI reconciled trade flows data for 2018. A country is identified as a gold exporter or oil exporter if more than 35% of its exports in that year comprised one of those products.”

Lockdowns were imposed across Africa (along with most of the rest of the world) from late March, and remained at their most stringent through April to July 2020. These – by design – significantly restricted internal mobility, reduced economic activity (particularly among informal workers), and closed borders. Estimates for African countries, broadly in line with global calculations, are that the most severe lockdowns suppressed annual economic activity by 2.5 percentage points of GDP for each month they were in place at the start of the crisis.<sup>148</sup> They led to delays and congestion at ports as authorities and shippers reacted to additional health measures, while air cargo declined precipitously.

Cross-border trade was particularly hard-hit by Covid-19 measures designed to curb the international spread of the virus. Land borders were clogged due to mandatory testing, truck sanitisation, and limits on how many crew members were permitted. Several borders were closed altogether. Some cross-border trade flows virtually disappeared.<sup>149</sup> As the crisis persisted, African countries responded with “safe trade” measures to facilitate trade and the transit of goods. Regional guidelines were first introduced on 6 April 2020 in the SADC, 24 April 2020 in the EAC, 15 May 2020 in COMESA, and 17 June 2020 in ECOWAS.<sup>150</sup>

Supply chains for firms in African countries were another casualty of the pandemic. Frequently changing lockdown rules at home and among trading partners seriously undermined



global value chains as well as production patterns that had come to rely on lean global outsourcing.<sup>151</sup> In a business survey conducted by the ECA and International Economics Consulting in July 2020, 56 per cent of a sample of African businesses reported that they were facing supply shortages.<sup>152</sup>

Services trade in Africa also sustained a heavy blow. Travel services, which cover temporary accommodation and tourism, for example, plummeted 87 per cent in the second quarter of 2020.<sup>153</sup> Transport services, including both passenger and freight conveyance, fell by about a third.<sup>154</sup> These two service sectors together account for 68 per cent of Africa's service exports in normal year, and have yet to rebound from the impact of Covid-19.

*Recommendation 1:* The years 2020 and 2021 showcased the tools that African countries were able to mobilise to facilitate cross-border trade in spite of the pandemic. The "safe trade" measures will likely remain in place for the immediate future, and should be considered, improved upon and harmonised by the AfCFTA Sub-Committee on Customs Cooperation, Trade Facilitation and Transit.

*Recommendation 2:* Negotiators should ensure that pharmaceuticals, health products and health services are considered in the AfCFTA schedules. In doing so, they can further current momentum for building regional pharmaceutical value chains that can better ensure affordable access in African countries.

*Recommendation 3:* The fluctuations in commodity prices that have accompanied the Covid-19 crisis have reemphasised the need for African countries to utilise the AfCFTA as a vehicle for diversifying trade.

*Recommendation 4:* The Covid-19 pandemic exposed and exacerbated deep economic and human rights inequalities, especially with regard to access to healthcare and social protection systems. States should increase their investment in social and economic rights by, among other things, expanding social security.

## **Climate change**

Although Africa is responsible for an historically negligible share of global carbon emissions – only 3.8 per cent – the continent still disproportionately shoulders the consequences. By 2050, climate change is forecast to reduce annual GDP by 15 per cent in West and East Africa, 10 per cent in North and Southern Africa, and 5 per cent in Central Africa.<sup>155</sup>

Free markets and unregulated businesses and investments in particular sectors may contribute to environmental degradation and climate change. This, in turn, poses a significant risk to securing the benefits of the AfCFTA. First, climate change can alter comparative advantage and expected patterns of trade, with adverse impacts on sectors such as agriculture, tourism and infrastructure. Second, climate change can have detrimental effects on physical infrastructure. Temporary, or permanent, closures of ports and key transport routes, compounded by damaged infrastructure, disrupt supply, transport and distribution chains and risk increasing the price of conducting trade under the AfCFTA.

On the other hand, well-managed adaptation to climate change can offer an opportunity to expand trade under the AfCFTA through regional and global value chains. Africa is home to considerable shares of our planet's total supply of "green minerals". The Democratic Republic of the Congo holds 47 per cent of the world's cobalt, which is used in the production of batteries. An estimated 42 of the 63 elements used in low-carbon technologies are found in Africa.<sup>156</sup> However, human rights abuses occur when the extraction and management of these resources is not sufficiently governed.<sup>157</sup>

Industrial goods are expected to experience the greatest boost under the AfCFTA, which should contribute to Africa's long-overdue industrialisation. This industrialisation could be fuelled using renewable energy. The continent's potential in this sector – including hydro, wind, geothermal and solar – is estimated to amount to more than eight times Africa's installed power-generation capacity in 2016.<sup>158</sup> Unfortunately, the utilisation of these resources is currently constrained by national capacities and the availability of technology.

*Recommendation 1:* Green value chains can and should be developed under the AfCFTA, including components of clean energy and photovoltaic systems. However, such value chains must be adequately supported by robust governance systems to avoid potential human rights abuses, particularly with regard to mining and extraction.

*Recommendation 2:* The African quality standards agenda should prioritise environmental standards and their regulation to complement green trade under the AfCFTA. Developing continental green standards can help build awareness, share information and incentivise the uptake and improvement of green business and trade practices.

*Recommendation 3:* Negotiations on intellectual property rights should establish the structures required to facilitate the development and diffusion of green technologies. Care must be taken that intellectual property rights protect indigenous and traditional knowledge.

*Recommendation 4:* Policy space should be carved out to explicitly allow environmental measures to be implemented without the risk of contravening AfCFTA disciplines.

*Recommendation 5:* National AfCFTA strategies should be used to identify the threats to trade posed by climate change, particularly those affecting marginalised groups.

*Recommendation 6:* AfCFTA negotiators can draw inspiration for specific green provisions from the WTO Trade and Environmental Sustainability Structured Discussions (TESSD).<sup>159</sup> It might then be possible to add a protocol to the AfCFTA on the environment and sustainable development. Further information could be garnered from the deeper analysis and suggestions delivered by the upcoming, ECA-led Strategic Environmental Assessment (SEA) of the AfCFTA.

## **Phase II AfCFTA negotiations**

As of November 2021, negotiations for the Phase II protocols have started but remain in their early stages. This section presents an overview of the likely components of the Phase II protocols and thus identifies several considerations to be taken into account in order to ensure human-rights consistent agreements and their implementation.

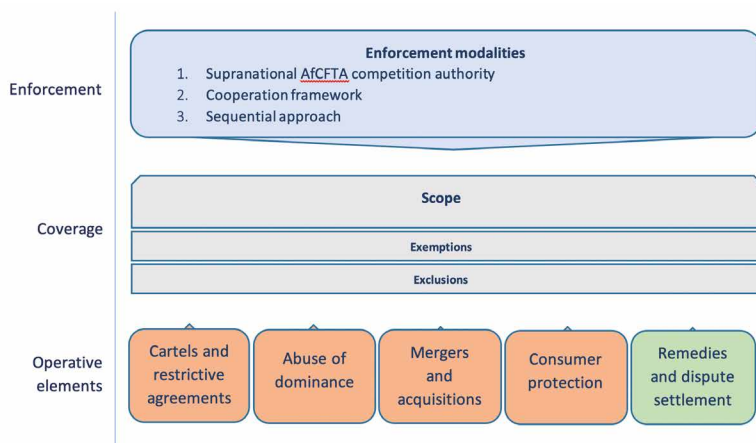
### **Competition Protocol**

As businesses seek to maximise profits, various practices (some anti-competitive) arise, including cartels, vertical restraints, mergers and acquisitions, and abuses of dominance. These behaviours cross borders, affecting multiple countries simultaneously. The role of the AfCFTA competition protocol will be to create legal safeguards addressing anti-competitive conduct, such as abuse of dominant market positions, across borders in Africa.

The operative elements of regional competition treaties differ little. In general, they comprise provisions on cartels and restrictive agreements, abuses of dominance, and mergers and acquisitions, though these standard building blocks can vary in their content. Some treaties, such as COMESA's, further include provisions on consumer protection. All the operative elements are then filtered through exclusions (practices named and excepted in the protocol) and exemptions (practices that may, upon application, be granted an exemption).

The biggest decision to be made by negotiators in the AfCFTA competition negotiations is likely to revolve around how the protocol will be enforced; specifically, whether a supranational entity will be created (such as the regional authorities of COMESA, the EAC and ECOWAS), or whether implementation will be left to national competition authorities, with coordination facilitated through a cooperation framework (as in the SADC).<sup>160</sup>

Figure 5. Schematic overview of options for the AfCFTA Competition Protocol "



Source: based on ECA, AUC, AfDB and UNCTAD. 2019. *Assessing Regional Integration in Africa IX: Next Steps for the AfCFTA*.

*Recommendation 1:* Exclusions and exemptions should be provided to permit valid carve-outs from the scope of the Competition Protocol, such as labour-related issues like collective bargaining, for example.

*Recommendation 2:* Efforts are required to ensure that the Competition Protocol is accessible to vulnerable groups, particularly small-scale farmers who may encounter anti-competitive buyer power. Language expressing such intentions could be included in the protocol's preamble or general objectives to inform its implementation.

*Recommendation 3:* The AfCFTA Competition Protocol should incorporate consumer protection in a dedicated sub-chapter to ensure that the advantages of an integrated African market extend to consumer welfare.

## Investment Protocol

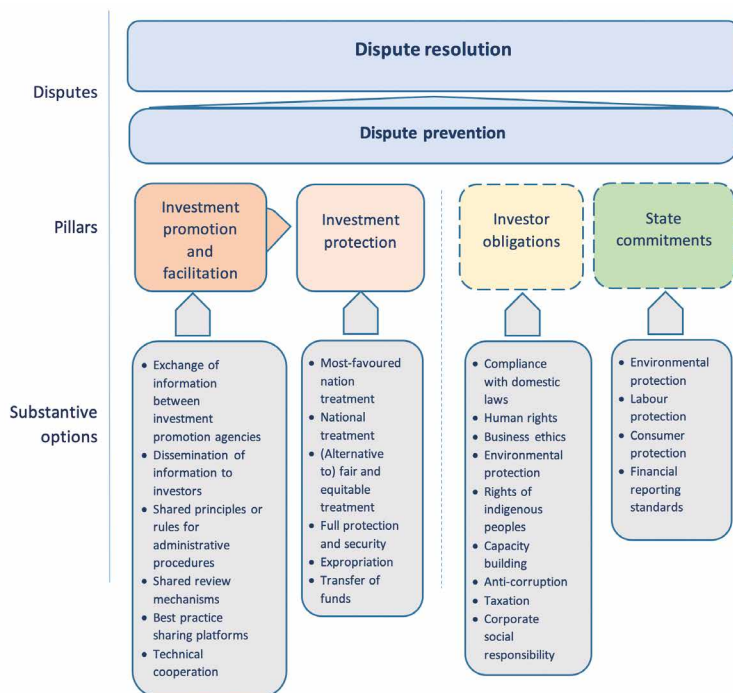
Investment treaties originated in Western economies that aimed to protect their capital in less developed, newly independent countries as the latter pursued economic emancipation strategies. Such treaties were – and often still are – oriented around “investment protection”, using international arbitration as an alternative to national law and domestic courts. They also often covered diplomatic protection.

Some “modern” international investment agreements (since the mid-2000s) have responded somewhat to valid criticisms about restricted policy space, opacity in arbitration

tribunals, lopsided commitments in favour of investors, and lengthy and costly dispute proceedings. These newer, “rebalanced” international investment treaties increasingly consider both investor and State obligations, investment promotion and facilitation, and State commitments to prevent any “race-to-the-bottom” incentives for regulatory arbitrage. The latter are especially relevant when it comes to, for example, taxation or labour and environmental rights. Refining and reforming investment treaties is ongoing, with current practices still criticised. This is particularly the case in the area of investor-State dispute settlement, for which negotiations continue at UNCITRAL.<sup>161</sup>

The AfCFTA Investment Protocol will draw from the Pan-African Investment Code (PAIC), which was adopted as a “non-binding instrument” by the AU’s Specialised Technical Committee (STC) on Finance, Monetary Affairs, Economic Planning and Integration in Addis Ababa in 2017. The Investment Protocol will likely amount to a legally enforceable transposition of the PAIC, with updates based on best-practice developments in drafting modern investment treaties.

Figure 6. Schematic overview of options for the AfCFTA Investment Protocol



Source: based on ECA, AUC, AfDB and UNCTAD. 2019. *Assessing Regional Integration in Africa IX: Next Steps for the AfCFTA*.

*Recommendation 1:* Too often, investment treaties are known and accessible only to powerful multinational companies. Negotiators should focus on provisions that are able to improve the investment climate for smaller businesses and vulnerable groups in Africa. Commitments regarding investment simplification, transparency and information dissemination should be included in the protocol's "investment promotion and facilitation" pillar.

*Recommendation 2:* Negotiators must ensure that any provisions on investment protection are explicitly limited in terms of the right to regulate. Justifiable instances of the right to regulate can be provided to expressly cover human rights issues including the right to food, gender equality, and the right to work.

*Recommendation 3:* The AfCFTA Investment Protocol should echo the sustainable development clauses in the PAIC, including investor obligations regarding human rights, labour issues, business ethics, environmental protection, the rights of indigenous peoples, anti-corruption, and corporate and social responsibility. It can also reference the principles for responsible contracts<sup>162</sup> and the guiding principles on business and human rights.<sup>163</sup> These can be built upon further to include obligations related to tax compliance.

*Recommendation 4:* The State commitments outlined in the PAIC should be incorporated into the Investment Protocol and expanded. Provisions on environmental protection, labour protection, consumer protection, and financial reporting standards should all be included.

## **Intellectual Property Rights Protocol**

According to the World Intellectual Property Organization (WIPO), intellectual property "refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce."<sup>164</sup> Intellectual property rights (IPR) afford their owners – typically creators – the right to prevent others from using, making and selling the protected subject. The intention is to stimulate and reward innovation as well as protect the identity of goods and services, for example, in the case of trademarks. National laws determine the eligibility and duration of protection; the scope of holders' exclusive rights; the conditions for acquisition and maintenance; and the rules governing enforcement.<sup>165</sup> Trade agreements are one of the tools that can be used to harmonise these national laws and the administration of IPR.

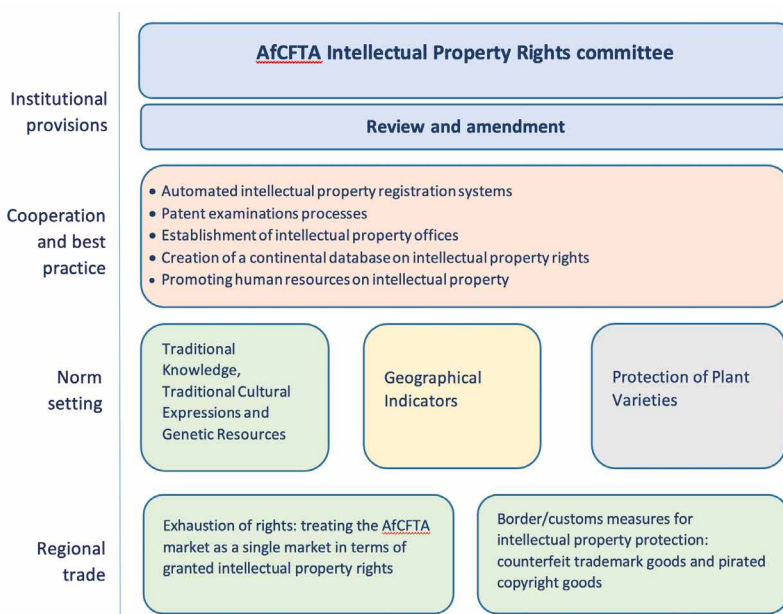
In the negotiations for an AfCFTA protocol on IPR, negotiators are likely to consider substantive provisions to set norms, particularly on overlooked issues like traditional knowledge. Doing so could establish a coherent approach to key African IP concerns that are not

adequately covered by existing multilateral treaties. A focus on regional trade is also probable, through provisions such as exhaustion of rights<sup>166</sup> and customs measures<sup>167</sup> to protect intellectual property.<sup>168</sup> Such provisions would cover aspects of intellectual property that can contribute to regional trade and value chain integration.

Negotiators will also debate cooperation and best practices. Though softer than legally binding obligations, articles on best endeavours could nevertheless help to make IPR more affordable, more accessible, simpler and better protected. To that end, negotiators could institute formal cooperation committees or networks of national and regional IP organisations. They might also strengthen IP administration, for example, through sharing knowledge on patent examinations, establishing intellectual property offices, and promoting designated human resources. The free and informed consultation and participation of affected parties, such as local communities and vulnerable groups, is essential throughout this process.

Crucially, States must ensure policy coherence between their IPR commitments and their obligations to human rights, to biodiversity, and to traditional and indigenous knowledge.

Figure 7. Schematic overview of options for the AfCFTA Intellectual Property Rights Protocol



Source: based on Biadgleng, E. 2021. "Potential Elements of an AfCFTA Intellectual Property Protocol." Presentation at the "Next Steps for the African Continental Free Trade Area" meeting, Nairobi, Kenya, 16-27 July 2021.

*Recommendation 1:* Ensure that the objectives of the Intellectual Property Protocol explicitly identify the use of IPR to further sustainable development, and that the objectives are consistent with States' obligations to human rights, environmental protection, biodiversity and traditional knowledge.

*Recommendation 2:* Build on African countries' agenda at the WTO to set norms ensuring the protection of genetic resources and associated traditional knowledge. This is often significant for small-holder farmers but otherwise underappreciated in conventional IPR systems.

*Recommendation 3:* Include provisions supporting the use of intellectual property for the attainment of human rights, particularly in areas such as health and disability. These should incorporate endorsements of the Nairobi Statement on Investment in Access to Medicines (2016)<sup>169</sup> or a similar commitment, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled (2013),<sup>170</sup> as well as the principles of fair, reasonable and non-discriminatory (FRAND) licensing terms for literary and artistic works.

## **E-Commerce Protocol**

On 10 February 2020, AU Assembly Decision Assembly/AU/4(XXXIII)<sup>171</sup> mandated negotiations for an additional AfCFTA protocol on e-commerce. Decision Ext/Assembly/AU/Decl.1 (XII)<sup>172</sup> of 5 January 2021 reiterated this mandate and set December 2021 as the deadline for the negotiations. This deadline was missed, but the E-Commerce Protocol was effectively brought forward to be negotiated alongside the other Phase II AfCFTA protocols.

The WTO defines e-commerce as the "production, distribution, marketing, sale or delivery of goods and services by electronic means."<sup>173</sup> This definition includes products or services ordered digitally but delivered physically (for example, items ordered from Jiji or Jumia or taxis hailed through Bolt), as well as products or services ordered and delivered online (for example, movies streamed over iROKOTv).

E-commerce was first included in a trade agreement in 2001.<sup>174</sup> Since then, the number of agreements addressing e-commerce has increased steadily, and now represents 27 per cent of the regional trade agreements (RTAs) notified to the WTO.<sup>175</sup> Provisions on e-commerce have appeared in all recently concluded mega-regional trade agreements, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the United States–Mexico–Canada Agreement (USMCA), and the Regional Comprehensive Economic Partnership (RCEP).<sup>176</sup> However, when it comes to e-commerce, developing countries are far more likely to agree to best-endeavour commitments and cooperation frameworks, rather than to binding and enforceable legal obligations.<sup>177</sup>



Negotiators from different regions consider a startling range of disparate issues relevant to negotiations on e-commerce (see Table 1). As only one African country is party to an existing FTA with e-commerce provisions (the Morocco–US Free Trade Agreement), it is difficult to clarify expectations for e-commerce negotiations under the AfCFTA. Nevertheless, negotiators are likely to consider the breadth of issues traditionally tackled in trade agreements, as well as to look beyond these topics where special interests emerge for the African context.<sup>178</sup> As they do so, they have the opportunity to draw from the many eTrade Readiness Assessments undertaken in African countries by UNCTAD. These help to understand national e-commerce ecosystems and their constraints.<sup>179</sup>

E-commerce offers a powerful opportunity to promote cross-border trade by SMEs and youth groups. However, it can also fall prey to systems of exclusion and marginalisation that benefit better resourced, digitally literate, or connected – and typically more privileged – businesses and individuals. It is therefore necessary to take proactive measures designed to enhance SME, youth and women’s participation in e-commerce.

Table 1. E-commerce issues in existing trade agreements

| Element  | Issues covered   | Examples  |
|--|--|---|
| <b>E-commerce issues for consideration in the AfCFTA E-Commerce Protocol</b> |  |   |
| Data governance rules and regulations  | <ul style="list-style-type: none"> <li>• Data protection, portability, security and privacy, including principles, frameworks or harmonisation of rules on personal data, company data, health data or public data;</li> <li>• Cross-border data flows and data localisation;</li> <li>• Coordinated cybercrime laws, investigations and information sharing;</li> <li>• Liability of intermediary service providers.</li> </ul> | <ul style="list-style-type: none"> <li>• EU General Data Protection Regulation (GDPR) and most EU trade proposals;</li> <li>• Costa Rica–Colombia FTA;</li> <li>• US–Republic of Korea FTA;</li> <li>• CPTPP;</li> <li>• USMCA;</li> <li>• United States proposal in US–Kenya FTA.</li> </ul> |
| Electronic transactions  | <ul style="list-style-type: none"> <li>• E-transaction laws, including legal recognition of electronic signatures and contracts, and the delineation of jurisdiction in cross-border electronic transactions disputes.</li> </ul>  | <ul style="list-style-type: none"> <li>• UNCITRAL Model Law on Electronic Commerce;</li> <li>• US–Peru Trade Promotion Agreement.</li> </ul>  |
| E-commerce taxation  | <ul style="list-style-type: none"> <li>• Prohibitions on the imposition of customs duties on electronic transfers;</li> <li>• Principles, frameworks or the harmonisation of laws on the taxation of cross-border e-commerce, including online jurisdictional issues.</li> </ul>   | <ul style="list-style-type: none"> <li>• WTO Moratorium on Customs Duties on Electronic Transmissions;</li> <li>• OECD/G20 negotiations.</li> </ul>   |

|   |  |   |
|---|--|---|
| Facilitation of e-commerce trade in goods                         | <ul style="list-style-type: none"> <li>• De minimis thresholds and simplified customs regimes for promoting e-commerce parcel trade.</li> </ul>  | <ul style="list-style-type: none"> <li>• USMCA provision on “reciprocal” de minimis levels.</li> </ul>  |
| General principles and coordination                               | <ul style="list-style-type: none"> <li>• Most favoured nation (MFN) principles and national treatment for electronic and digital products and services;</li> <li>• Non-discrimination of digital goods and services;</li> <li>• Cooperation, transparency and coordination regarding the design, implementation and review of national e-commerce rules and regulations;</li> <li>• Capacity building and resource pooling.</li> </ul> | <ul style="list-style-type: none"> <li>• Singapore–Australia FTA;</li> <li>• US–Republic of Korea FTA;</li> <li>• US–Singapore FTA;</li> <li>• Republic of Korea–Viet Nam FTA;</li> <li>• Many WTO proposals covering Aid for Trade in e-commerce, such as JOB/GC/116.</li> </ul> |
| <b>E-commerce issues that could affect other AfCFTA protocols</b> |  |   |
| Trade in goods  | <ul style="list-style-type: none"> <li>• Tariff elimination for goods necessary to support e-commerce (such as computers, telecommunications equipment and semiconductors);</li> <li>• Digital facilitation for trade in goods, including e logistics, paperless trading, single windows, and electronic customs procedures.</li> </ul>  | <ul style="list-style-type: none"> <li>• WTO Information Technology Agreement;</li> <li>• Costa Rica–Colombia FTA;</li> <li>• China–Peru FTA;</li> <li>• Recent Australia and New Zealand FTAs.</li> </ul>  |
| Trade in services   | <ul style="list-style-type: none"> <li>• Liberalisation commitments on services necessary to support e-commerce (such as telecommunications services, computer services, electronic payments, and deliveries), most importantly regarding modes 1 and 2 of supply under the AfCFTA.<sup>180</sup></li> </ul>   | <ul style="list-style-type: none"> <li>• General Agreement on Trade in Services (GATS) (depending on the classification of e-commerce; see the following section).</li> </ul>   |
| Intellectual property rights                                      | <ul style="list-style-type: none"> <li>• Aspects of intellectual property specific to e-commerce, such as source code and algorithms, and the cyber theft of trade secrets;</li> <li>• Technology transfer issues.</li> </ul>  | <ul style="list-style-type: none"> <li>• Recent US FTAs (for example, on digital rights management and source code disclosure);</li> <li>• US WTO proposals.</li> </ul>   |
| Competition   | <ul style="list-style-type: none"> <li>• Online consumer protection and safety, including returns and supplier liability;</li> <li>• Updated definitions of dominance and anti-competition, accounting for digital business models and the importance of data;</li> <li>• Rethinking mergers and acquisitions of start-ups and related SMEs in the e-commerce ecosystem.</li> </ul>  | <ul style="list-style-type: none"> <li>• Costa Rica–Colombia FTA;</li> <li>• Singapore–Australia FTA;</li> <li>• Japan–Mongolia EPA;</li> <li>• Republic of Korea–Viet Nam FTA;</li> <li>• Proposals in US–Kenya FTA negotiations (third-party liability limitations).</li> </ul> |
| Investment  | <ul style="list-style-type: none"> <li>• E-commerce-related investment: investment through electronic platforms and crowdfunding.</li> </ul>   | <ul style="list-style-type: none"> <li>• US WTO proposals.</li> </ul>   |
| Other   | <ul style="list-style-type: none"> <li>• Open government data;</li> <li>• E-procurement.</li> </ul>  | <ul style="list-style-type: none"> <li>• USMCA;</li> <li>• EU–Indonesia proposals.</li> </ul>   |

Source: based on Banga K.; MacLeod J. and Mendez-Parra, M. 2021. *Digital trade provisions in the AfCFTA: What can we learn from South-South trade agreements?*

*Recommendation 1:* E-commerce remains a relatively new issue in terms of trade governance. As such, negotiators should resist making binding commitments at the expense of sacrificing policy space. Careful consultation is required, particularly with vulnerable groups, including youth, women traders, small-scale farmers, and informal cross-border traders, who all may be affected.

*Recommendation 2:* Negotiators should consider e-commerce and trade beyond the traditional elements raised in similar negotiations by more developed countries. They should also reflect “bottom up” issues that would benefit marginalised African groups.

*Recommendation 3:* Negotiators should place the AfCFTA E-Commerce Protocol within a broader policy agenda that addresses the digital divide and other constraints on digital opportunities, including rural disadvantages, encountered by marginalised groups such as women and the digitally disconnected.

## **Women and Youth Protocol**

The prevailing assumption regarding trade liberalisation over the past 50 years has been that, although some might lose from open trade, overall society would gain. However, trade has recently come under scrutiny and been criticised for leaving too many behind, especially society’s most vulnerable. Trade agreements have tried harder to ensure that their gains are more evenly distributed, which is reflected in a growing number of provisions that go beyond trade liberalisation per se to consider issues of sustainable, social and equitable development, including gender, labour and environmental issues.

An AfCFTA protocol on women and youth is currently under consideration.<sup>181</sup> As yet, it is still unclear what this protocol may focus on, but inspiration can be drawn from how gender and youth issues have been addressed in existing free trade agreements.

While references to youth issues are far fewer, at least 75 FTAs now comprise provisions that in some way mention women or gender.<sup>182</sup> These provisions remain extremely varied in terms of language, scope and commitments: some merely acknowledge gender equality in the preamble, while others grant an associated “right to regulate” (for example, allowing public procurement restrictions that promote gender inclusion). Others commit to adopting domestic policies and programmes on gender. Most common, however, are loose “best endeavour” provisions for “cooperation” on gender issues.

The African RECs were among the first to recognise gender in trade treaties. ECOWAS 1993 contains an article on Women and Development, which commits to identifying and

assessing “all constraints that inhibit women from maximising their contribution.”<sup>183</sup> The COMESA Treaty includes a chapter on Women in Development and Business,<sup>184</sup> and the EAC 1999 has a chapter on Enhancing the Role of Women in Socio-Economic Development.<sup>185</sup>

The most comprehensive gender-related provisions can be found in the 2017 modernised Chile–Canada FTA.<sup>186</sup> The amendments affirm a commitment to adopt gender equality laws and establish trade and gender committees to review implementation. However, the chapter on gender is not subject to the dispute settlement mechanism, and so is not legally enforceable. This is not uncommon: existing gender provisions in FTAs are usually couched in “best endeavour” language, are similarly exempt from dispute settlement mechanisms, or entail behind-the-border commitments that are extremely unlikely to be contested or enforced in a trade dispute.<sup>187</sup> Consequently, though chapters and articles on gender help raise awareness of gender equality issues and encourage gender mainstreaming, this is not sufficient.

*Recommendation 1:* The process of developing the Women and Youth Protocol should focus on the inclusion and participation of women and youth representatives. Consultation with these groups should be as central as possible to the negotiations.

*Recommendation 2:* Many current FTAs comprise gender-related provisions, which have become more popular in recent years. However, while they help raise the profile of gender issues in trade, these provisions are too often symbolic assertions that lack the necessary legal bite to actually deliver positive outcomes. Meanwhile, explicit mentions of youth-related issues are very rare in existing trade agreements. AfCFTA negotiators should build on best practices, including cooperation on access to skills development for women and youth; research; gender and youth impact assessments; and setting up gender and youth committees for monitoring. At the same time, negotiators should break new ground on enforceable obligations such as gender- and youth-specific minimum legal standards; for example, requiring Parties to adopt equal pay legislation where it does not already exist.

*Recommendation 3:* Use the Women and Trade Protocol as an opportunity to establish targeted indicators for women and youth in trade, and for the impact of the AfCFTA on these groups. These indicators can then serve to inform the AfCFTA monitoring system.

## Summary

A wide variety of new developments has confronted the AfCFTA since the 2017 HRIA. Some of these can be leveraged to energise initiatives or provide momentum to advance intra-African trade. In other instances, circumstances have presented real challenges. The Covid-19

pandemic is the most obvious issue: though it has generated substantial barriers across the continent, however, it also motivates the development of regional pharmaceutical value chains and diversification away from the volatile commodity exports that currently dominate African trade.

Climate change is a slower-burning danger. It poses a significant risk to the AfCFTA and to securing the benefits of the Agreement. Yet using the AfCFTA to expand regional trade makes it possible to adapt to climate change in a more positive way. Green trade in both goods and services can be liberalised to support green value chains more effectively. In turn, these can be complemented by harmonised environmental quality standards under the African quality standards agenda. Negotiations on intellectual property rights can establish incentive structures to facilitate the development and diffusion of green technologies. Policy space can be carved out to allow for environmental measures. Negotiators can also draw inspiration for green AfCFTA provisions from the WTO's Trade and Environmental Sustainability Structured Discussions, paving the way for an AfCFTA protocol on the environment and sustainable development.

Since the 2017 HRIA, negotiations have begun on the three Phase II AfCFTA protocols on Competition Policy, Investment, and Intellectual Property Rights. An additional protocol, E-Commerce, has since been added to the negotiation mandate and discussions have begun for a protocol on Women and Youth. Each of these protocols offers new opportunities to use the AfCFTA as a tool to support and further human rights.

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## VI. Conclusions

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The present report has sought to review and assess the extent to which the AfCFTA Agreement, the negotiation processes, and the broader AfCFTA ecosystem have met the recommendations of the 2017 HRIA. As well as identifying gaps and ongoing risks from a human rights perspective, the report has also tried to pinpoint new and emerging opportunities and challenges. This assessment was undertaken in response to the imminent conclusion of Phase I of the AfCFTA negotiations and the finalisation of the AfCFTA legal text. Implementing the AfCFTA, while continuously ensuring that it contributes to human rights, is now the issue at hand. To quote a recent ECDPM article, “the hard work has just begun.”<sup>188</sup>

African negotiators, policymakers and participants in the AfCFTA are not entirely off-track. Of the 36 scorecard issues reviewed, 7 have been accorded a green flag, 16 amber, 8 red. Five have been scored grey, as insufficient information was available or evaluation not possible. Impressive efforts have been made to prioritise gender and youth under the Agreement. Discussions for a specific protocol on these issues are notable, but progress is also visible in heightened awareness and data collection. The profile of ICBT has been raised substantially since AfCFTA negotiations began. Work to support informal cross-border traders is present throughout the AfCFTA, though recognition of the importance of the sector could be better incorporated into the Agreement itself.

There are also areas where much more work is required. Red flags have been raised regarding the human rights associated with transparency and participation in the negotiating process. As of November 2021, critical components of the Agreement, such as the Rules of Origin and tariff schedules for most countries, remained unavailable to stakeholders even in preliminary form. Further efforts are needed to adequately support the right to work and the agro-manufacturing sector through complementary measures flanking the AfCFTA, in particular, the BIAT Action Plan, PIDA, and the CAADP. All three of these programmes are lagging behind schedule according to recent evaluations. The AU Protocol on Free Movement should be fast-tracked, and a continent-wide Simplified Trade Regime developed, to better support informal cross-border traders. Negotiators also need to ensure that guidelines for the use of trade remedies and safeguards under the AfCFTA are urgently concluded, and that the upcoming negotiations on the Investment Protocol addresses labour rights.

Assessing the alignment of the AfCFTA with human rights is not a process that can end at this juncture. Implementation is always a critical – and often more challenging – component of delivering policies for development. As meaningful implementation of the AfCFTA gets



underway, its contribution to human rights should be continually measured and re-evaluated through carefully considered indicators and monitoring systems.



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