

# Keys to success for the AfCFTA negotiations

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## INTRODUCTION

As of April 29, 2019, 22 countries have deposited their instruments of ratification of the African Continental Free Trade Area (AfCFTA) agreement<sup>1</sup> to the African Union (AU), meeting the threshold for the agreement to come into effect. Now, the date for the entry into force of the AfCFTA has been set for May 30, 2019.<sup>2</sup>

The significance of the AfCFTA cannot be overstated: It will be the world's largest free trade area since the establishment of the World Trade Organization (WTO) in 1994.<sup>3</sup> Landry Signé has estimated that under a successfully implemented AfCFTA, Africa will have a combined consumer and business spending of \$6.7 trillion in 2030.<sup>4</sup> He also finds that the AfCFTA will have a significant impact on manufacturing and industrial

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<sup>1</sup> In March 2018, 44 African countries signed the Establishment of the African Continental Free Trade Area. By doing so, African leaders set out to achieving a long-held vision of free trade across the continent. Since its launch, the AfCFTA has gained momentum: The total number of countries that have signed is now 52. Although 22 have deposited their instruments of ratification, many others are finalizing the process.

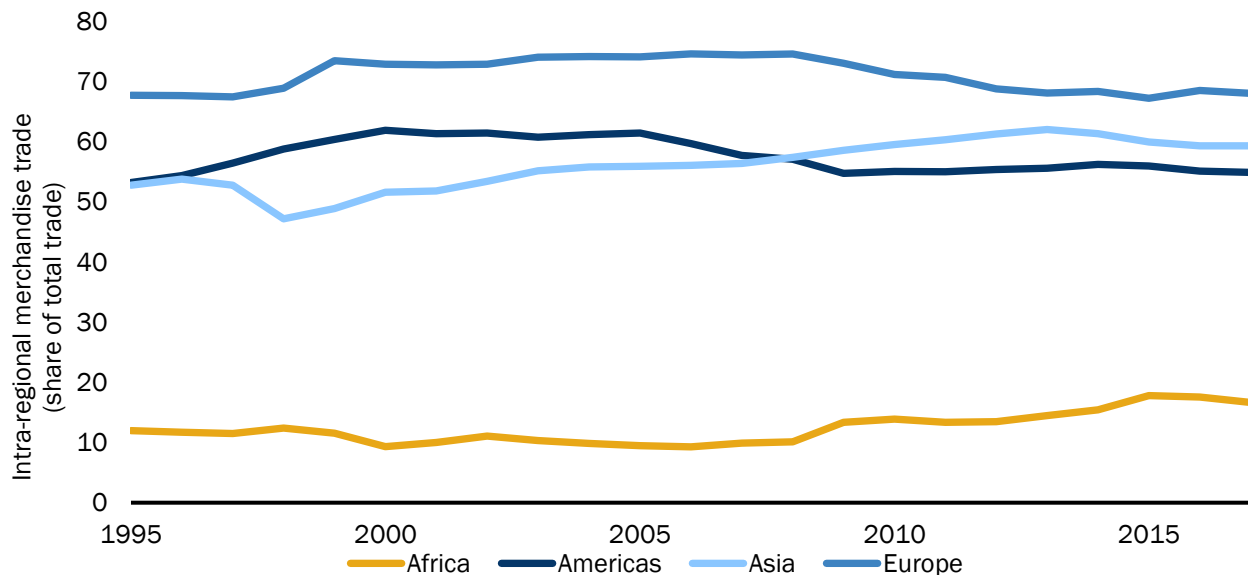
<sup>2</sup> Tralac, "Status of AfCFTA Ratification." Available at: [www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html](http://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html).

<sup>3</sup> Tralac, "African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents." Available at: [www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html](http://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html)

<sup>4</sup> See Landry Signé, "How Africa is Bucking the Isolationist Trend." Available at: [www.foreignaffairs.com/articles/africa/2018-05-23/how-africa-bucking-isolationist-trend](http://www.foreignaffairs.com/articles/africa/2018-05-23/how-africa-bucking-isolationist-trend); "How can the new African free trade agreement unlock Africa's potential?" Available at: [www.oecd-development-matters.org/2018/10/22/how-can-the-new-african-free-trade-agreement-unlock-africas-potential/](http://www.oecd-development-matters.org/2018/10/22/how-can-the-new-african-free-trade-agreement-unlock-africas-potential/); "Africa has a new free trade area. This is what you need to know." Available at: [www.weforum.org/agenda/2018/04/why-africa-s-free-trade-area-offers-so-much-promise/](http://www.weforum.org/agenda/2018/04/why-africa-s-free-trade-area-offers-so-much-promise/); and "Africa's big new free trade agreement, explained." Available at: [www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/](http://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/).

development,<sup>5</sup> tourism,<sup>6</sup> intra-African cooperation, and economic transformation.<sup>7</sup> UNECA has predicted it will raise intra-African trade by 15 to 25 percent, or \$50 billion to \$70 billion, by 2040, compared to an Africa without the AfCFTA. The International Monetary Fund (IMF) similarly projects that, under the AfCFTA, Africa's expanded and more efficient goods and labor markets will significantly increase the continent's overall ranking on the Global Competitiveness Index.<sup>8</sup> Increased market access, in turn, is expected to enhance the competitiveness of industries and enterprises, the exploitation of economies of scale, and the efficacy of resource allocation.<sup>9</sup>

**Figure 1: Africa's intra-regional merchandise trade compared to other regional blocs**



Source: UNCTAD, "Merchandise: Intra-trade and extra-trade of country groups by product, annual," 2017. Available at: <https://unctadstat.unctad.org>

While the AfCFTA's ratification is a cause for celebration, much work remains as critical parts of the agreement have yet to be completed—including countries' schedules of tariff concessions and services commitments, rules of origin, investment, intellectual property, competition, and a possible protocol on e-commerce.

The extent to which the AfCFTA will reduce barriers to intra-African trade is largely linked to the ongoing negotiations. This piece explores the implications of those negotiations, with a particular focus on market access for goods and services and rules of origin. It also briefly touches upon the outstanding regulatory issues.

## STATE OF PLAY OF THE AFCFTA NEGOTIATIONS

Negotiations to establish the AfCFTA were first launched in June 2015. On March 21, 2018, following 10 negotiating rounds, 44 of 55 African Union Member States signed the Agreement Establishing the AfCFTA, its protocols on trade in goods and services, dispute settlement procedures, and their annexes, covering *inter alia*,

<sup>5</sup> Landry Signé, "The Potential of Manufacturing and Industrialization in Africa: Trends, Opportunities, and Strategies," Brookings Institution Africa Growth Initiative Report, 2018. Available at: [www.brookings.edu/research/the-potential-of-manufacturing-and-industrialization-in-africa/](http://www.brookings.edu/research/the-potential-of-manufacturing-and-industrialization-in-africa/).

<sup>6</sup> Landry Signé, "Africa's Tourism Potential: Trends, Drivers, Opportunities, and Strategies," Brookings Institution Africa Growth Initiative Report, 2018. Available at: [www.brookings.edu/research/africas-tourism-potential/](http://www.brookings.edu/research/africas-tourism-potential/).

<sup>7</sup> Landry Signé, African Development, African Transformation: How Institutions Shape Development Strategy. Cambridge: Cambridge University Press, 2018.

<sup>8</sup> IMF, "A Competitive Africa: Economic integration could make the continent a global player," December 2018. Available at: <https://www.imf.org/external/pubs/ft/fandd/2018/12/pdf/afcfta-economic-integration-in-africa-fofack.pdf>.

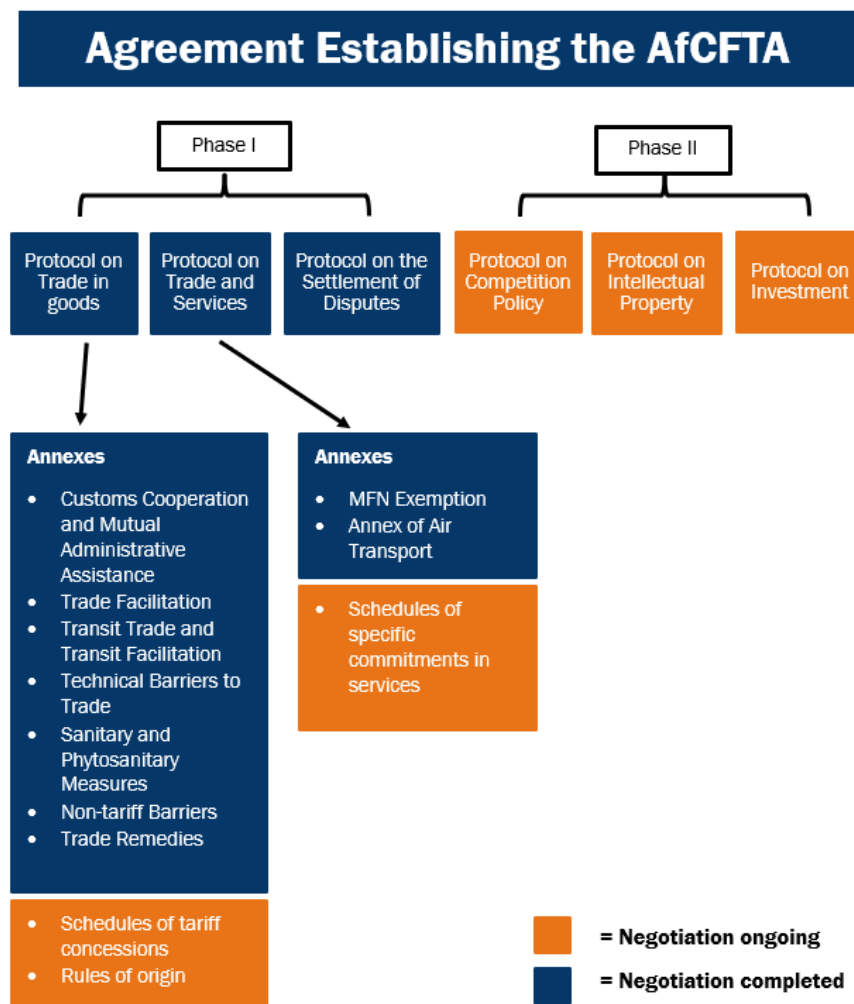
<sup>9</sup> Tralac, "African Continental Free Trade Area (AfCFTA) Questions and Answers." Available at: <https://www.tralac.org/documents/resources/faqs/2019-african-continental-free-trade-area-faqs-june-2018-1/file.html>.

customs cooperation, trade facilitation, sanitary and phytosanitary measures, and rules of origin. These negotiations took place under Phase I of the AfCFTA—goods and services liberalization.

A number of key Phase I issues remain to be negotiated, including schedules of tariff concessions, schedules of services commitments, and rules of origin. As long as these negotiations are pending, it remains unclear which products will be subject to tariff cuts and which services sectors will be liberalized. Likewise, uncertainty remains regarding rules of origin, i.e., rules regarding the type of value addition that must occur within an AfCFTA State Party in order for a product to benefit from AfCFTA tariff rates.

Phase II of the AfCFTA negotiations covers regulatory trade issues that take place “behind the border.” These negotiations, which commenced in February 2019 (but were discussed as early as November 2018), focus on three topics: investment, competition policy, and intellectual property rights. All Phase II issues remain outstanding. Negotiators are also debating whether the AfCFTA should include a protocol on e-commerce<sup>10</sup> in order to take full advantage of the Fourth Industrial Revolution.

Figure 2: The status of the AfCFTA protocols and annexes<sup>11</sup>



<sup>10</sup> Tralac, “Experts meet to set the stage for AfCFTA Phase II negotiations.” Available at: <https://www.tralac.org/news/article/13695-experts-meet-to-set-the-stage-for-afcfta-phase-ii-negotiations.html>.

<sup>11</sup> This reproduced and slightly modified figure was originally published by Tralac, “African Continental Free Trade Area: Questions and Answers.” Available at: <https://www.tralac.org/documents/resources/faqs/2377-african-continental-free-trade-area-faqs-june-2018-update/file.html>.

In December 2018, a roadmap was adopted to finalize outstanding work on the AfCFTA negotiations. On rules of origin, negotiators are expected to submit an agreement by June 2019.<sup>12</sup> AU members agreed on a January 2020 deadline to submit their negotiated market access offers for goods and the five priority services sectors: transport, communications, financial services, tourism, and business services.<sup>13</sup> Phase II negotiations are expected to be completed by June 2020.

## OUTSTANDING PHASE I ISSUES

### The implications of a non-traditional most-favored nation clause in the AfCFTA

The AfCFTA applies the most-favored nation (MFN) principle.<sup>14</sup> MFN aims to protect the interests of all the parties to the agreement by avoiding the erosion that occurs by one country granting more liberalized concessions to other countries.<sup>15</sup> As such, an MFN clause in a free trade agreement (FTA) requires a country to unconditionally extend any concessions, privileges, or immunities granted to one member to all other members of the free trade agreement.

Notably, the MFN principle in the AfCFTA operates differently than a traditional MFN clause. A key difference is that its application is not unconditional or automatic. Rather, countries that have signed on to the AfCFTA (State Parties) can only receive MFN rates on a *reciprocal basis*. This means that if State Party A had an applied MFN rate of 0 percent on cotton fabrics, State Party B would have access to State Party A's 0 percent tariff on cotton fabric *only if* it likewise agreed to apply its MFN tariff on cotton fabric in return.<sup>16</sup> Failure to negotiate reciprocal MFN risks creating a disadvantage for African products compared to like products imported from Parties (countries that have not signed on to the AfCFTA) for which MFN rates have been secured. Thus, while the AfCFTA technically contains an MFN clause, calling it MFN is, in fact, misleading.

The absence of a traditional MFN clause in the AfCFTA is neither unusual nor problematic *per se*. Many FTAs do not feature full or unconditional MFN clauses in order to prevent “free riding,” i.e., when a country with a relatively closed economy gains additional market access without having to make concessions in return. For instance, the Comprehensive and Progressive Trans-Pacific Partnership’s (CPTPP) MFN clause is limited to investment, and the draft text of the Economic Partnership Agreement (EPA) between the East African Community (EAC) and the European Union (EU) limits the application of the MFN obligation for EAC countries to “major trading economies.”<sup>17</sup>

In the context of the AfCFTA, the absence of a traditional MFN clause serves a different purpose, namely, preserving the *acquis*. This term, which first entered the African regional integration terminology through the Tripartite Free Trade Area (TFTA) negotiations, means that States belonging to one of the eight regional economic communities (RECs) recognized under the AfCFTA<sup>18</sup> shall “maintain, and where possible improve upon” the levels of liberalization.<sup>19</sup> This objective has informed the unique scope of the AfCFTA’s non-traditional MFN clause: It

<sup>12</sup> Ibid.

<sup>13</sup> Talkmore Chidede, “Updates from the 7th African Ministers of Trade Meeting (12-13 December 2018).” Available at: <https://www.tralac.org/blog/article/13854-updates-from-the-7th-african-ministers-of-trade-meeting-12-13-december-2018.html>.

<sup>14</sup> AfCFTA Agreement, Articles 5, 18; Protocol on Goods, Article 4; Protocol on Services, Article 4.

<sup>15</sup> Mark Simpson, “The MFN clause as a challenge to a bold and ambitious UK-EU FTA.” Available at: <https://www.insidebrexitlaw.com/blog/the-mfn-clause-as-a-challenge-to-a-bold-and-ambitious-uk-eu-fta>.

<sup>16</sup> The number of tariff digits at which reciprocal MFN will be negotiated is still under discussion.

<sup>17</sup> John Bosco, “The MFN clause in the EAC-EU negotiations: State of play and related implications,” *International Center for Trade and Sustainable Development*. Available at: <https://www.ictsd.org/bridges-news/bridges-africa/news/the-mfn-clause-in-the-eac-eu-epa-negotiations-state-of-play-and>.

<sup>18</sup> The RECs recognized by the African Union are: the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of Western African States (ECOWAS); the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).

<sup>19</sup> AfCFTA Agreement, Article 8; Trudy Hartzenberg, “AfCFTA negotiations after Kigali – keeping an eye on the end game,” 20 June 2018. Available at: <https://www.tralac.org/blog/article/13119-afcfta-negotiations-after-kigali-keeping-an-eye-on-the-end-game.html>.

applies not only to trade with countries that are not party to the AfCFTA (Third Parties), but also to State Parties.<sup>20</sup> In other words, while countries within the EAC are trading most products with each other on a duty-free basis, non-EAC AfCFTA State Parties that are importing products at tariff rates higher than 0 would not automatically be entitled to receive that 0 percent.

While this outcome is consistent with the principle of preserving the *acquis*, the lack of a traditional MFN clause in the AfCFTA also risks the creation of a patchwork of rights and obligations that differ across each of the State Parties. Moreover, it means that the AfCFTA may not foster intra-African value chains to the degree suggested by some critics.

### **The enhanced importance of schedules in tariff concessions and services commitments in the AfCFTA**

The ongoing tariff discussions could minimize the tariff discrimination caused by the absence of a traditional MFN: Negotiators should keep in mind that, the more ambitious the concessions, the less the absence of traditional MFN will be felt.

In June 2017, AU Member States agreed to liberalize 90 percent of their tariff lines on goods. The remaining 10 percent will be divided between sensitive products (7 percent), for which State Parties are given a longer liberalization timeframe, and excluded products (3 percent), which will be exempt from liberalization altogether and remain under each Member States' existing tariffs.<sup>21</sup> For the 90 percent of liberalized goods tariffs, the absence of a traditional MFN clause will have little impact. Indeed, given that it is not possible to apply an MFN rate lower than zero, the effect of a fully liberalized tariff schedule, i.e., a “zero” tariff, under the AfCFTA would be similar to, if not more favorable than, MFN rates.<sup>22</sup>

Yet for the remaining 10 percent of tariff lines not subject to immediate and/or full liberalization, which are still to be determined by the State Parties as part of the ongoing negotiations, the absence of a traditional MFN clause could be significant. As mentioned above, this absence could result in situations where products from Third Parties imported into African countries are treated more favorably than the same products imported from African countries to other African countries. The extent to which a continuing lack of a level playing field for African products will hinder intra-African trade will depend on which tariff lines are included in the 10 percent of sensitive and excluded products not immediately subject to liberalization.

AU Member States agreed in December 2018 that the excluded products will represent no more than 3 percent of tariff lines, accounting for no more than 10 percent of the value of a country's imports from African countries.<sup>23</sup> While these conditions make it more difficult for State Parties to exclude key products that currently dominate intra-African trade—such as petroleum, cotton, live animals, maize, and cocoa<sup>24</sup>—State Parties still have significant leeway to determine the types of products they will liberalize under the AfCFTA.

While most of the ongoing AfCFTA debate on schedules focuses on tariffs, it is key not to forget services. Not only do they make a significant contribution to manufacturing value chains, but will also play a key role in intra-African integration and the future of continental trade.

Globally, services have played an increasingly important role in economic growth and development, making a larger contribution to poverty reduction than agriculture or manufacturing.<sup>25</sup> Since 1980, trade in services has

<sup>20</sup> Specifically, under Article 4 of the Protocol on Trade in Goods and Article 5 of the Protocol on Trade in Services, State Parties are not required to extend MFN rates applied to *State Parties* - countries that have ratified and acceded to the AfCFTA and for which the agreement is in force.

<sup>21</sup> Talkmore Chidede, “Updates from the 7th African Ministers of Trade Meeting (12-13 December 2018).” Available at: <https://www.tralac.org/blog/article/13854-updates-from-the-7th-african-ministers-of-trade-meeting-12-13-december-2018.html>.

<sup>22</sup> However, tariff differentiation could still result as products will be subject to different rules of origin.

<sup>23</sup> Talkmore Chidede, “Updates from the 7th African Ministers of Trade Meeting (12-13 December 2018).” Available at: <https://www.tralac.org/blog/article/13854-updates-from-the-7th-african-ministers-of-trade-meeting-12-13-december-2018.html>.

<sup>24</sup> Gumisai Mutume, “How to Boost trade within Africa”, AfricaRenewal. Available at: <https://www.un.org/africarenewal/magazine/september-2002/how-boost-trade-within-africa>.

<sup>25</sup> UNCTAD, “Global importance of services”. Available at: <https://unctad.org/en/conferences/publicsymposium/2014/Pages/importance-of-services.aspx>.

outpaced trade in goods, accounting for almost 71 percent of global GDP in 2010.<sup>26</sup> In Africa, nearly 55 percent of GDP is generated by services.<sup>27</sup>

Yet African service providers face barriers to export services. Few African countries have scheduled services commitments, and fewer still are net services exporters.<sup>28</sup> African services exports amount to just 2 percent of global trade in services.<sup>29</sup> Thus, there is opportunity for the AfCFTA to expand competitiveness in African trade in services by liberalizing the service sector.

Importantly, the extent to which the AfCFTA will enhance intra-African trade will largely be a function of the negotiation threshold<sup>30</sup> and the specific commitments State Parties will make for the different services sectors. So far, State Parties have identified five priority sectors: transport, communications, financial services, tourism, and business services. Specific offers around these are in the process of being negotiated.

### Remaining ambiguity about who is negotiating what with whom

When thinking about the implications of tariff concessions and services schedules, it is also key to consider the structure of the negotiations: Who is negotiating what with whom? In the context of the AfCFTA, this question is anything but straightforward.

First, as noted above, the AfCFTA stipulates the principle of the *acquis*. In preserving the *acquis*, State Parties seek to protect existing RECs from extra-REC competition.<sup>31</sup> Accordingly, the AfCFTA envisions that tariff concessions will be negotiated only between RECs and/or State Parties that belong to different RECs.<sup>32</sup>

Second, four out of eight of the RECs are customs unions: ECOWAS, EAC, SACU, and CEMAC. State Parties that belong to these custom unions will likely be making concessions as a bloc. However, in reality, it is challenging for these regional blocs to make common offers, as not all members of these customs unions have signed or ratified the AfCFTA (a notable exception includes Botswana). Likewise, least-developed countries (LDCs) within custom unions are entitled to longer liberalization periods pursuant to the special and differential treatment (SDT)<sup>33</sup> provisions that form a key principle of the AfCFTA.<sup>34</sup> There is thus remaining ambiguity about how, and whether, custom unions will operationalize common tariff concessions.

Third, there is an open question regarding the recipient party of market access offers: will State Parties/RECs make offers bilaterally, which means there can be different offers to individual State Parties or rather at an MFN basis, which entails that State Parties/RECs submit a common offer to all State Parties together (except to those countries with whom they have a deeper REC FTA arrangements)? While this remains an open question, a template for goods tariff concessions adopted at the 7th African Union Ministers of Trade meeting suggests there will be leeway for making different offers to different countries.<sup>35</sup>

In the next few months, the framework that countries will adopt to structure their market access offers will be critical in determining whether the AfCFTA will indeed create the “one Africa” many have hoped for.

<sup>26</sup> Ibid.

<sup>27</sup> UNCTAD, “Mission to unlock Africa’s services sector”. Available at: <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1988>.

<sup>28</sup> According to ICTSD, only 11 African countries are net service exporters. Bineswaree Balaky, “Unlocking the potential of Africa’s services for structural transformation”, ICTSD, 19 May 2016. Available at: <https://www.ictsd.org/bridges-news/bridges-africa/news/unlocking-the-potential-of-africa%E2%80%99s-services-for-structural>.

<sup>29</sup> Bineswaree Balaky, “Unlocking the potential of Africa’s services for structural transformation”, ICTSD, 19 May 2016. Available at: <https://www.ictsd.org/bridges-news/bridges-africa/news/unlocking-the-potential-of-africa%E2%80%99s-services-for-structural>.

<sup>30</sup> Thresholds sets out the parameters/frameworks that countries must apply when they are negotiating. For example, it could stipulate a minimum amount of commitments that must be made in different sectors.

<sup>31</sup> Bineswaree Balaky, “Unlocking the potential of Africa’s services for structural transformation.”

<sup>32</sup> Ibid.

<sup>33</sup> SDT provisions give developing countries and LDCs special rights and allow members to treat them more favorably than other members. This flexibility exists to account for different levels of development.

<sup>34</sup> AfCFTA Agreement, Article 5.

<sup>35</sup> 7th African Union Ministers of Trade Meeting, Template for Goods and Services.

## Rules of origin

Another outstanding Phase I issue regards of origin (RoO). RoO are criteria that determine the origin of a product and, by doing so, establish which products are eligible to receive preferential tariffs. Is a blouse made from Chinese silk, designed and stitched in China, but packaged in Kenya eligible to receive AfCFTA preferential tariff rates? What if it is made of imported Chinese silk, but stitched together in Kenya? The answer to these questions depends on the RoO that are being negotiated.

The ongoing RoO discussions center around the level of restrictiveness of the rules. The more advanced African countries advocate for stricter rules of origin in the form of product-specific rules. They are worried about trade deflection: The weaker the rules of origin, the easier it is for non-AfCFTA countries to benefit from this African trade agreement.<sup>36</sup>

Yet, the stricter the rules, the more difficult it will be for companies, especially small- and medium-sized enterprises (SMEs) in LDCs, to meet the value-added threshold, and thus receive AfCFTA tariff preferences. For instance, it would be much easier to meet a requirement that 30 percent of a product must originate from the origin-claiming country, rather than 50 percent. Likewise, it would be easier to demonstrate that 30 percent of a product must originate from the origin-claiming country than, for example, to demonstrate “double transformation” of a product, in which a country must make both the clothing and the fabric from which it is produced. Given the weak state of manufacturing in many African countries, and the fact that Africa’s private sector consists, for the most part, of ill-equipped SMEs, strict rules of origin would preclude the majority of African businesses from taking advantage of the preferential tariffs under the AfCFTA.<sup>37</sup> Thus, to ensure that State Parties will be able to trade using the AfCFTA preferences, negotiators should adopt relatively lenient rules of origin.

Another factor that must be kept in mind during the RoO negotiations is harmonization. Africa’s RECs have taken different approaches to rules of origin. For instance, COMESA only applies a general rule, requiring that 35 percent of value addition must take place within a COMESA country.<sup>38</sup> SADC, on the other hand, also applies product-specific rules of origin.<sup>39</sup> These rules will stay in place for intra-REC trade. Since product-specific RoO are typically more difficult to meet compared to a general rule, for products with AfCFTA product-specific RoO, COMESA-based producers will not be as competitive compared to their SADC counterparts.

While this move prevents optimal harmonization of rules of origin within Africa, it would nevertheless be important that the AfCFTA RoO build upon the RoO already in the RECs as much as possible. Failure to do so could disrupt supply chains, add to transaction costs, and erode competitiveness.<sup>40</sup>

## PHASE II ISSUES—A BIRD’S EYE VIEW

Phase II negotiations center around protocols of competition, intellectual property, investment, and, possibly, e-commerce. State Parties need to agree on the objective of these protocols. Is the objective of an African Investment Protocol to provide market access and protect investors, or, rather, to promote and facilitate investment? Or is it both? Similarly, should the Protocol on Competition create an intra-African competition authority, or require African states without competition laws to adopt such laws and create national competition authorities? And should the Intellectual Property Protocol aim to harmonize the variety of overlapping regional and national IP regimes? Or, rather, should the goal be to develop an Africa-specific protocol that prioritize issues of specific relevance to Africa, such as the protection of traditional knowledge? Can it do both?

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<sup>36</sup> NewsDay, “Rules of Origin Stall AfCFTA,” 29 March 2018. Available at: <https://www.newsday.co.zw/2018/03/rules-of-origin-stall-afcfta/>.

<sup>37</sup> Ibid.; Peter Draper et al. “Can rules of origin in sub-Saharan Africa be harmonized?” German Development Institute. 2016.

<sup>38</sup> Tralac, “African Continental Free Trade Area (AfCFTA), FAQs”. Available at: <https://www.tralac.org/documents/resources/faqs/2377-african-continental-free-trade-area-faqs-june-2018-update/file.html>.

<sup>39</sup> Ibid.

Another issue relates to the relationship between the AfCFTA protocols and existing agreements already negotiated between African countries and Third Parties. Similar to the Protocol on Trade in Goods and the Protocol on Trade in Services, certain Phase II protocols, such as the Protocol on Competition and Investment, will likely not contain a traditional MFN clause. This situation, in turn, could result in discriminatory treatment. For instance, absent a traditional MFN requiring countries to extend any privileges granted to Third Parties to State Parties, weaker investment protection provisions in the AfCFTA investment protocol vis-à-vis existing bilateral investment treaties between State Parties and Third Parties could mean that foreign investors in Africa would receive *better* treatment than African investors.

The vast economic disparity that exists among African countries is another key issue that must be addressed to ensure that all countries will be able to effectively implement the AfCFTA provisions, especially in the context of Phase II negotiations. The economic disparity occurs on many levels. African countries have vastly different levels of GDP, with over 50 percent of Africa's cumulative GDP contributed by just three countries: Egypt, Nigeria, and South Africa.<sup>41</sup> Conversely, Africa's six sovereign island nations collectively contribute just 1 percent.<sup>42</sup> The AfCFTA would have the greatest level of income disparity of any continental free trade agreement, and more than double the level witnessed in other regional blocs like the Caribbean Community and Common Market (CARICOM) or the Association of South East Asian Nations (ASEAN).

Similarly, African countries maintain massive inconsistencies in their regulatory environments. For instance, only 25 out of the 55 African Union member states have an operational competition authority in place, whereas approximately 17 countries have not adopted any competition legislation (the remaining countries fall somewhere in between).<sup>43</sup> For the AfCFTA to deliver, it must address these discrepancies.

Special and differential treatment (SDT) would be one way to address different levels of development, especially regarding LDCs. For SDT provisions to be effective, however, their design must be tailored to different development concerns raised by the different provisions outlined below.<sup>44</sup>

For those provisions that minimize free riding but create implementation difficulties for LDCs—for instance, provisions on competition and IP—the SDT provisions in the WTO Trade Facilitation Agreement (TFA) may serve as a model. Applying the TFA model would enable LDCs to identify (i) obligations they commit to comply with upon entry into force, (ii) obligations they commit to comply with after a period of time, and (iii) obligations that would be contingent upon receiving technical assistance. By contrast, for other provisions that have raised concerns around infant industry protection and policy space, temporary exemptions from certain disciplines would be a more suitable approach.

One issue, however, that must be addressed in the context of providing technical assistance under the AfCFTA is financing.<sup>45</sup> In contrast to SDT at the multilateral level, few AfCFTA countries would have the budget to pay for the technical assistance that LDCs in the AfCFTA may require. One idea to resolve this challenge would be to engage existing regional institutions in carrying out some of the SDT financing for initiatives around technical support and capacity building, but this issue must be further explored.

## RECOMMENDATIONS

The ratification of the AfCFTA presents a real milestone for African unity. Whether it will go beyond symbolism, however, depends in part on the depth and scope of the provisions and commitments currently being negotiated.

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<sup>41</sup> Rilwan Akeyewale, "Who are the Winners and Losers of the AfCFTA," World Economic Forum, 17 October 2018. Available at: <https://www.weforum.org/agenda/2018/10/africa-continental-free-trade-afcfta-sme-business/>.

<sup>42</sup> *Ibid.*

<sup>43</sup> LEX Africa, "Developments in Competition Law in Africa," 22 Augustus 2018. Available at: <https://www.lexafrika.com/developments-in-competition-law-in-africa/>.

<sup>44</sup> Colette van der Ven, "Special and Differential Treatment in the Context of the Digital Era". CUTS International, 2018.

<sup>45</sup> See, e.g., David Luke and Jaime Macloed, "Bringing the AfCFTA about: Key factors for success," ICTSD, 20 September 2017. Available at: <https://www.ictsd.org/bridges-news/bridges-africa/news/bringing-the-cfta-about-key-factors-for-success>.



The negotiation outcomes, in turn, will reflect the political commitment African nations show towards intra-African trade liberalization and continental unity.

Negotiators must be cautious not to add additional layers of complexity to an already complex and overlapping network of trade agreements in Africa. They can do so by ensuring that the commitments they make in goods and services are as *ambitious as possible* within existing parameters. For instance, this process would ideally include committing to immediately liberalizing as many tariff lines as possible as well as adopting a liberal approach to negotiating reciprocal MFN.

Moreover, to maximize the benefits derived from the AfCFTA, State Parties must make commitments in line with their comparative advantage for diversification and value chain development. Such analysis should look at not only *existing* trade flows, but also *nascent opportunities*. Maximizing the AfCFTA benefits will require that governments develop proactive national strategies that will identify opportunities and constraints and inform their tariff commitments for goods and services.<sup>46</sup>

In conducting this analysis, national governments *must establish a close link with the private sector*. Indeed, in setting their scheduling priorities, African governments must be sure to listen to the needs and concerns of the private sector, especially small- and medium-sized enterprises. From these discussions, negotiators must gain an understanding of the sectors that will be most conducive to liberalization, and which sectors would benefit from being excluded or gradually liberalized.

While most of the focus in the AfCFTA debate centers around goods, it is imperative that governments *do not overlook the importance of the services industry*, as Africa's services exports grew more than six times faster than merchandise exports between 1998 and 2015,<sup>47</sup> a trend likely to continue given the sector's tremendous business opportunities.<sup>48</sup>

With respect to RoO, it is important that they are sufficiently flexible, with a view to enabling SMEs in least-developed AfCFTA State Parties to take advantage of AfCFTA preferential tariffs. Complicated and stringent RoO could risk straining the institutional capacities of African countries ill-equipped to manage complicated RoO, especially in the context of porous borders.<sup>49</sup> Moreover, while the *acquis* and the existing RoO make full RoO harmonization impossible, negotiators should ensure, at a minimum, that *the RoO are built upon existing regimes*.

In the context of the Phase II negotiations, a number of key questions regarding scope and objective must be clarified. Given the vast disparity between the development of different African countries, questions regarding capacity building for Phase II are especially critical. The AU, RECs, and international organizations should come to an agreement about *who is going to foot the bill for the additional resources* that will be required to make the regulatory protocols workable for all African countries, especially LDCs.

Finally, the negotiators must clarify the numerous ambiguities currently present in the AfCFTA Agreement. They could do so by creating a roadmap of the remaining unknowns: for example, who is negotiating what with whom, how reciprocal MFN is being approached, what will happen to customs unions if not all members have ratified/signed on to the AfCFTA, and how conflicts will be resolved. These additional clarifications will be critical for the AfCFTA's successful implementation going forward.

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<sup>46</sup> Joy Kategkwa, presentation at ARIA Expert Group Meeting at UNECA, 18 November 2018.

<sup>47</sup> John Page, "How industries without smokestacks can address Africa's youth unemployment crisis," *Brookings Institution*, 2019. Available at: <https://www.brookings.edu/research/how-industries-without-smokestacks-can-address-africas-youth-unemployment-crisis>.

<sup>48</sup> Acha Leke and Landry Signe, "Spotlighting opportunities for business in Africa and strategies to succeed in the world's next big growth market," *Brookings Institution*, 2019. Available at: <https://www.brookings.edu/research/spotlighting-opportunities-for-business-in-africa-and-strategies-to-succeed-in-the-worlds-next-big-growth-market>.

<sup>49</sup> Peter Draper et al. "Can rules of origin in sub-Saharan Africa be harmonized?" German Development Institute. 2016.

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