

Greening the AfCFTA: It is not too late

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Abstract

Environmental sustainability is a key component of Africa's Agenda 2063: The Africa We Want. Yet, the recently launched African Continental Free Trade Area (AfCFTA) contains only minimal references to the environment. This policy brief highlights various ways in which State Parties can strengthen the linkages between the AfCFTA and the environment, with a focus on concrete approaches and strategies. With respect to the AfCFTA protocols that have already been negotiated—including the Annexes on Technical Barriers to Trade, Sanitary and Phytosanitary Measures, and various Annexes on trade facilitation—strategic implementation can enhance the link between the AfCFTA and the environment. With respect to ongoing negotiations, including on tariff schedules and services concessions, as well as future negotiations on the Protocols of Intellectual Property, Investment, Competition and E-commerce, State Parties have the option of more clearly emphasizing the link between the AfCFTA and the environment. The policy brief also encourages the AfCFTA Secretariat to explore the possibility of adding a Protocol on the Environment and Sustainable Development.

1. INTRODUCTION

On January 1, 2021, trade under the African Continental Free Trade Area (AfCFTA) officially commenced. As African countries seek to rebuild their economies after the damage caused by COVID-19, the timing of the AfCFTA could not be better. Indeed, the AfCFTA is predicted to bring vast economic benefits to the continent, with some studies finding that the AfCFTA will contribute to boosting the combined consumer and business spending in Africa to over \$6.7 trillion by 2030.¹ Perhaps more importantly, according to World Bank estimates, by 2035 the AfCFTA could increase real income gains by 7 percent, boost African exports by \$560 billion, and lift 30 million Africans from extreme poverty.²

The strengthening of intra-African value chains, increased economic growth, and enhanced human development gains are not the only effects that will define the AfCFTA's success: In an era marked by rapidly advancing environmental degradation and climate change, the AfCFTA must also serve as a lever for sustainable growth. In fact, environmental sustainability is a key component of Africa's *Agenda 2063: The Africa We Want*, which aspires to build a prosperous Africa on the basis of inclusive growth and sustainable development, with an emphasis on the importance of building "environmentally sustainable and climate resilient economies and communities."³ Already, at the regional level, regional economic communities (RECs) have adopted environmental policies, focusing *inter alia*, on biodiversity loss, land and water degradation, desertification, urban and industrial pollution. African countries have also made serious commitments to combat climate change, with more than 90 percent having ratified the Paris Agreement. In their Nationally Determined Contributions (NDCs), 70 percent of African countries have made commitments towards clean energy and agriculture.⁴

The African continent is facing enormous environmental challenges. Despite contributing the least to global warming—both in absolute and per capita terms—studies predict that Africa as a region will suffer the most from the devastating impacts of climate change.⁵ According to the Intergovernmental Panel on Climate Change (IPCC), Africa can expect adverse climate impacts on port facilities, buildings, roads, railways, airports, and bridges, due to rising sea levels and the increased occurrence of extreme weather phenomena. Moreover, trends in deforestation and land degradation are damaging fragile ecosystems, resulting in irreversible biodiversity loss, water scarcity, and debilitating effects, such as floods and mudslides, on the poorest communities. In cities, air pollution and ineffective waste management pose serious and growing problems. In fact, according to World Bank calculations, sub-Saharan Africa alone produces around 62 million tons of waste (including plastic waste) a year—a figure that is expected to double by 2025.⁶

1 Landry Signé (2020), *Unlocking Africa's Business Potential: Trends, Opportunities, Challenges, and Strategies*. Washington DC: The Brookings Institution Press, available at: <https://www.brookings.edu/book/unlocking-africas-business-potential/>

2 The World Bank (2020), "The African Continental Free Trade Area: Economic and Distributional Effects." Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/34139/9781464815591.pdf>

3 African Union (2015), "Agenda 2063: The Africa we want." Available at: https://au.int/sites/default/files/documents/33126-doc-ten_year_implementation_book.pdf.

4 United Nations Climate Change (UNFCCC) (2020), "Climate Change is an increasing Threat to Africa", available at: <https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa#:~:text=Increases%20in%20temperature%20and%20changes,fever%2C%20malaria%20and%20yellow%20fever.>

5 World Economic Forum (2018), "Africa's fastest-growing cities are the most vulnerable to climate change globally.", Available at: <https://www.weforum.org/agenda/2018/12/africa-s-fastest-growing-cities-are-the-most-vulnerable-to-climate-change-globally.>

6 Eleni Mourdoukoutas, "Africa Renewal, Africa's bumpy road to sustainable energy". Africa Renewal. Available at: <https://www.un.org/africarenewal/web-features/africa%E2%80%99s-bumpy-road-sustainable-energy.>

Climate change and environmental degradation seriously risk undermining the economic benefits the AfCFTA is predicted to bring.⁷ According to a study by the International Monetary Fund (IMF), rising temperatures could decrease Africa's GDP between 2.25 percent and 12.12 percent, depending on the magnitude of the temperature increase.⁸ Another study finds that nearly half of the continent's GDP is vulnerable to extreme climate patterns.⁹ Moreover, extreme weather events could damage infrastructure crucial for transportation, making intra-African trade slower and more costly. Warmer climates and weather extremes are also predicted to reduce agricultural yields (with sub-Saharan Africa expected to experience the worst declines¹⁰) and harm biodiversity, which would directly impact the region's nascent but growing tourism industry.¹¹

Focusing on sustainable growth is also increasingly important as the world's three largest economies—China, the European Union (EU), and the United States—have either made, or have pledged, major commitments to green their economies. Of particular importance for Africa is the EU's ambitious Green Deal, which approaches climate change and environment-related challenges by seeking to achieve net zero emissions by 2050 and gradually transitioning towards a circular economy. One of the main building blocks of the European Green Deal, the Circular Economy Action Plan (CEAP), specifically aims to reduce pressure on natural resources by targeting how products are designed, promoting circular economy processes, and encouraging sustainable consumption.¹² It foresees the introduction of more stringent standards such as eco-design requirements for a range of different sectors and value chains, including electronics and ICT, batteries and vehicles, packaging, plastics, textiles, and high impact intermediate products.¹³ Despite their importance, these and other environmentally centered regulations being developed in the EU and other advanced economies could inadvertently undermine the benefits currently enjoyed by African countries under preferential market access arrangements.¹⁴ The emergence of a global landscape that is increasingly focused on environmental aspects of trade must be addressed for Africa to be competitive going forward.

Against this backdrop, this policy brief explores how the AfCFTA can be used as an instrument for advancing green growth. It highlights various ways in which State Parties can strengthen the linkages between the AfCFTA and the environment, with a focus on concrete approaches and strategies. The sections below analyze how the AfCFTA can be greened through its substantive provisions—with a focus on the ongoing market access negotiations under Phase I (tariff concessions and services schedules); the finalized Annex on Sanitary and Phytosanitary (SPS) measures, the Annex on Technical Barriers to Trade (TBT); and the Annexes on Trade Facilitation, Customs Cooperation and Transit. It also offers a bird's-eye view of greening the ongoing Phase II Protocols that are yet to be negotiated (covering competition, intellectual property, and investment), and Phase III negotiations on e-

7 Xinhuanet (2020), "Climate change poses risk to Africa's free trade area: UN official." Available at: http://www.xinhuanet.com/english/2020-02/27/c_138823514.htm.

8 United Nations Climate Change (UNFCCC) (2020), "Climate Change is an increasing Threat to Africa". Available at: <https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa>.

9 World Economic Forum (2018), "Africa's fastest-growing cities are the most vulnerable to climate change globally." Available at: <https://www.weforum.org/agenda/2018/12/africa-s-fastest-growing-cities-are-the-most-vulnerable-to-climate-change-globally>.

10 Jodi Keane et al. (2021), "The Climate and Trade Nexus", Overseas Development Institute (ODI). Available at: https://cdn.odi.org/media/documents/climate_trade_nexus_v7.pdf.

11 David Luke and Lily Sommer (2020), "To build back better, make African trade greener." Available at: <https://news.trust.org/item/20201005102659-850yc/>.

12 European Commission, Environment, "Circular Economy Action Plan." Available at: https://ec.europa.eu/environment/strategy/circular-economy-action-plan_en.

13 European Commission, (COM(2020)), "A new Circular Economic Action Plan for a Cleaner and more Competitive Europe." Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:9903b325-6388-11ea-b735-01aa75ed71a1.0017.02/DOC_1&format=PDF.

14 Institute for European Environmental Policy (IEEP), "Towards the future Generalised Scheme of Preferences Regulation granting trade advantages to developing countries." Available at: <https://ieep.eu/uploads/articles/attachments/c527f72f-1c99-4383-ba65-31a671c91ef1/IEEP%20response%20to%20GSP%20public%20consultation%20-%20July%202020.pdf?v=63762649757>.

commerce.¹⁵ This policy brief further highlights that it is not too late for the State Parties to agree to develop a Protocol on the Environment or on Sustainable Trade. Box 1 and Figure 1 below explain the current state of the different phases of the AfCFTA negotiations.

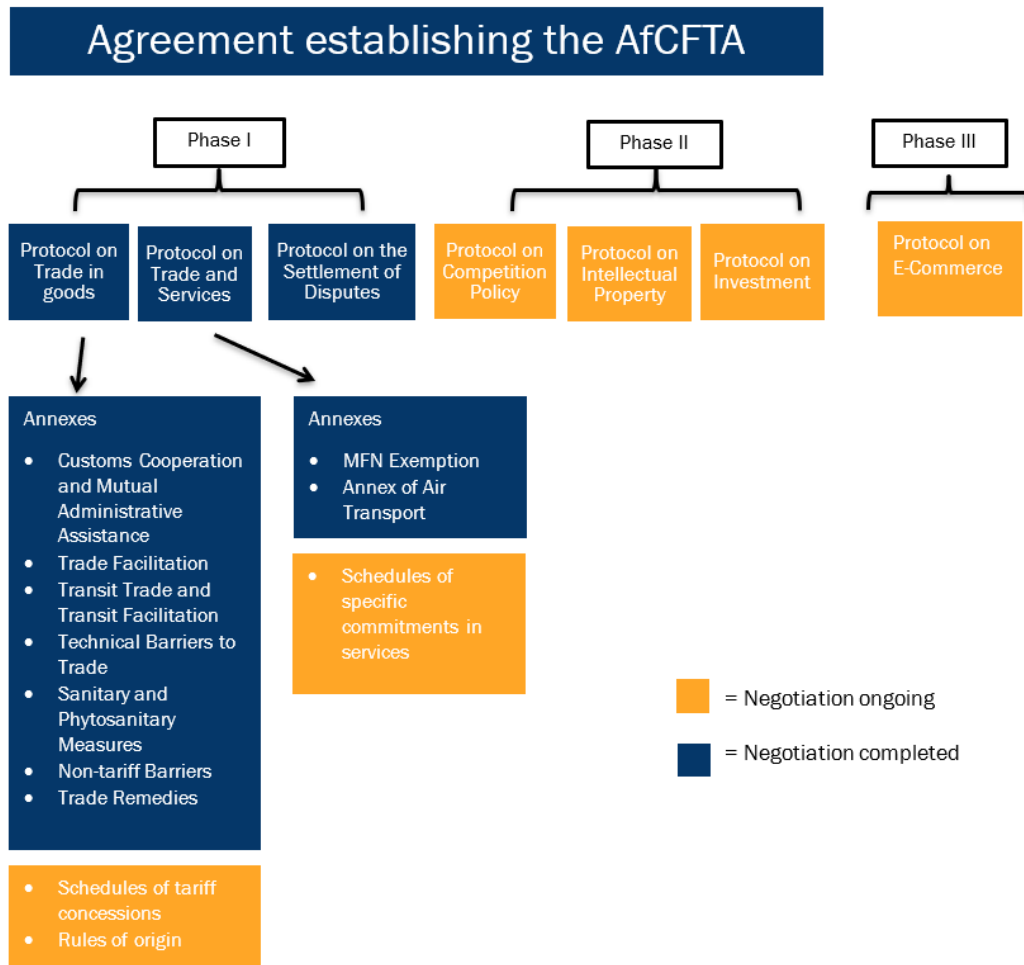
To be clear, this policy brief does not suggest that the AfCFTA will have a net positive effect on the environment as assessing the overall impact of trade liberalization on the African continent on the environment requires detailed empirical study beyond the scope of this paper. Rather, this paper explores how the AfCFTA—both the concluded parts and the areas under negotiation—can be leveraged to advance Africa’s sustainable growth objectives.

Box 1: AfCFTA State of Play

While trade under the AfCFTA officially commenced on 1 January 2021, the negotiations, which have been divided in three different phases, are far from complete. Under Phase I, State Parties concluded the negotiations of the Protocols on Trade in Goods, Trade in Services, and the Protocol on the Settlement of Disputes, and their accompanying annexes. However, State Parties are still negotiating tariff schedules, rules of origin, and services schedules. Phase II negotiations, which are ongoing, cover Protocols on Intellectual Property, Competition and Investment. Phase III negotiations on e-commerce yet have to commence. The structure of the AfCFTA and the stage of negotiations is illustrated in Figure 1 below.

¹⁵ A more elaborated discussion of Phase II Phase III Protocols will be presented in a subsequent paper.

Figure 1: The negotiating status of AfCFTA Protocol and Annexes



Note: This figure is modified and updated from a figure originally published by Tralac in "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>.

2. TRADE AGREEMENTS AND THE ENVIRONMENT

To understand the role of the AfCFTA within Africa's quest for green growth, it is imperative to revisit the relationship between trade agreements and the environment more generally.

Trade agreements can have both positive and negative impacts on the environment. On the one hand, trade agreements seek to increase trade and enhance economic growth, which tends to accelerate climate change by, *inter alia*, generating emissions related to transportation and deforestation. Moreover, many trade agreements restrict a country's ability to adopt certain types of environmental policies: For instance, trade agreements often restrict the types of subsidies countries can provide, thereby limiting the options for subsidizing renewable energy.

On the other hand, trade agreements can advance environmental objectives. By creating new markets, trade agreements present an opportunity to create economies of scale and share know-how, thereby promoting economic efficiency and innovation in support of environmental outcomes. Indeed, the AfCFTA could accelerate the development of sustainable technologies and sustainable infrastructure.¹⁶ Enhanced intra-African trade through the AfCFTA could facilitate leapfrogging into green industries and renewable resource-based technologies.¹⁷ By lowering trade barriers, trade agreements can also facilitate the diffusion of environmental goods and services. Finally, trade agreements can discourage or prohibit environmentally harmful practices that impact trade, including by requiring that the Parties comply with multilateral environmental agreements (MEAs), such as the Convention on International Trade in Endangered Species (CITES) or the Basel Convention that controls transboundary movements of hazardous wastes and their disposal.

The extent to which a trade agreement positively effects environmental sustainability depends, in part, on the specific provisions set out in the agreement concerned. In recent years, we have witnessed an upward trend in both the number and type of environmental provisions in trade agreements. In 2018, free trade agreements (FTAs) contained an average of 73 different environmental provisions, covering exceptions and preambular references, but also more substantive environmental provisions—ranging from encouraging effective implementation of multilateral environmental agreements (MEAs) and recognizing a party's right to adopt measures that are necessary for the environment, to encouraging the harmonization of environmental laws and standards, to promoting the use of environmental impact assessments.¹⁸

Many recently adopted FTAs¹⁹ include specific chapters on trade and the environment or trade and sustainable development. For example, FTAs negotiated by the European Union contain a chapter on trade and sustainable development, which requires trade partners, *inter alia*, to follow international environmental standards, effectively enforce environmental laws, trade sustainably in natural resources, combat illegal trade in threatened and endangered species, encourage trade that supports tackling climate change, and promote practices such as corporate social responsibility.²⁰ Similarly,

¹⁶ Carlos Lopes (2021), "Europe and Africa needs to see eye to eye on climate change", Available at: <https://oecd-development-matters.org/2021/01/04/europe-and-africa-need-to-see-eye-to-eye-on-climate-change/>.

¹⁷ Ibid.

¹⁸ World Trade Organization (2016), Typology of Environment-related provisions in regional trade agreements, available at: https://www.wto.org/english/res_e/reser_e/ersd201613_e.pdf.

¹⁹ Recently adopted RTAs that include specific environmental chapters include: the Progressive Trans-Pacific Partnership Agreement (CPTPP), the United States Canada Mexico Agreement (USMCA), the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the Vietnam-EU Free Trade Agreement and the Peru-Australia Free Trade Agreement (PAFTA).

²⁰ European Commission, *Sustainable Development*, Available at: <https://ec.europa.eu/trade/policy/policy-making/sustainable-development/>.

FTAs entered into by the United States contain a variety of environmental provisions, typically set out in a separate Environmental Chapter.²¹

By contrast, the AfCFTA does not currently feature a Protocol on the Environment and Sustainable Development. As the AfCFTA negotiations are ongoing, it would still be possible for the AfCFTA State Parties to include such a protocol. Indeed, State Parties have been open to adopt new protocols after signing the AfCFTA: The Protocol on e-Commerce was not initially envisioned to be part of the AfCFTA, but was added later on. The AfCFTA Secretariat has also commenced work on a possible Protocol in Women in Trade.²² With respect to trade and the environment, a recent UNCTAD study on the implications of the AfCFTA for trade in biodiversity calls for a mandate to develop an additional legal instrument on cooperation on trade, the environment, and sustainable development.²³ The AfCFTA Secretariat is encouraged to explore the possibility of adding a Protocol on the Environment and Sustainable Development. In parallel, there are numerous ways in which State Parties can green the AfCFTA, as is further explored in the sections below.

3. ENVIRONMENTAL PROVISIONS IN THE AFCFTA

The AfCFTA contains only minimal environmental references. The preamble of the agreement establishing the AfCFTA reaffirms the right of State Parties to regulate within their territories and provides flexibility for achieving legitimate policy objectives, including in areas related to the environment. Similarly, the preamble of the Protocol on Trade in Services recognizes the right of State Parties to pursue national policy objectives and introduce new services regulations to meet legitimate policy objectives, including sustainable development. It further emphasizes that, in complying with the provisions of the Protocol on Trade in Services, State Parties may not compromise environmental protections and overall sustainable development. However, these preambular references do not set out legally binding obligations and cannot, therefore, be interpreted as reflecting a strong commitment to the environment on the part of AfCFTA State Parties.

In addition to the preambular references, the AfCFTA also contains environmental exceptions: Under certain circumstances, State Parties may adopt measures that are inconsistent with the Protocol on Trade in Goods, including if these measures are “necessary to protect human, animal or plant life or health;” or “relat[ed] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”²⁴ Provided certain conditions are met, the adoption of measures that are necessary to protect human, animal, or plant life or health could justify violations of provisions in the Protocol on Trade in Goods and the Protocol on Trade in Services. For instance, if a State Party were to adopt a ban on plastic packaging, or on the imports of certain types of plastic waste, these provisions would likely constitute a violation of Article 9 of the AfCFTA Protocol in Trade in Goods, which prohibits quantitative restrictions. The violation could be excused, however, if the State Party can demonstrate that the measure is necessary to protect human, animal, and plant health and life, and that the measure is not discriminatory nor serves as a disguised restriction on trade.

Absent any jurisprudence, uncertainty remains with respect to how an AfCFTA adjudicatory body would approach the issue, and, therefore, what environmental measures will and will not be justified under the general exceptions clauses in the AfCFTA. Taking World Trade Organization (WTO) jurisprudence

²¹ In contrast to EU FTAs, environmental provisions contained in US FTAs are subject to enforceable dispute settlement.

²² UN Women, “Survey on “Women in Trade” – AfCFTA”, Available at: https://data.unwomen.org/form/afcfta_survey. Available at: https://data.unwomen.org/form/afcfta_survey.

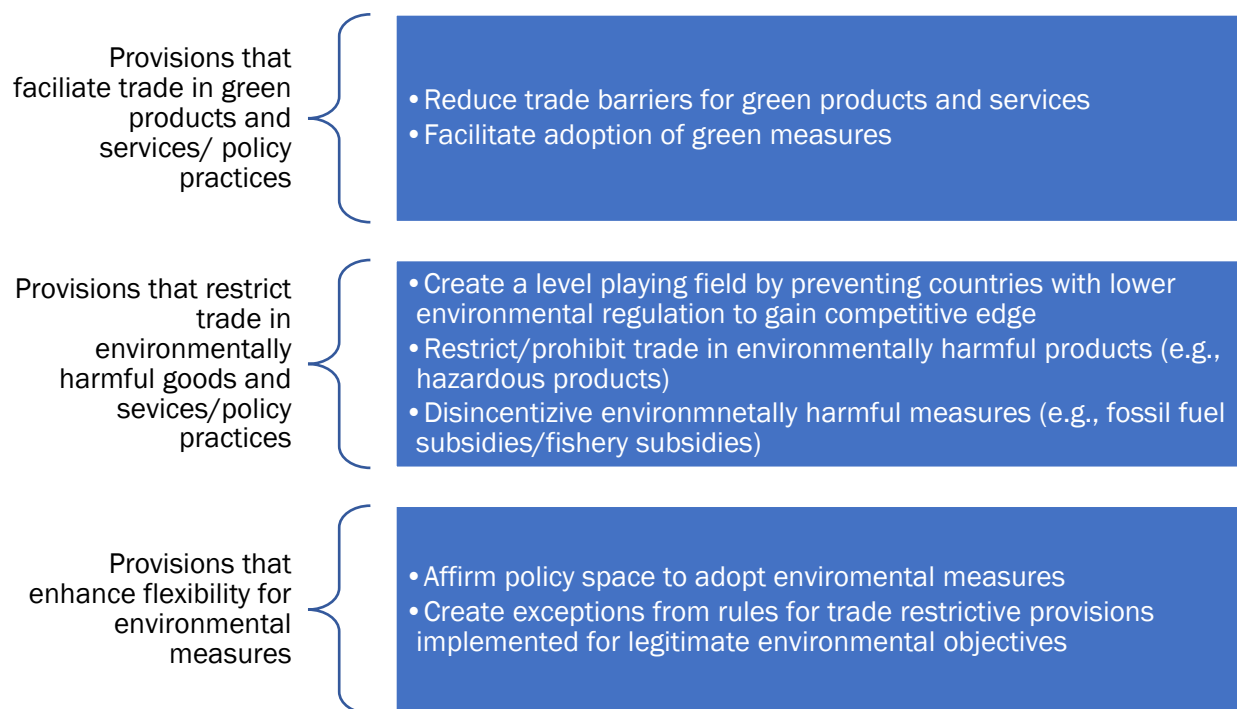
²³ UNCTAD (2021), “Implications of the African Continental Free Trade Area for Trade and Biodiversity: Policy and Regulatory Recommendations.” Available at: https://unctad.org/system/files/official-document/ditctedinf2021d3_en.pdf.

²⁴ Article 26, General Exceptions, Agreement Establishing the AfCFTA.

as guidance, however, not all environmental measures will be justifiable under the scope of the general exceptions.

As noted above, unlike many recent FTAs, the AfCFTA does not contain environmental provisions beyond the preambular language and the exceptions. While this omission is a missed opportunity, it is not too late to strengthen the link between the AfCFTA and the environment. Indeed, there are various ways in which substantive provisions in FTAs can advance environmental objectives, even absent explicit environmental references: They can facilitate trade in environmental goods and services; reduce or restrict trade in environmentally harmful products; and secure policy space to adopt environmental regulation and to adopt measures necessary to comply with commitments under multilateral environmental agreements (MEAs). These three functions are summarized in Figure 2 below.

Figure 2: Overview of different ways in which trade agreements can advance environmental protections



4. REMOVING MARKET ACCESS BARRIERS ON ENVIRONMENTAL GOODS AND SERVICES

Environmental goods

By reducing or fully removing, tariffs on environmental goods—broadly considered to include goods that measure, prevent, limit, minimize or correct different types of environmental damage—FTAs can facilitate trade in goods that advance environmental objectives.²⁵ According to recent estimates, lowering tariffs on a broad set of environmental goods could reduce CO2 emissions as much as 10 million tons by 2030, while increasing world trade by 1.1 percent.²⁶ A key challenge to reducing tariffs on environmental goods concerns disagreement as to the definition of an environmental good. Indeed, failure to agree on a definition of environmental good was the main reason that multilateral negotiations on an Environmental Goods Agreement (EGAs) stalled in 2017.²⁷

Agreement on what constitutes an environmental good might be easier in a regional context: State Parties to the Asian Pacific Economic Cooperation (APEC) have committed to apply tariff reductions on an agreed list of 54 environmental goods.²⁸ Similarly, the AfCFTA could be an opportune setting to reach agreement on what constitutes an environmental good, especially given that the group is more homogenous than that under the WTO. Strategically reducing tariffs on environmental goods in the context of the AfCFTA could result in intra-African value chains in environmental goods, thereby reducing Africa's current import dependency on environmental goods, as illustrated in Figure 3.

As tariff negotiations are already under way, it might be too late to introduce the idea of negotiating and agreeing upon an environmental goods list among the State Parties that is tailored to the concerns and interests of AfCFTA State Parties. Absent such a continent-wide initiative, however, State Parties/customs unions could consider including in their own tariff concessions products and technologies that address environmental priorities for Africa and that can be competitively produced within the African continent, thereby facilitating intra-African trade in these goods. For instance, this could include drip irrigation systems, solar driers, rainwater harvesting technologies, ethanol cook stoves, or inputs for global green production.

Box 2: AfCFTA tariff negotiations – State of Play

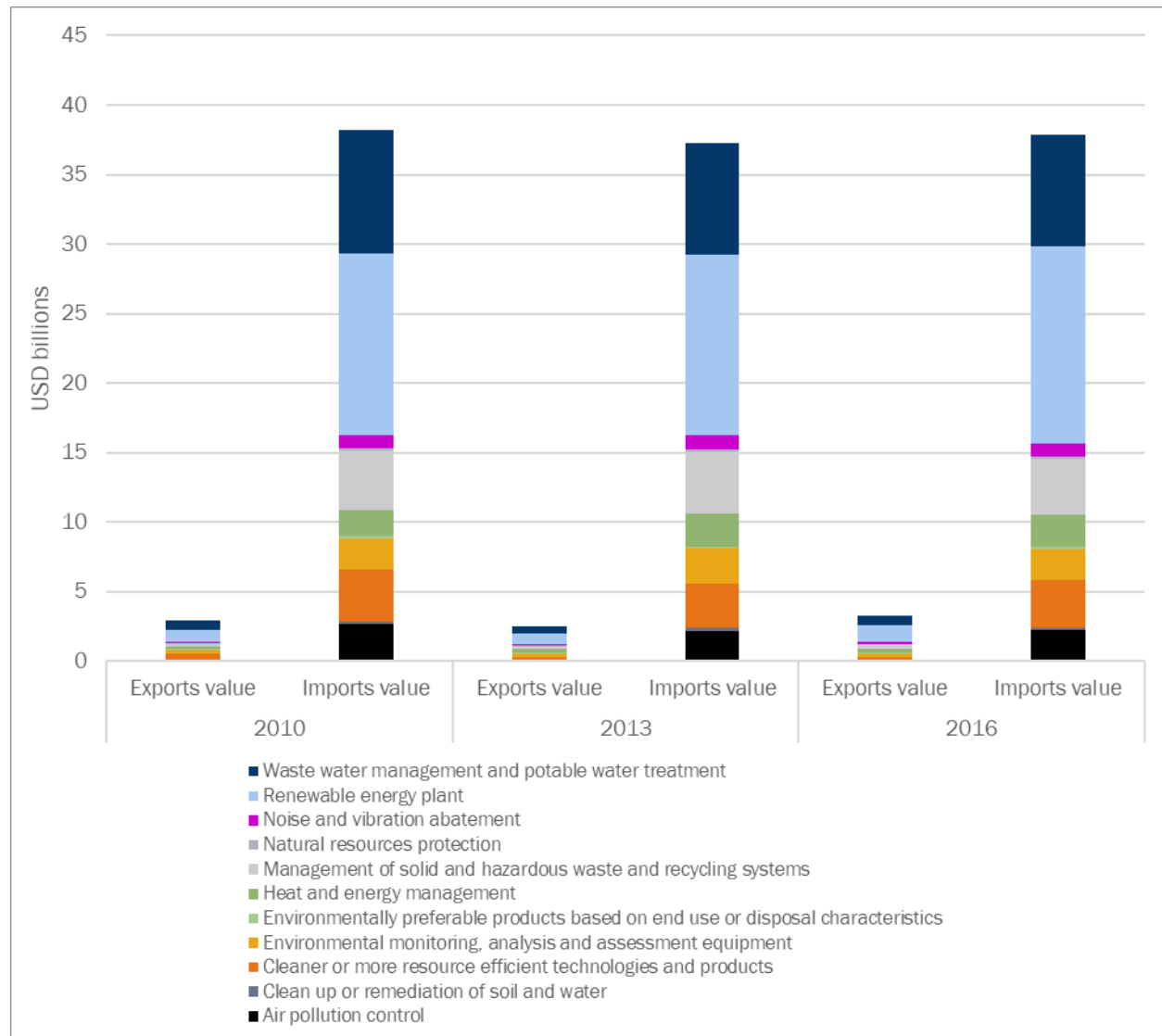
Under the AfCFTA, State Parties agreed to reduce, and ultimately eliminate, 90 percent of their tariff lines on goods to commence immediately, and take place within a 10-year phase down for Least-Developed Countries (LDCs), and a 5-year phase down for non-LDCs. The State Parties further agreed to liberalize an additional 7 percent of tariff lines on designated sensitive products – to start only after five years.¹ State Parties maintain the liberty to exempt 3 percent of tariff lines from liberalization altogether. While trade under the AfCFTA officially commenced on January 1, 2021, tariff concession negotiations have yet to be completed. So far, 41 countries have submitted their initial schedules of concessions.¹ However, many tariff offers do not necessarily cover 90 percent of tariff lines.

25 There is no international consensus on how to define “environmental goods”, which has been a major stumbling block to advance environmental goods negotiations.

26 European Commission (2016), “Trade Sustainability Impact Assessment on the Environmental Goods Agreement.” Available at: https://trade.ec.europa.eu/doclib/docs/2016/august/tradoc_154867.pdf.

27 Various approaches are possible: a product can be an environmental good (i) because it is produced in a manner that causes less environmental harm compared to like products; (ii) because it generates environmental benefits in terms of its end-use (e.g., bicycles or solar panels); or (iii) because it reduces environmental damage (e.g., pollution treatment or monitoring equipment).

28 APEC (2012), “ANNEX C – APEC List of Environmental Goods”, 2012 Leaders' Declaration, Asia-Pacific Economic Cooperation, Vladivostok, Russia, 8-9 September 2012. Available here: <https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/AssetPDF/EGS%20Ecosystems%20Brief%20040914%20-%20low%20res.pdf>.

Figure 3: Trade in environmentally related goods for Africa

Note: The indicator reports the value of exports and imports of environmentally-related goods as defined in the Combined List of Environmental Goods (CLEG) in current USD for all African countries between 2003 and 2016.

Source: This figure is based on data from the OECD (stats.oecd.org).

Environmental services

The ongoing services negotiations can also be leveraged to advance Africa's green growth agenda.

For example, protecting the environment is contingent upon access to various different services, including services that reduce exhaust gases and improve air quality; services that treat and clean-up polluted water; and services that dispose of solid and hazardous waste.²⁹ Services are also critical for

²⁹ Most of these services correspond to a specific category "environmental services" under the services classification CPC 94. This covers services relevant to reducing waste such as sewage services (WTO Central Product Classification 9402), refuse disposal service6 (9402), and sanitation and similar services (9403), and services relevant for (a) cleaning of exhaust gases (CPC 9404), noise abatement services (CPC 9405), nature and landscape protection services (CPC 9406), and other environmental protection services not included elsewhere (CPC 9409).<https://www.intracen.org/Services-Sector-Environmental-Services/>.

facilitating a transition towards a green economy: For instance, access to solar photovoltaic (PV) technology will be of little use without adequate access to the assembly of solar or lithium-ion cells, grid connection, installation services, and maintenance services.³⁰ Similarly, product design, waste recycling, and water treatment services are critical for businesses and cities to move away from linear economic principles towards circular production processes. Creating a green enabling environment also requires access to cost-competitive logistics, professional, transportation, financial, digital, and telecommunications services—given that many green technologies are enabled by advancements in the digital sphere.

As of December 5, 2020, 34 State Parties had submitted their initial services offers³¹ focusing on the five priority services sectors identified by the State Parties: transport, communications, financial services, tourism, and business services.³² As noted above, many of these services will play an important role in building an enabling environment for competitive green industries. Tourism services can also have an important environmental dimension: For instance, a State Party can require tourism operators to comply with specific eco-tourism standards.³³ They can either do so through domestic regulation, or by adding a subsector for eco-tourism in their services schedule and making commitments in only this subsector.

Liberalizing services in the identified priority sectors will, however, only go so far in advancing the environmental agenda. A broader, more far-reaching approach to trade in services is required, starting with the identification of the specific services that will be critical for Africa's green transition. Such an approach must be tailored to the specific characteristics and requirements of the continent and will likely include low-cost services such as the operation and maintenance of decentralized and mini electronic grid solutions, labor-intensive waste recycling, and the assembly of solar panels.

Not all services important to developing a green economy currently correspond to items on the services classification system W/120,³⁴ which is typically used as a basis for services schedules in FTAs. For instance, the W/120 does not contain sub-categories for waste recycling, ecotourism, or product-design services. As countries are free to deviate from the W/120 when making services commitments, State Parties could explore adding new services subsectors to their services schedules. The European Union is already doing so, having added the subsector “recycling services” to its services schedules in a number of recent FTAs.³⁵ To identify more specific subsectors with environmental relevance, State Parties could turn to the Central Product Classifications (CPC) or the International Standard Industrial Classification of all Economic Activities (ISIC), which contain additional detail on various types of services with environmental relevance.

30 Altenburg, T., & Assmann, C (2017), Green Industrial policy. Concept, Policies, Country Experiences. Available at: https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/altenburg_rodrik_green_industrial_policy_webversion.pdf.

31 African Union (2020), “Decision on the start of trading under the African Continental Free Trade Area (AfCFTA). Available at: <https://www.tralac.org/documents/resources/cfta/4247-au-assembly-thirteenth-extraordinary-session-on-the-afcfta-decision-and-declaration-5-december-2020/file.html>.

32 Landry Signe and Colette van der Ven (2019), “Keys to Success for the AfCFTA negotiations.” Available at: https://www.brookings.edu/wp-content/uploads/2019/05/Keys_to_success_for_AfCFTA.pdf.

33 The use of standards to facilitate the uptake of environmental goods and services is discussed in more detail in the section below.

34 Multilateral Trade Negotiations, The Uruguay Round, Services Sectoral Classification List, MTN.GNS/W/120. Available at : https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=179576&CurrentCatalogueIdInd%20ex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

35 The EU has included recycling services as a committed service subsector in a number of FTAs, including the EU-Korea FTA, EU-Singapore FTA, and EU-Vietnam FTA.

5. REMOVING NON-TARIFF BARRIERS ON ENVIRONMENTAL GOODS AND SERVICES

To enhance alignment between the AfCFTA and Africa's green growth agenda, State Parties are also encouraged to adopt a proactive approach to removing non-tariff barriers to trade in green products and services. The sections below analyze how the AfCFTA's Annex on Technical Barriers to Trade (TBT) and Annex on Sanitary and Phytosanitary (SPS) measures can advance Africa's green growth agenda.

Technical barriers to trade

Given their potential in shaping production and consumption patterns, technical regulations and standards constitute key policy instruments for advancing environmental objectives.³⁶ Indeed, most governments have adopted standards regulating air pollution, hazardous waste management, solid waste management, and pesticides. Environmental standards are becoming increasingly common in international practice, including in the area of energy efficiency and labelling initiatives, the circular economy, biodiversity issues, and in eco-tourism.

TBT chapters can facilitate trade in products that meet certain environmental standards by reducing the heterogeneity of technical regulation and standards, which can create significant compliance burdens and costs for exporters trading with numerous jurisdictions simultaneously. The AfCFTA's TBT Annex, which is based on the WTO TBT Agreement, aims to reduce non-tariff barriers by encouraging (i) cooperation in standards, technical regulation, conformity assessment, accreditation, and metrology; and (ii) the elimination of unnecessary and unjustifiable technical barriers to trade; and the promotion of mutual recognition of results in conformity assessments.³⁷

Importantly, in areas in which no relevant international standards exist, the Annex on TBT encourages State Parties to commit to develop and promote regional standards under the umbrella of the African Standards Organization (ARSO) or the African Electro-Technical Standardization Commission (AFSEC).³⁸ The noticeable dearth in international standards relevant to the circular economy and other environmental standards presents an opportunity for State Parties to develop regional standards in these areas. In doing so, State Parties should focus on areas of relevance to Africa, such as plastic waste recycling standards for various end-use applications.³⁹ Developing such regional standards could boost intra-African trade in, for instance, recycled plastic and other relevant environmental products, as it reduces inefficiencies and costs associated with different standards and regulations adopted across jurisdictions. The TBT Annex also promotes the use of mutual recognition of conformity assessment procedures, whereby Parties agree to recognize the competence of the other Party's testing facilities, thus avoiding the need for duplicative testing. The TBT Annex does not specifically mention mutual recognition for environmental standards. However, State Parties have the option to apply mutual recognition of conformity assessment results to ensure compliance of environmental products, such as wind turbines, solar PV technology, and recycled electronics, with the relevant standards. Doing so would reduce compliance costs and procedures—thus facilitating trade in environmental products.

36 Christoph Bellman and Colette van der Ven (2020), "Greening regional trade agreements on non-tariff measures through technical barriers to trade and regulatory co-operation.", Available at: <https://www.oecd-ilibrary.org/docserver/dfc41618-en.pdf?expires=1612376998&id=id&accname=guest&checksum=2DC3429E974E96CF113A8897E1CF9B39>.

37 Annex 6, AfCFTA, Article 4.

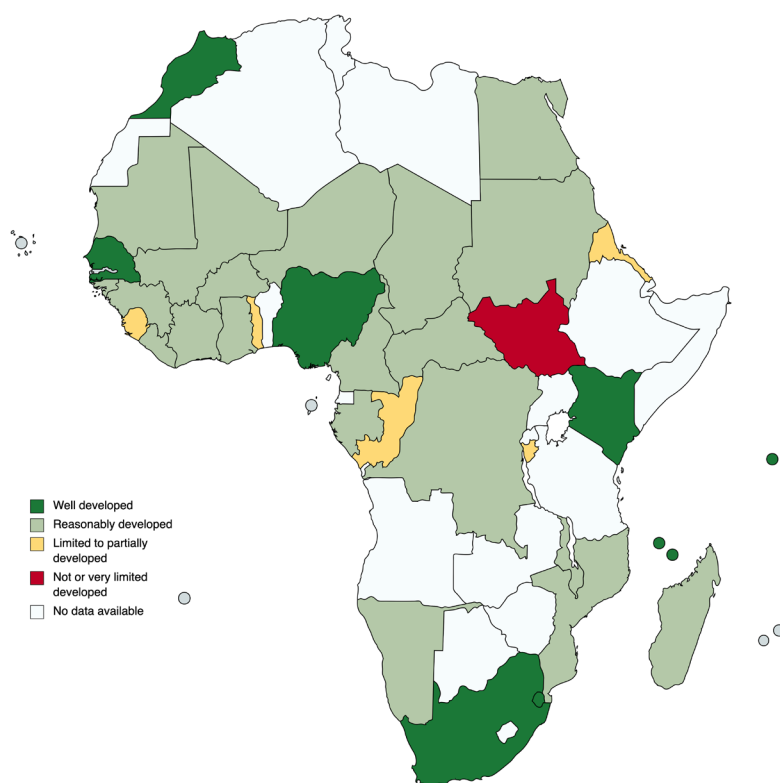
38 Global Plastic Action Partnership (2020), "Trade and the Circular Economy: Deep dive into plastic action in Ghana." Available at: https://globalplasticaction.org/wp-content/uploads/NPAP_Ghana_Trade_and_Circular_Economy.pdf.

39 Ibid.

Sanitary and phytosanitary measures

The AfCFTA also contains an SPS Annex, which covers a sub-category of technical regulations that relate to the protection of human, animal, and plant life and health. Specifically, the SPS Annex aims to facilitate trade and enhance the technical capacity of State Parties to implement and monitor SPS measures, while encouraging the use of standards developed by three international standards-setting bodies: the CODEX Alimentarius, the International Office of Epizootics, and the International Plant Protection Convention, which regulate the use of toxic pesticides and veterinary medicines, invasive alien species, and animal diseases. By encouraging State Parties to use these international standards as the basis for their SPS measures, the SPS Annex facilitates protection of biodiversity and other environmental objectives such as reducing soil pollution.

Figure 4: SPS Status of AfCFTA State Parties



Source: Oswald Chinyamakobvu, (8-11 September 2020), "Update on the African Continental Free Trade Area (AfCFTA)", IPPC Regional Workshop.

The SPS Annex also requires that African countries have in place a functioning SPS system. As illustrated in Figure 4, a significant number of African countries have underdeveloped SPS systems. To enhance environmental protection, State Parties are encouraged to use the SPS Annex to upgrade their SPS systems, including by taking advantage of cooperation and technical assistance opportunities. Doing so would better position State Parties to respond to environmental threats to crop production that are expected to become more acute as a result of climate change. Indeed, higher temperatures will likely result in new pests, which in turn will increase demand for new pesticides and intensify the need for a capable SPS system.⁴⁰

40 Standards and Trade Development Facility, "Climate Change and Trade: The Link to Sanitary and Phytosanitary Standards" Available at: https://www.standardsfacility.org/sites/default/files/STDF_Climate_Change_EN_0.pdf.

6. CONTROL OVER THE IMPORTATION OF ENVIRONMENTALLY HARMFUL PRODUCTS

In addition to facilitating trade in environmental goods and services, trade agreements can also be harnessed to restrict trade in products that exacerbate environmental challenges. For instance, governments can restrict trade in protected animal or plant species to prevent overexploitation; prohibit subsidies on illegal fishing; and ban or restrict the import of unsustainable products like single-use plastic packaging or waste that is unfit for recycling. In response to a rapidly growing plastics pollution problem, bans on plastic bags have been particularly popular on the African continent, with 34 out of 54 states having passed laws to ban plastics—with various degrees of success.⁴¹ Depending on the structure and design of these bans, such measures could constitute quantity restrictions under the Protocol on Trade in Goods, but could be potentially justified under the exceptions clause, as explained earlier in this policy brief.

The AfCFTA can also play an important role in controlling the import of waste. Rules for trade in waste are set out in the Basel Convention—a treaty on the transboundary movement and disposal of hazardous and other wastes and a convention signed by all African countries except South Sudan. The Basel Convention stipulates that certain types of waste can be traded only when importing and transit countries have given Prior Informed Consent (PIC), a procedure that involves four key steps: (i) notification by the state of export or by the exporter to the appropriate authorities of export, import, and transit; (ii) written consent by transport/importing states; (iii) the use of transboundary movement documents from point of export to disposal; and (iv) the confirmation of disposal.⁴²

Evidently, to effectively control and distinguish between different types of imported waste, customs authorities must have the ability to process export, import, and transit approvals; approve contracts for waste processing; and issue appropriate shipping documentation. The AfCFTA contains various trade facilitation provisions that can be harnessed to strengthen customs processes, including by digitizing and automating the PIC process.⁴³ Effectively digitalizing customs authorities and border controls could significantly facilitate PIC procedures for trade in certain types of waste.

The AfCFTA contains three Annexes that focus on enhancing intra-African customs procedures: the Annex on Trade Facilitation; the Annex on Customs Cooperation; and the Annex on Transit. For example, the Trade Facilitation Annex encourages State Parties to cooperate with one another where they share a common border, including through establishing one-stop border post controls. Implementing such one-stop border posts would minimize the number of customs checks and could significantly facilitate the development of customs capacity equipped to adopt a smooth PIC procedure while preventing the import of illegal, hazardous waste.

A climate waiver

A more radical approach to aligning the AfCFTA with Africa's environmental agreement would be through the adoption of a so-called "climate waiver" that would allow countries to justify trade-restrictive climate response measures, provided they are applied in a non-discriminatory manner and do not constitute a disguised restriction on trade. Article 15 of Agreement Establishing the AfCFTA

41 Greenpeace (2020), "34 Plastic Bans in Africa – a reality check". Available at : <https://www.greenpeace.org/africa/en/blogs/11156/34-plastic-bans-in-africa/>.

42 World Economic Forum (2020), "Plastics, the Circular Economy, and Global Trade". Available at: http://www3.weforum.org/docs/WEF_Plastics_the_Circular_Economy_and_Global_Trade_2020.pdf.

43 For instance, under the technical cooperation provisions set out in the Annex on Customs Cooperation, State Parties endeavor to support each other in the modernization of customs procedures, including e-customs and electronic data interchange applications. Likewise, the Annex on Trade Facilitation provides that each State Party shall endeavor to make available forms by electronic means, allow documentation to be submitted electronically, establish an electronic system for data exchange, and collaborate with other State Parties for the implementation of mutually compatible electronic systems.

allows for the adoption of a “waiver of obligations” in “exceptional circumstances.” Developing an effective climate waiver is currently being explored by scholars in the context of the World Trade Organization. Advocates of this approach consider a climate waiver to be the best option to slow climate change without undermining the core principles of the trading system.⁴⁴ Others consider it to be of little added value, arguing that the WTO exceptions clause provides sufficient flexibilities for climate-related measures and a poorly-designed climate waiver could risk exempting inherently protectionist measures from the WTO disciplines. Procedurally, adopting a climate waiver will likely be difficult, as it requires putting in place appropriate legal and technical specifications, and the necessary political will. These caveats notwithstanding, a climate waiver is another idea that State Parties should explore to enhance alignment between the environment and the AfCFTA.

7. GREENING PHASES II AND III PROTOCOLS ON INVESTMENT, COMPETITION, INTELLECTUAL PROPERTY, AND E-COMMERCE

The previous sections suggest various ways for State Parties to green Phase I Protocols and Annexes. Additional opportunities to green the AfCFTA present themselves with the ongoing negotiations for the adoption of Phase II Protocols, which cover intellectual property rights, investment, and competition policy, and the expected Phase III negotiations on e-commerce. This section provides a high-level overview of ways in which Phase II and Phase III Protocols can advance Africa’s green growth agenda.

Protocol on Investment

While numerous uncertainties remain about the scope and coverage of the Protocol on Investment, it will likely be modelled on the Pan-African Investment Code (PAIC). Moreover, in accordance with the principle of the *acquis*,⁴⁵ it will build on existing investment agreements in the RECs, which means that the Protocol on Investment can be expected to cover not only traditional topics in investment agreements, like investment protection and promotion, but also newer issues such as investment facilitation and investors’ obligations which are covered by existing agreements.

The Protocol on Investment can play an important role in advancing Africa’s environmental agenda. By creating a stable regulatory regime, the Protocol on Investment can reduce the risk associated with intra-African investment, which could promote cross-border investment flows, including in areas such as renewable energy and low emissions technology, waste management, and pollution control. Doing so will be critical to build the requisite green infrastructure while strengthening intra-African value chains.

With respect to specific provisions, and similar to the PAIC, State Parties negotiating the Protocol on Investment should consider exempting measures designed and applied to protect the environment from obligations such as Most-Favored Nation (MFN)⁴⁶ and National Treatment (NT),⁴⁷ and include a general exceptions clause similar to the provisions set out in the Protocol on Trade in Goods and Services explained earlier in this article.⁴⁸ State Parties should also consider including language requiring investors not to undermine environmental obligations to create a more favorable investment climate. Examples can be taken from the State Parties’ existing Bilateral Investment Treaties (BITs).

44 See, e.g., James Bacchus, “The Content of a WTO Climate Waiver”, Available at: <https://www.cigionline.org/sites/default/files/documents/Paper%20no.204web.pdf>.

45 This term means that States belonging to one of the eight regional economic communities (RECs) recognized under the AfCFTA shall maintain the levels of liberalization already achieved in the REC context.

46 MFN in FTAs requires a Party to unconditionally extend any concessions, privileges, or immunities granted to one member to all other members of the free trade agreement.

47 National treatment stands for the principle of giving others the same treatment as one’s own nationals.

48 See, e.g., Pan-African Investment Code, Articles 8.2 and 10.2.

For example, the Japan-Mozambique BIT provides that the parties should not encourage investments by relaxing or waiving their environmental protection measures.⁴⁹ State Parties should further consider including provisions for environment-specific performance requirements, or provisions that promote the transfer of environmentally sound technologies—provisions that are already included in the investment provisions of some RECs.⁵⁰

To advance the environmental agenda, the Protocol on Investment should require investors to protect the local environment and comply with environmental regulations in the host country. Such a requirement would likewise be aligned with recent BIT trends in Africa.⁵¹ Moreover, the Protocol on Investment could introduce obligations for investors to conduct an environmental impact assessment, prior public consultations, and/or international certification (for example, ISO 14001 on environmental management).⁵²

*Protocol on Intellectual Property*⁵³

There are different approaches that the Protocol on Intellectual Property (IP) could take—from establishing regional cooperation in intellectual property, to creating a regional intellectual property filing system, to harmonizing IP legislation across the continent, to developing a unifying law on a regional basis. Notwithstanding the final structure and approach that will be adopted, existing national and regional intellectual property frameworks within Africa suggest that the protocol will, *inter alia*, address a number of different issues relevant to the preservation of biodiversity, such as provisions on plant variety protection to balance the interests of breeders with protection for traditional plant varieties to preserve biodiversity.⁵⁴ Particular examples for provisions related to the preservation and protection of traditional knowledge may be found in the World Intellectual Property Organization (WIPO) Draft Articles on the Protection of Traditional Knowledge.⁵⁵ The protocol could also seek to address the misappropriation of genetic resources, which has been a particular concern for developing countries.

The Protocol seeks to strengthen intellectual property protection across the African continent, thereby serving as a means for incentivizing technological innovation in critical sectors such as renewable energy. To date, only four African countries—Algeria, Egypt, Morocco, and South Africa—have filed renewable energy technologies patents. In total, these four countries filed 5,031 patents, which compares unfavorably to the three leading countries in this area: China (240,054), the United States (106,171), and Japan (84,316), but against other developing regions such as Latin America, which has filed a total of 15,840 patents in renewable energy technologies.⁵⁶ While patent registration and innovation depends on a large number of factors, the Protocol on IP has the potential to advance green innovation across the African continent by strengthening IP protection. In this regard, and given the

49 Japan - Mozambique BIT (2013), Article 24. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3114/download>

50 See e.g., ECOWAS Common Investment Code (2018), Art. 29. Available at: <https://wacomp.projects.ecowas.int/wp-content/uploads/2020/03/ECOWAS-COMMON-INVESTMENT-CODEENGLISH.pdf>.

51 See, e.g., the COMESA Investment Agreement, the ECOWAS Investment Code, the Morocco-Nigeria BIT, and South Africa's model BIT.

52 See. E.g. Article 18 Morocco - Nigeria BIT (2016). Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3711/morocco%E2%80%93nigeria-bit-2016->

53 For a more detailed discussion on BioTrade, the AfCFTA and Intellectual Property, please consult: UNCTAD, "Implications of the African Continental Free Trade Area for Trade and Environment: Policy and Regulatory Recommendations" (forthcoming UNCTAD, 2021).

54 Katrin Kuhlmann and Akinyi Lisa Agutu, "The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development." *Georgetown Journal of International Law*, Vol. 51, No.4, 2020. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599438.

55 WIPO Draft Articles on the Protection of Traditional Knowledge, Rev. 2, 31 August 2018, WIPO/GRTKF/IC/38/4. Available at: https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=416956.

56 Carlos Lopez (2021), "Europe and Africa need to see eye to eye on Climate Change." Available at: <https://oecd-development-matters.org/2021/01/04/europe-and-africa-need-to-see-eye-to-eye-on-climate-change/>.

vast disparity that exists between the intellectual property regimes across the African continent, the Protocol should include provisions on cooperation and technical assistance.

Competition Policy Protocol

Negotiations are currently ongoing for a Protocol on Competition Policy in the AfCFTA. Based on existing competition policy initiatives in regional economic communities and relevant trends, State Parties may seek to regulate cartels, mergers, abuse of dominance, and anti-competitive agreements tailored to Africa's particular circumstances. The Protocol on Competition will likely also contain provisions that seek to coordinate policy among competition authorities that exist nationally and regionally within the continent, while promoting the establishment of domestic competition regimes through the provision of technical assistance and mutual cooperation.

Adopting competition provisions across the African continent would ensure that the benefits associated with the creation of an intra-African market would not be undermined by restrictive or anti-competitive practices adopted by a handful of powerful firms.⁵⁷ Disciplining anti-competitive practices would be particularly important for Africa's green growth agenda, given that monopolies and oligopolies tend to be particularly prevalent in infrastructure environmental services, such as waste management.⁵⁸

To align the protocol with Africa's environmental agenda, State Parties should consider adopting an approach to regulating anti-competitive practices whereby environmental costs and benefits are factored into the design and enforcement of competition law provisions.

Protocol on e-Commerce

The AfCFTA will also include a Protocol on e-Commerce. Such a protocol will likely cover a number of e-commerce and related issues by including provisions on data localization, cross-border data flows, consumer protection, electronic transaction frameworks, paperless trade administration, electronic authentication, and technology and related matters.⁵⁹ Through a Protocol on e-Commerce, State Parties can develop a digital enabling environment across the continent, the benefits of which would not be limited to e-commerce, but would also address digital innovation and the digitalization of government services.

By encouraging the development of a digital enabling environment in Africa, the Protocol on e-Commerce could spur the adoption of digital technologies that are critical for environmental preservation and climate change initiatives. For instance, artificial intelligence (AI), 3D printing, and other emerging technologies will be foundational in facilitating a transition from current linear economic models to circular ones. Moreover, big data analytics and algorithms can enhance environmental monitoring of air and soil quality and provide early warning systems for wildfires and extreme weather events. Grids powered by AI can monitor trends in energy consumption, thereby reducing the emission of greenhouse gas. Connecting sensors to the internet can prevent deforestation.⁶⁰ Furthermore, critical innovation in digital trade leads to the decarbonization of long-distance transport. In sum, Africa's green agenda will be heavily reliant on digital technologies and

57 Trudi Hartzenberg (2019), "Cooperation on competition in the AfCFTA." Available at: <https://www.tralac.org/blog/article/14078-cooperation-on-competition-in-the-afcfta.html>.

58 International Trade Centre (2014), "Trade in Environmental Goods and Services", Available at: <https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/AssetPDF/EGS%20Ecosystems%20Brief%20040914%20-%20low%20res.pdf>.

59 Ify Oqo (2020), "An Agenda for the AfCFTA Protocol on E-Commerce." Available at: <https://www.tralac.org/blog/article/14692-an-agenda-for-the-afcfta-protocol-on-e-commerce.html>.

60 Digwatch, "Digital and the Environment", Available at: <https://dig.watch/trends/digital-and-environment>.

solutions, the uptake of which will be facilitated by an enabling digital environment that a Protocol on e-Commerce could seed and nurture.

8. FINAL OBSERVATIONS

Failing to include specific environmental provisions in the AfCFTA beyond the preamble and exceptions clauses was a missed opportunity. As this policy brief has shown, however, it is not too late to strengthen the link between the AfCFTA and the climate goals in Africa's *Agenda 2063*.

By creating an intra-African market, the AfCFTA provides businesses the opportunity to develop green technologies, goods, and services, thereby building intra-African value chains that minimize the continent's dependency on imported green technologies, goods, and services from outside the continent.

With respect to protocols and annexes that have already been finalized, State Parties can strengthen the link with environmental objectives by removing non-tariff barriers on trade in environmental goods and services, and through strengthening controls on the import of environmentally harmful products. With respect to ongoing market access negotiations, including tariff schedules and services commitments, State Parties have the opportunities to strategically link environmental objectives with market access. For ongoing Phase II and Phase III negotiations, State Parties should seek to make the link between the AfCFTA and the environment more explicit and direct.

Strengthening the link between trade agreements and the environment calls for a proactive approach. For instance, as explained in this policy brief, services schedules are not always sufficiently detailed to reference specific environmental services. Similarly, there is a dearth of international and regional standards relevant to areas such as the circular economy. With respect to intellectual property rights, it would be important for AfCFTA State Parties developing the Protocol on IP to address the misappropriation of genetic resources in order to preserve biodiversity, whereas in the context of investment, State Parties could consider adopting a more balanced approach with respect to investors' rights and obligations. In exploring these and other options, State Parties are encouraged to build on existing regulations and frameworks developed by the RECs, and, where necessary, consider novel approaches.

In parallel, the AfCFTA Secretariat is encouraged to explore State Parties' interest in adding a Protocol on the Environment and Sustainable Development. Doing so would allow State Parties to address environmental challenges and concerns of specific relevance to building a prosperous, inclusive, and sustainable Africa.

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