**A Model Private Sector Bill of Rights for an Enabling Business Environment in Africa to Enhance the Implementation of the AfCFTA Agreement**

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**Background**

The Africa Private Sector Summit (APSS), in partnership and collaboration with the Association of African Universities (AAU), the Pan African Chambers of Commerce and Industries (PACCI), Federation of West Africa Chambers of Commerce and Industry (FEWACCI), East Africa Chambers of Commerce, Industry and Agriculture (EACCIA), Wealth Master Group, the Int’l Chamber Great Lakes Region (ICGLR), the Global Institute for Strategic Planning and development (GISPD), the United Nations Economic Commission for Africa (UNECA), the Europe Union (EU), Coalition of Dialogues in Africa (CoDA), the Center for International Private Enterprise, and the private sector, organized an African Private Sector Summit on, "Righting the Wrongs of Doing Business in Africa". This summit brought together stakeholders from industry, governments, academia, and civil society. It was attended virtually by three Presidents: Botswana, Rwanda (represented by a Minister) and Niger (represented by a Minister). Opening statements included remarks by the president of the Africa Business Council (AfBC), the Secretary General of the AfCFTA, president of PACCI and prominent institutions.

One of the outcomes of the week-long event was a call for a *Model Bill of Rights for an Enabling Business Environment in Africa* to Enhance Implementation of the AfCFTA. This is premised on the notion that an enabling and functional business environment for the private sector in Africa would help in the implementation of AfCFTA. The final Bill of Rights will be validated by stakeholders, including Chambers of Commerce, Manufacturers and Trade Associations, universities, labor, CSOs and member States for validation. The Bill of Rights is intended to address pertinent issues for the seamless implementation of the RECs and AfCFTA protocols. Trade integration can only be realized and be successful in the presence of peace and security, respect for the rule of law, a strong and reliable banking system, stable currencies, strong infrastructure, among others.

Following legal and socio-economic analysis of relevant laws and literature, the Consultant has produced an initial report detailing the minimum conditions necessary for the private sector in African countries to function optimally and contribute to the implementation of AfCFTA. The report will be the Model Bill of Rights for an Enabling Business Environment in Africa to Enhance Implementation of AfCFTA. Please find below a full version of the report.

**Abstract:**

An enabling business situation is one that removes constraints in the regulatory and institutional environment, making it easier for carrying out business. Strengthening the role of the private sector in economic development will require creating a strong, stable and transparent legal environment for business. The last two decades has seen countries attempting to boost their business environment by regulating trade and trade increasingly through bilateral and regional free trade agreements (FTAs), rather than through multilateral forums like the World Trade Organization (WTO). This trend is evidenced in Africa, where in 2018 countries have negotiated and signed the African Continental Free Trade Agreement (AfCFTA), a mega-regional agreement which will encompass the 55 member countries of the African Union (AU) and eight recognized Regional Economic Communities (RECs).[[1]](#footnote-1) The FTAs are based on the presumption that enhancing the rights given to businesses will result in growth of stronger local industries, that will aid domestic development by advancing intra-African trade and boosting Africa’s trading position in the world market.

However, analysis of past bilateral, regional, and multilateral FTAs made by African countries, shows that they have largely failed in achieving their objectives of enhancing the African business environment, by steadily attracting higher foreign direct investment and intra-regional trade. This makes it imperative to consider why the rules and policies adopted because of these FTAs have not had the expected results, and what adjustments need to be made to ensure that the AfCFTA is more effective in meeting its objective of advancing intra-African trade and boosting Africa’s trading position in the global market.[[2]](#footnote-2) Previous studies examining the business environment in Africa have two major shortcomings: they are not holistic, as they assess the enabling environment from mainly an economic perspective, ignoring the social and political aspects; and while identifying certain problems, and proffering some recommendations on enhancing the business environment in the continent, they do not go further to provide a framework for country’s to use in practically implementing the resolutions. Because these studies are often non-participatory, the resulting laws represent ‘the policies of the government, by the government, for the government’, and are ineffective in meeting the needs of businesses.

This study helps to fill in the gap by carrying out interdisciplinary research and holistically analyzing the relationship between business rights and other areas of law that affect the business environment, such as human rights, labour, contracts, customs, competition, the sustainable development goals (SDGs) and sociocultural rights. Critical and comparative analysis is made of the regulations affecting the business environment at the multilateral (WTO and WIPO Agreements), continental and regional levels, to determine whether they are suitable for the needs of African businesses. It examines how the provisions and structure of AfCFTA, and related regional agreements, can be integrated so as to enhance an enabling environment for doing business in African countries. Based on findings, the report goes on to develop a model framework of recommended practical steps that can be taken by governments and multilateral institutions for reforming business regulations that are more suitable for advancing private sector development in the continent. The practical utility and effectiveness of recommendations is enhanced by the inclusion of major stakeholders and other relevant bodies in designing the model. Thus, in contrast to previous studies, this Bill of Rights represents ‘the policies of the businesses, by the businesses, for the businesses.’

1. **CHAPTER ONE Introduction: The Research Question, Objectives, Methods and Methodology, Targets of Study and How to Use It.**

**1.1 Introduction:** Over the years African countries have made several efforts to improve the business environment, but statistics show that these efforts have largely been unsuccessful. Since the 1980s, growth on the continent had been elusive, with economic stagnation and retardation becoming the defining characteristics for most African countries (Kempe, 1997). Concerted efforts by international development financiers, donors, and non-governmental organizations, including Multilateral Financial Institutions (MFIs), did not make significant headway in reviving African economies. This is despite the experimentation of several development models and paradigms, most of which emphasized structural reforms and were foreign designed and therefore alien to Africans (UNCTAD, 2003). These foreign designed programs increased poverty in Africa, particularly in the 1980s and 1990s. These were the decades of IMF and World Bank led structural adjustment programs that starkly failed to revive the African economies (Moyo, 2009). The late 1990s, however, saw a significant shift in Africa’s development paradigm. This led to increasing attention being given to Africa’s participation in its own development planning. Increased ownership of its own development initiatives, strategies, capacity building of African professionals, knowledge management, and improved governance, among other development issues, became the hallmark of change in Africa (ERA, 2010).

Major factors that have been identified as being detrimental to Africa’s business environment include the marginalization of African businesses from the global economy, scarce finance, healthcare, poor infrastructure, climate change, wars, and weak governance. Other factors that present challenges in Africa include: starting a business, dealing with licenses, hiring and firing workers, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, and closing a business.[[3]](#footnote-3) The devastation caused by wars has also hampered investment in some African countries. In most countries, these challenges are interrelated. For example, poor leadership and weak governance, breeds conflict and make the establishment of businesses difficult. The lack of businesses creates unemployment and poverty, which limits the purchasing power of individuals. Poorer consumers reduce the business opportunities and innovation by corporations, with poverty becoming more entrenched leading to greater probabilities for conflict, poor leadership, and weak governance (ERA 2010). Thus, creating an enabling business environment requires holistic interdisciplinary consideration of the various factors to create effective policy frameworks. The lack of consistency in Africa’s treaties leading to advanced local business growth, emphasizes the need to critically analyze the theories on which they were built for their appropriateness for African economies and business.

This research helps to fill in the gap by holistically analyzing the relationship between business rights and other areas of law that affect the business environment, such as human rights, labour, contracts, competition, and sociocultural rights; along with the relationship between regulations at the multilateral, continental and regional levels. It examines how the provisions and structure of AfCFTA, and related regional agreements, can be integrated so as to create an optimal environment for doing business in African countries. Based on findings, the report goes on to design a model framework for business regulation more suitable for advancing private sector development in the continent.

**1.2 The Research Question and Objectives:** The study analyses the following question: “How can the provisions of the AfCFTA be practically implemented to advance an enabling atmosphere for doing business in Africa, without conflicting with related regional and multilateral laws?” Here, an enabling business environment describes those characteristics that are conducive to advancing the qualitative and quantitative production, intraregional and international trade exports, competitiveness and sustainability of businesses located in Africa.

The paper’s overall objective is to provide AfCFTA member states with a practical framework by which they can effectively implement the AfCFTA provisions so as to create a more enabling environment for doing business in their countries. The framework will be used by African countries for three purposes: i) assessing the implications of regulations for their business environment; (ii) integrating provisions that enhance the business environment in their domestic IP regulations; and (iii) ensuring that any new regulations adopted do not conflict with the provisions of existing regional, continental and multilateral laws related to businesses.

The primary targets of this bill are policy makers, governments, private enterprises, regional economic communities located in Africa, and countries that are signatories to the AfCFTA. As the issue of how to harmonize regional and multilateral free trade agreements to advance domestic businesses is relevant to all developing countries, it will also be relevant to developing countries facing similar issues. Further, because the study adopts an inter-disciplinary method, analyzing the structure and regulations made by multilateral institutions relating to trade (such as the UN human rights treaties and SDGs; the WTO’s GATT, GATS and TRIPS agreements; the WIPO treaties; WDB, and IMF), its results will provide clarity to developing countries that deal with these institutions.

**1.3 Research Methodology and Methods:** This research is primarily based on the functionalist (also known as instrumentalist) theory, which states that the existence and effectiveness of a system is inferred from its output. A functionalist approach does not consider business rights as inherent, but rather as tools designed by society to achieve certain socio-economic goals (outputs). Where the underlying goals of a law are not being achieved, this justifies the adaptation of the system. Under the functionalist theory law does not exist in a vacuum, but is interdependent and contributes to social stability and functioning as a whole.

The primary research method utilised is doctrinal examination of laws, with analysis focusing on the international and regional legal frameworks on business rights and development in the African context.[[4]](#footnote-4) Also, an interdisciplinary research method is used and examination made of relevant socio-economic, political, scientific, and development literature, to determine the practical implications that current regulations will have on business rights. Critical legal analysis is adopted which goes beyond stating what the law is on a particular issue, to appraising the adequacy of existing rules in fulfilling set objectives, and proposes amendments to any regulations and policies found wanting. [[5]](#footnote-5) This will involve examination of relevant regulations, interpretative jurisprudence, and inter-disciplinary literature reviewing the development and application of IP regulations and policies relating to the business environment in Africa, and helps in predicting how laws and policies should proceed in the future. Other rights that are interrelated with, and will likely impact on business rights, such as human rights, labor, and farmers rights will also be analyzed, so as determine their potential overlaps with IP regulation and how these may be resolved.

In this report, analysis is conducted in the following steps: Firstly, Part II analyses the main concepts and indicators that determine an enabling environment for private sector development in Africa. Detailed examination is made of the socio-economic theories underlying contemporary laws regulating the business environment; important non-legal factors affecting the business climate; and the relevant laws. In Part III, an interdisciplinary examination is carried out to determine the state of the contemporary business environment in Africa, and the opportunities and challenges it presents. Thirdly, the role that multilateral and regional regulations and institutions play in determining the business environment is analyzed in Part IV. Critical doctrinal examination is made of the relevant provisions of the WTO Agreements, AfCFTA and RECs, to determine the implications that they may have for increasing intra-regional trade and the ability of African companies to compete in the world market. Based on the findings in the previous sections, Part V goes on to design a model framework for creating an enabling business environment in African countries under the AfCFTA. Finally, in Part VI examination is made of important issues that still need to be dealt with to ensure the sustainability of the Bill of Rights/ model law in the future.

**2.0 The Enabling Environment for Private Sector Development in Africa: Concepts and Actors**

**2.1 Definition of Terms**

Business environment describes all the internal and external factors that affect the functioning of a business (e.g., micro, market, and macro environments).[[6]](#footnote-6) The business environment includes norms and customs, laws, regulations, policies, international agreements and public infrastructure that either facilitate or hinder the movement of a product or service along its value chain.[[7]](#footnote-7) Broadly, the business environment does not just consist of formal laws and policies, but also comprises socio-economic, political, and institutional factors, such as the level of infrastructural development, social norms, and geographical preferences, that influence a business decision to establish, or not set up, in a country or region.

Enabling the business environment has been described as the removal of constraints in the business regulatory and institutional environment to make the business climate friendlier, less cumbersome and easy to comply with for micro and small-scale enterprises.[[8]](#footnote-8) A favourable investment climate is key to attract and retain more private investment, create more and better jobs and improve the lives of their citizens. It goes hand in hand with macroeconomic stability, good governance and the rule of law. Access to markets, developed financial institutions, low taxes, easy registration, as well inclusive competition have also been identified as key factors that enhance the business environment of a country or region.[[9]](#footnote-9)

Within this concept distinctions are also made between the terms the ‘regulatory business environment’, and the ‘investment climate’.

(a) The term “regulatory business environment” is used to refer to formal regulations that immediately affect businesses through the costs of compliance. These consists of direct costs, for example expenses made by an enterprise in order to obtain licensing; and indirect costs, for example where regulations make the registration of a business lengthy and time consuming, and the enforcement of contracts or the hiring of workers complicated and costly, this will also lead to indirect costs to affected businesses, as they will be unable to function effectively and make a profit. The World Bank/IFC’s annual Doing Business series, measures business environment based on the time and costs impacts those regulations have on the following ten aspects of business life: starting a business, employing workers, getting credit, enforcing contracts, closing a business, registering property, dealing with licences, protecting investors, paying taxes, and trading across borders.

(b) Meanwhile, the term “investment climate” is used more broadly to refer not just to formal factors that affect the workings of businesses, but also to socio-economic factors, such as the lack of infrastructure, the level of education, rule of law, political stability and security, and functioning financial markets, that may indirectly influence the decisions of firms to invest, productively create jobs, and expand, in a given locality.[[10]](#footnote-10)

Thus, the term “investment climate,” as used in the World Development Reports and Investment Climate Surveys, refers to a set of *enabling factors* broader than the “regulatory business environment.” The broader holistic definition of the investment climate will be adopted in this study.

The form of treaties that a country adopts, largely depends on the underlying theories that they adopt regarding the relationship between business and other factors. Understanding these theories is imperative in designing a regulatory and policy framework suitable for the African context. Thus, the following section examines the major theoretical approaches to business regulation, so as to identify which could be most useful for advancing the ease of doing business in Africa.

**2.2 Theoretical Approaches to Regulating the Business Environment**

**2.2.1 The Neoclassical Approach**: Proponents of the neoclassical approach to an enabling environment assume that most markets work reasonably well without government intervention if property rights and competition are guaranteed. Neoclassical theorists advocate that improving the business environment is best supported by stronger business rights, competition, free and deregulated markets, with minimum intervention by the government.[[11]](#footnote-11) For example, the Doing Business Reports argue that creating a level playing field through deregulation and guaranteed property rights is the most important condition for boosting economic growth and making it more equitable. The Reports emphasize that extensive government regulations hamper the formation, registration and growth of private enterprises and create numerous opportunities for rent-seeking bureaucrats to extract bribes, thereby increasing corruption significantly. Throughout the Reports, government interventions are largely perceived as “distortions” and “burdens” for private investors.[[12]](#footnote-12)

Proponents of the classical approach claim that opening free markets and granting greater rights to private business will automatically unleash poverty reducing development in all countries. (Hernando de Soto, 1898 & 2000; World Bank/IFC 2005:3; Klein/Hadjimichael 2003, Klein 2006, Klapper 2006). However, this theory has not held out in developing countries, or in Africa’s Least Developed Countries.

Analysis of the provisions of major trade agreements, like the WTO-TRIPS agreement, and Africa’s RTAs, indicates that they are premised on the neoclassical approach to trade, investment and development. Similarly, global financial institutions like the World Bank and IMF, adopt the neoclassical approach by discouraging deliberate government action aimed at ensuring that businesses also advance public policy goals like poverty reduction, local content, and sustainable development.

**2.2.2 The Neo-Structuralist Approach**: The Neo-Structuralist Approach stresses that importance of other factors in determining private sector development. They differ significantly from Neo-classicalist, in supporting a more active role for governments in preventing market failure and aiding business development. A radical form of the Neo-Structuralist Approach can be seen in the economic models adopted in the former USSR, and Eastern European countries, where governments attempted to regulate market entry to the highest levels, without considering the power of market forces.

Applying a neo-classical or structuralist approach to African economies would be challenging for the following reasons:

1. Research has shown that free trade and open markets alone are not sufficient to boost development, except they are supported by other factors such as certain levels of infrastructure and skilled workers. Apart from a few countries, like South Africa, African countries still lack these other factors. This is demonstrated in the failure of the Structural Adjustment Programs (SAPs) to enhance economic development in African countries. Despite opening their markets, reducing the exchange rates for their currencies, and taking on loans with stringent conditions, these policies did not spur substantive continuous economic growth in the region. Under the Lomé Conventions, ACP countries were 'entitled' to a given amount of aid, irrespective of their development performance. The Cotonou Agreement established a European Development Fund, which made the grant of European aid a subjective 'reward', given depending on the success of ACP countries in fulfilling certain conditions (such as sound economic policies, governance, effective implementation, support to non-state actors) as assessed by the European Community.[[13]](#footnote-13) ACP countries were persuaded to adopt World Bank-imposed structural adjustment programmes (SAPS) under the increasing management and supervision by the EU of its financial assistance.[[14]](#footnote-14)
2. Open markets are most beneficial to countries whose businesses are highly industrialized, as they have competitive advantage, and often end up becoming a monopoly in the local market. The small and micro enterprises that are dominant in African countries are unable to compete in local markets that allow free access, competition, and non-intervention by the state, as they have comparatively less capital, technological production, and are placed lower down in the value chain than multinational companies. At the earlier stage of development, economists advise that certain protections are required for new industries in developing countries (infant industries), until they mature and grow economies of scale that can rival with multinationals.[[15]](#footnote-15) African countries should learn from the experiences of developing economies like India, whose initial refusal to apply IP laws to medicines has been credited with the growth of the pharmaceutical industry in the country. Similarly, China’s non-adoption of WTO TRIPS standards, which enabled local companies to begin production of their own technologies through reverse engineering and copying, has been credited for helping the country to becoming a major player in international trade.[[16]](#footnote-16).
3. However, it must be pointed out that infant industries only become competitive when they are given classical incentives to learn how to become more efficient. This explains why in Latin America and Africa, the preferential treatment of firms and sectors did not lead to continued economic growth, as enterprises were shielded from competition, but the states did not enforce performance criteria. Thus, the infant industries did not metamorphosize into successful exporters.[[17]](#footnote-17)

**2.2.3 The Functionalist Approach:** The economic level of African businesses, does not make the application of the neoclassical approach suitable for them.[[18]](#footnote-18) Similarly, the over control by government and protectionism allowed in some neo-structuralist approaches would not work in African countries that face challenges of corruption. What is required is practical *balanced approach* that allows for design of regulatory frameworks based on the goals that they are to achieve, and that are suitable to the unique socio-economic circumstances of countries. The case for a developmental approach to promoting economic integration in Africa arises from the reality that many of the major barriers to promoting intra-regional trade arise not from tariff and regulatory barriers but from underdeveloped production structures and inadequate infrastructure.[[19]](#footnote-19)

Thus, this study proposes adoption of a functionalist and developmental approach to business as more appropriate to African countries, as it will allow for flexibilities that take into consideration their unique needs (such as large numbers of SMEs, reliance on agriculture, lack of value-added manufacturing). Only provisions that enhance these interests should be considered as creating an enabling environment for business in African states. The functionalist approach allows for integration of both the interests of the private sector with public interest, in a flexible manner that supports sustainable business growth and development in Africa. This approach is elaborated in detail in chapter five of this report.

**2.3 Essential Principles and Factors Necessary for an Enabling Business Environment**

The United Nations Industrial Development Organisation (UNIDO) (2008) asserts that there are various factors which contribute to the creation of an enabling environment, including efficient bureaucracy, a well-maintained infrastructure development, as well as a functional educational system. These factors are examined in detail below:[[20]](#footnote-20)

**2.3.1 Principles for an Enabling Business Environment**

An enabling business environment is supported by the existence of certain legal and socio-economic principles, specifically security, stability and predictability of laws, functional banking systems, access to credit and infrastructure. These factors are examined in greater detail below.

**Security and Predictability of Laws**:

Ensuring the predictability of laws is an important factor necessary for creating a business environment. Even where there is a change of government due to a coup, investors will feel more secure investing in places where their business interests will be secure despite changes in government. The Afrimex bank has successfully applied this principle to ensure investments in participatory countries, like Chad and Rwanda, which has made them attract more FDI.

Perceptions that regulations are unpredictable are likely to have a negative impact on long-term business planning and investment, confuse interpretations of the rules, and increase the potential for corruption. In 20 out of the 26 African countries for which comparative data are available, less than a fifth of respondents believed that regulations affecting their operations were fully predictable. For all 26 countries, the average percentage of respondents who rated regulations as fully predictable was 17 %. Results vary greatly across countries. The percentage of firms that think that regulations are fully or somewhat predictable ranges from 13 % in Guinea Bissau to 70 % in Rwanda and Ghana. In six countries more than 60 % of respondents rate changes in business regulations as fully or somewhat predictable.[[21]](#footnote-21)

**Macroeconomic Stability and Functional Banking Systems**

The term "Macroeconomic Stability" describes a national economy that has minimized vulnerability to external shocks, which in turn increases its prospects for sustained growth. Both the IMF and World Bank identify macroeconomic stability as the cornerstone of any successful effort to increase private sector development and economic growth. According to the Maastricht criteria, macroeconomic stability is measured by five variables: low and stable inflation, low long term interest rates, low national debt relative to GDP, low deficits, and currency stability.[[22]](#footnote-22) Macroeconomic stability exists when key economic relationships are in balance—for example, between domestic demand and output, the balance of payments, fiscal revenues and expenditure, and savings and investment. These relationships, however, need not necessarily be in exact balance. Imbalances such as fiscal and current account deficits or surpluses are perfectly compatible with economic stability provided that they can be financed in a sustainable manner. There is no unique set of thresholds for each macroeconomic variable between stability and instability. Rather, there is a continuum of various combinations of levels of key macroeconomic variables (e.g., growth, inflation, fiscal deficit, current account deficit, international reserves) that could indicate macroeconomic instability.[[23]](#footnote-23) Macroeconomic stability depends not only on the macroeconomic management of an economy, but also on the structure of key markets and sectors. To enhance macroeconomic stability, countries need to support macroeconomic policy with structural reforms that strengthen and improve the functioning of these markets and sectors.

Macroeconomic stability is the cornerstone of any successful effort to increase private sector development and economic growth. Cross-country regressions using a large sample of countries suggest that growth, investment, and productivity are positively correlated with macroeconomic stability (Easterly and Kraay, 1999). Although it is difficult to prove the direction of causation, these results confirm that *macroeconomic instability has generally been associated with poor growth performance*. Without macroeconomic stability, domestic and foreign investors will stay away and resources will be diverted elsewhere. In fact, econometric evidence of investment behavior indicates that in addition to conventional factors (i.e., past growth of economic activity, real interest rates, and private sector credit), private investment is significantly and negatively influenced by uncertainty and macroeconomic instability (see, for example, Ramey and Ramey, 1995).[[24]](#footnote-24)

Macroeconomic stability acts as a buffer against currency and interest fluctuations in the global market. It is a necessary, but insufficient requirement for growth. Exposure to currency fluctuations, large debt burdens, and unmanaged inflation can cause economic crises and collapse in GDP.

Macroeconomic stability is a necessary precondition for promoting trade and financial integration across regions and across the global market. However, in order to achieve macroeconomic stability, it is essential to ensure the stability, predictability, and transparency of the financial system. At the same time, governments need to adopt a liberal policy toward FDI inflows, which will enable foreign enterprises to exploit the comparative advantages of countries in the region and to locate their production facilities accordingly.[[25]](#footnote-25)

Access to finance is widely acknowledged as a tool for promoting an enabling business environment through credit creation and enhancing capital accumulation. A functional banking system must provide structures that ensure secure payments, transparent accounting, access to credit, and predictability in financial policies. Providing for financial services through the use of technology (such as ATMs, mobile wallets, and online banking) has been identified as especially important for business growth in the digital age, as the shift from cash payments to digital payments will increase participation by enterprises in the formal banking sector, and improve efficiency by increasing the speed of payments and reducing the cost of disbursing and receiving them.[[26]](#footnote-26)

Providing functional and inclusive banking systems are especially important in African countries because according the 2017 Global Findex Database, about 1.7 billion adults remain unbanked a large number of whom are living in developing countries, one of which is Nigeria. In 2014, it was reported that Sub-Saharan Africa, with about 350 million unbanked adults, accounts for 17% of the global unbanked population. Most small businesses in Africa are financially excluded, as they do not fully participate in the formal financial sector. Many business transactions rely exclusively on cash and small businesses do not have access to credit beyond their personal networks and informal lenders.[[27]](#footnote-27)

The African Development Bank has identified a positive and significant relationship between financial sector development, economic growth and poverty reduction. They have also concluded that the disappointing outcome in Africa reflects, the small scale of the operations of most African financial systems, and that this deficiency could be corrected through promoting regional financial integration (RFI).[[28]](#footnote-28)

**Access to Infrastructure**: Infrastructural development is a key driver of economic growth and gains in productivity. When economic growth is combined with strong income distribution policies it can enable sustainable development. The Programme for Infrastructure Development in Africa continues to serve as the framework for infrastructure development in Africa. The main difficulty African countries face is overcoming the infrastructure deficit, and especially their weak capacity in moving projects to financial close, with 80 per cent of infrastructure projects failing at the feasibility and business plan stages. Infrastructural development in Africa had a positive impact, as evidenced by increased electricity generation, the number of roads constructed and upgraded, container depots built and ports upgraded, as well as an increase in ICT and mobile penetration.[[29]](#footnote-29) Transport networks across regions are especially important, as the ability to freely move its products and services to users, with minimum cost and delay, is important to business proficiency. Further improving infrastructure in African countries will make it more attractive to manufacturing and industries that rely greatly on electricity.

**2.3.2 Regulatory Business Environment**

**The Judicial System:** In the context of the judicial system, three factors have been identified as being possibly detrimental to an enabling environment: The differences between common law and civil law systems; the multiplicity of courts with overlapping jurisdictions; and the non-enforceability of the decisions of the regional courts.

The judicial systems in African countries are shaped based on colonial legacies. For example, most of the French speaking countries adopt a civil law system, while the English speaking countries adopt a common law system. Some countries like South Africa use a combination of civil and common law. *The main difference between the two systems is that in common law, past legal precedents or judicial rulings are used to decide cases at hand. In contrast, under civil law, law is made through legislation alone, as contained in domestic statutes and ordinances*.[[30]](#footnote-30) This makes the judicial process generally longer and more varied in common law countries, than civil law countries. Further, the civil and common law traditions each takes a different view of the relationship between national and international law. While civil law countries view the regulations contained in international treaties as laws applicable at the domestic level without further process, common law countries do not view them as enforceable until enacted as national laws through separate domestic processes. For example, in the Mba case, when the applicant went to the High Court of Ghana seeking enforcement of the ECOWAS Court’s judgment awarding him US$800,000 damages, the High Court refused his application on the basis that neither the ECOWAS Treaty nor the Court’s Protocol had been incorporated into Ghanaian law through legislation. This followed an earlier judgment, in which the Supreme Court of Ghana held that it could not enforce an order of the International Tribunal of the Law of the Sea (ITLOS). Because Ghanaian law took a dualist approach to treaties, the absence of any legislation incorporating the Law of the Sea Convention into national law meant that orders of ITLOS were not binding on the Ghanaian courts even though Ghana, being a party to the Convention, was bound at the international level. Thus, a Member State’s rules of civil procedure may prevent execution against the State itself. Also, the ECOWAS Court’s Protocol says nothing about enforcement of the Court’s judgments outside the region.[[31]](#footnote-31) For international and continental trade, this might cause uncertainty as businesses will be unsure which systems apply in each state.

In most African countries, the judicial system comprises the Supreme Court, Court of Appeal, High Court and Magistrates’ Courts, as well as specialized courts that deal with issues relating to trade such as the income tax courts, labour courts, and land claim courts. The overlap between the roles of these courts can result in contradictory judgments that negatively affect the business environment by increasing the lack of predictability of laws.

The decisions of national courts in Arica may be subject to judicial review or appeal under the various regional economic communities. For example, decisions have been made by the ECOWAS Court on issues relating to trade and investment. However, in contrast to the judicial system developed under the WTO-TRIPS system, the decisions of the regional courts are non-enforceable in domestic countries. They require domestication by enaction of national legislation in order to be put into effect.[[32]](#footnote-32) This works against an enabling business environment as the implementation of laws is often difficult.

Though the capacity of regional courts to act as an investment tribunal, because they have jurisdiction to adjudicate on various categories of potential disputes between investors and their member host states, has been established. Yet, *the regional court’s ability to act is divided between its various jurisdictions and the ambit of its powers is unclear*, as a result both of ambiguities and inconsistencies in the drafting of the Court’s Protocol and the regional Supplementary Act on Investments, and of divergences in the Court’s own jurisprudence. Thus, the current situation is by no means optimal. The regional Court may be an available forum, but is it a desirable one, particularly when an investor might have the option of bringing its claims under an applicable bilateral investment treaty or free trade agreement?

*It is proposed that the AfcFTA could promote a more enabling investment environment in Africa by establishing a single continental investment and trade court with jurisdiction that covers that of the regional courts.*

The business environment is highly fragmented, being regulated by a large span of laws including Contracts, Commercial, Labour, Customs, Land and intellectual property (IP).

**Contract Law, Competition; Customs:** Contract laws will determine the ability of entrepreneurs to commence a business, the markets which they can participate in, and any restraining conditions (such as anti-trust laws). While intellectual property regulations will affect the ability of firms to access knowledge, technology.

**Labour Market Deregulation:** Labour laws will determine the costs of employing workers by business. Migration is both a root factor and an outcome of international economic rules and norms. Multilateral labour law has a direct impact on migration and access to skilled workers. Yet, free migration is a topic that AU countries are hesitant in discussing. Often, the economic disparities between countries shape how international labour laws are formed. From the relationship between EU migration governance, trade, and development in Africa, the impact of US economic conduct in Latin America and the Caribbean, to the impact of Chinese FDI on the movement of people and services between China and Africa, there are numerous ways that international economic law and migration are intertwined. Though liberalization of trade and the free movement of capital, goods and services has become the norm for an enabling business environment, supported by international law, the free migration necessary to support this remains an outlier.

Prof Achiume emphasizes that the current consideration of international economic law and migration as separate fields not only undercuts the goals of promoting interconnection, but also exacerbates the continued disenfranchisement of marginalized communities in the form of illegality and economic exploitation. To rectify this, Achiume argues for a decolonial approach in international migration, which can be achieved via more inclusive migration governance processes and policies, that economically emancipate workers.[[33]](#footnote-33)

Thus, creating an endearing atmosphere for business will require the reimagining of laws regulating migration and labour within international economic laws, so as to foster easy movement of persons to provide companies the needed skills and labors to remain sustainable.

**Easy Registration and Removing Red Tape**: Burdensome procedures and regulations consume time and financial resources. These transaction costs cut into the resources that can be used for core business activities. Moreover, higher entry barriers and levels of bureaucratic “red tape” are seen as a major cause of informality and corruption. Simplifying and even abandoning unnecessary regulations is therefore seen as an important step towards creating a better business environment and enhancing productivity growth.[[34]](#footnote-34) In practical terms, this would require enacting and implementation of regulations making registration of new businesses and licensing cheaper and quicker; protecting property, including intellectual property rights; ensuring equality and access to justice for both local and foreign companies; regulating for fair access to markets and services; and fiscal regimes that encourage foreign direct investment.[[35]](#footnote-35) An example of where the removal of bureaucratic delays was successfully used to boost enterprise is the establishment of the single business permit (SBP) in Kenya in 1998, to replace the former system where businesses had to obtain various licences for each business activity.[[36]](#footnote-36) Several studies have linked the creation of the SBP, by increasing business revenues and lowering the regulatory compliance cost for businesses, to advancing revenue generation and business investment in Kenya.[[37]](#footnote-37)

However, there seems to be disagreement on how significantly legal barriers impact investment, especially in developing countries. For despite the fact that business registration is comparatively cheaper in African countries in comparison to developing countries in Europe, or the United States, investment levels remain higher in the latter regions. Authors like Van Stel, Storey and Thurik (2007), “do not subscribe to the view that heavily ‘regulated’ countries (in terms of entry regulations) need only to reduce such ‘burdens’ in order to become more enterprising and by implication wealthier. What seems more likely is that entry regulation influences the distribution of business activity between the formal and the informal economy, rather than influencing the total volume of activity.” (van Stel et al. 2007: 16) For African countries easing the process for setting up and running businesses would be useful in bringing informal sector enterprises into the formal economy, thus empowering them.

**Property Law (Land Title)**

It is important that businesses be granted the ability to acquire and own land within a country, without the risk of the land being seized by the government for discriminatory reasons without providing adequate compensation. Meeting this requirement in African countries is difficult because Land Law, which determines property rights, are governed by national governments, which are based on different systems of land allocation including common law (English speaking countries), civil law (French speaking countries), and traditional law.

While acknowledging the rights of national governments to seize privately owned property to fulfil public purposes like laying of pipes or the construction of a hospital, an enabling business environment should also ensure that businesses are given adequate notice and compensation when governments exercise this right.

**Banking Law (Access to Credit)**

Financial regulation is a form of [regulation](https://en.wikipedia.org/wiki/Regulation) or supervision, which subjects [financial institutions](https://en.wikipedia.org/wiki/Financial_institution) to certain requirements, restrictions and guidelines, aiming to maintain the stability and integrity of the [financial system](https://en.wikipedia.org/wiki/Financial_system). This may be handled by either a [government](https://en.wikipedia.org/wiki/Government) or non-government organization. Financial regulation has also influenced the structure of banking sectors by increasing the variety of financial products available. Banking law can affect the ability of businesses to obtain indemnity and overdrafts, thus affecting the business environment. The challenge for most African states lies in the fact that banking policy is not only governed by national agencies and regulations, but by international organizations like the World Bank, IMF and the African Development Bank (ADB). Greater effort is needed to ensure that the policies required by these multilateral institutions are suitable for the socio-economic circumstances of individual African states. Allowing for contextualized strategies is important as ‘one size does not fit all’ in applying international economic law to advance development. Countries must be given adequate room to tailor their fiscal policies to fit their socio-economic needs.

**2.3.3 Good Investment Climate**

**Security, Good Governance, and Political Stability**: The key elements of good governance, are accountability, transparency, combating corruption, citizen participation, and an enabling legal/judicial framework. Promotion of good governance that strictly adheres to the establishment and protection of fundamental human rights through institutionalisation of democracy and transparency.

“Fighting poverty and improving human development in Africa must begin with the creation of wealth, a process that requires the existence of a robust entrepreneurial class. In order to achieve these goals, there must be peace and security—especially the peaceful coexistence of the various ethnocultural groups that inhabit each African country. Unfortunately, weak and dysfunctional governance structures continue to prevent many African countries from creating and sustaining the necessary enabling environment for peaceful coexistence, entrepreneurship, and wealth creation. In fact, in countries such as Cameroon, the DRC, and South Sudan, the absence of governance structures undergirded by the rule of law has failed to halt ethnic-induced violence. That violence stunts entrepreneurship and economic growth in these countries. Peace and security, which are a sine qua non for entrepreneurial activities and the creation of wealth, are unlikely to return to these countries without the provision of participatory and inclusive governance structures.”[[38]](#footnote-38) For example, since ending the Rwandan genocide in 1994 and increasing security, the Rwandan economy has considerably strengthened with larger private and external investments, average annual growth rates of 7%, and per-capita GDP (purchasing power parity) estimated at $2,214 in 2020, compared with $127 in 1994.[[39]](#footnote-39)

Thus, it is imperative that countries entrench mechanisms that promote constitutionalism, accountability, democracy, and good governance if Africa is to enhance its business environment.

**Functioning Markets and Trade liberalisation**: Investments in value-adding and labour-intensive sectors require markets to sell the products and services produced. Most African countries on their own are too small to allow for significant economies of scale. Thus, trade policy plays a key role to attract more productive investment to African countries – first, by reducing barriers to regional and international trade and second, by granting the assurances necessary for becoming part of 21st-century value chains. Moreover, trade facilitation is important to enable companies of all sizes to reap the benefits of trade liberalisation fully. The AU should make sure that its trade facilitation activities under multilateral and bilateral agreements and as part of its aid programmes are streamlined to ensure maximum benefits.[[40]](#footnote-40)

An ADB study has reviewed the experiences of regional financial integration in both the European Union (EU) and in Asia, and has drawn some lessons for Africa. One of the lessons learned is that market forces alone cannot ensure that financial integration will occur at a pace, or in a form, that meets the requirements of increasing trade and investment flows while protecting the economies from becoming financially vulnerable. Thus, African countries need to take a holistic approach by balancing marketing and trade policies with national development and domestic business goals.[[41]](#footnote-41)

**Human Resource Development: Education and Capacity building**

Education ‘can be defined as the stock of skills, competencies, and other productivity-enhancing characteristics’ (WEF 2016). In general, education—as a critical component of a country's human capital—*increases the efficiency of each individual worker* and helps economies to move up the value chain beyond manual tasks or simple production processes (WEF 2016). Education is a leading determinant of economic growth, employment, and earnings.[[42]](#footnote-42) Higher education and professional training that provides people with the skills required by the labour market are key factors for an enabling business environment and development that may create greater tax revenue, increase savings and investment, and lead to a more entrepreneurial and civic society.[[43]](#footnote-43)

Statistics from the UN have identified disparities in educational opportunities and outcomes in Sub-Saharan Africa, resulting in many students from the region incapable of participating in a highly complex global economy.[[44]](#footnote-44) Of all regions, sub-Saharan Africa has the highest rates of education exclusion. Over one-fifth of children between the ages of about 6 and 11 are out of school, followed by one-third of youth between the ages of about 12 and 14. According to UIS data, almost 60% of youth between the ages of about 15 and 17 are not in school.[[45]](#footnote-45)

While companies can outsource human skills, this is much more expensive and less sustainable than building corporations at locations that have an indigenous pool of talent suitable to the company’s specific skills. For example, many observers attribute India's leap onto the world economic stage as stemming from its decades-long successful efforts to provide high-quality, technically oriented tertiary education to a significant number of its citizens.[[46]](#footnote-46)

The educational institutions in Africa have been faulted for being too few in comparison to the large population, and for producing poor quality graduates, that do not produce inventions relevant to the needs of the community, and incapable of meeting the needs of skilled private industries.[[47]](#footnote-47) Inadequate funding, educational infrastructure, as well as social biases based on gender, have been identified as primary causes of this gap. Correcting this anomaly will be essential in making Africa’s environment more business friendly.

Education enables upward socioeconomic mobility and is a key to escaping poverty. Yet, enrollment rates for higher education in Sub-Saharan Africa are by far the lowest in the world. Between 2010 and 2019, the global primary and secondary school completion rates increased from 82 per cent to 85 per cent and from 46 per cent to 53 per cent, respectively. In sub-Saharan Africa, the primary completion rate rose from 57 per cent in 2010 to 64 per cent in 2019, while the secondary rate grew from 26 per cent to 29 per cent, leaving that region furthest behind.[[48]](#footnote-48) Currently, the gross enrollment ratio in the region stands at only 6 percent.[[49]](#footnote-49) With schools and workspaces transitioning online due to COVID-19, information and communication (ICT) skills have become critically important. However, available data from 2017–2019 indicate that less than 40 per cent of youth and adults reported performing one of the basic ICT skills in the last three months, such as sending an email with an attachment.[[50]](#footnote-50) The educational institutions in Africa have been faulted for being too few in comparison to the large population, and for producing poor quality graduates, that do not produce inventions relevant to the needs of the community, and incapable of meeting the needs of skilled private industries.[[51]](#footnote-51)

As stated by Mr. Quartey during the opening of the European Union–Africa Business Forum in Brussels, Belgium, in June 2017, “Our institutions are churning out thousands of graduates each year, but these graduates cannot find jobs because the education systems are traditionally focused on preparing graduates for white-collar jobs, with little regard to the demands of the private sector, for innovation or entrepreneurship.” He noted that if African youths are not adequately prepared for the job market, “Growth in technical fields that support industrialization, manufacturing and development in the value chains will remain stunted.” Inequality’s inclusion among the Sustainable Development Goals (SDG 10: Reduced Inequalities) serves as an important reminder to leaders in Africa to take the issue seriously.

Dr. Ngozi Okonjo Iweala, Director of the World Bank, has posited that for Africa to present itself as an attractive destination for investment and not just aid, a large expansion of skills and human capital is needed, through the revamping of its educational institutions and greater focus on science and technology (STEM) education.[[52]](#footnote-52) The AU, keeping in mind that the continent’s population will double in the next 25 years, is seeking through its Continental Education Strategy for Africa 2016–2025 to expand access not just to quality education, but also to *education that is relevant to the needs of the continent*.[[53]](#footnote-53)

**Development of Indigenous Innovation, Partnership Formation, Entrepreneurship and Small and Medium scale enterprises**

The majority of business activity in African countries is carried out by small and medium scale enterprises. Countries of sub-Saharan Africa typically display a firm size distribution characterized by a large number of micro and small enterprises on the one hand and a small number of large enterprises on the other hand. Hardly any micro and small enterprises grow sustainably and make the transition to medium-sized or even large enterprises.[[54]](#footnote-54)

Thus, the WIPO Development agenda recommends that for business, IP and trade regulations to advance development, special provisions must be made to support small and medium-sized enterprises (SMEs), research institutions, and anti-competitive practices in developing countries and Least Developed Countries (LDCs).[[55]](#footnote-55)

Although Africa has 18% of the world’s population, it accounts for only 0.3% of global R&D spending and 0.5% of patent applications. Trade statistics paint a picture of a relatively low-tech, low value-add region: Africa produces 0.4% of global high-technology exports and 0.8% of middle-technology exports, such as industrial machinery, autos, and chemicals.[[56]](#footnote-56) Thus, for AfCFTA policy to advance Africa’s business environment, it is necessary that it helps sustain businesses towards the attainment of production self-sufficiency and the creation of gainful employment for the most vulnerable members of society, including the youths and women.

A large proportion of trade in African countries is carried out informally, with use of traditional knowledge. However, IP and trade related agreements do not have provisions for rewarding farmers, local communities and indigenous peoples for their roles in conserving and providing the genetic resources used by scientists and breeders to develop the new IP-protected varieties and other products using agricultural biotechnologies or other means; neither do they protect farmer-bred varieties (i.e. “traditional” and more informal communal systems of innovation by farmers and indigenous communities). These are concepts covered under multilateral biodiversity agreements (the CBD, particularly Articles 12 and 16, and the ITPGRFA), and which countries also have to address in ways that are both consistent with international trade agreements and between different pieces of legislation.[[57]](#footnote-57)

Consequently, creating an enabling atmosphere to advance sustainable business growth in Africa cannot be achieved by a legal/intellectual property framework that undermines the role of the informal sector and the associated traditional knowledge of local communities. When IPR privileges scientific biotechnology over traditional based biotechnological products and processes relevant to agriculture, it fosters a culture of dependence by practitioners of traditional agriculture on corporate seed monopolies and proprietors of modern biotechnology.[[58]](#footnote-58) This makes it necessary that IP regulations integrate both the innovation systems and biotechnologies produced by traditional and scientific systems to advance food security in West Africa.[[59]](#footnote-59)

**Public- Private Partnership Formation**: Although SMEs represent a high proportion of businesses in Africa, they generally have less access to funding. Banking groups report that the lack of adequate collateral (37%) and of bankable projects (40%) are key reasons that hold them back from lending more to SMEs. Two other important obstacles reported by banking groups are high default rates (17%) and lack of information (17%). The lack of managerial capacity in SMEs is yet another hurdle (11%) that is reported. The lack of collateral (33%), high default rate (33%) and lack of managerial capacity of SMEs (17%) were already mentioned as top constraints to lending to SMEs in 2018. With SMEs often operating informally and lacking proper accounting and financial reporting documents, it is difficult for banks to assess credit risk and to monitor borrowing entities.[[60]](#footnote-60)

One method put forward for making businesses more viable in Africa is encouraging the formation of public private partnerships. This is because the corporations might have the collateral, managerial capacity and information that is lacking in local enterprises. Public-private partnerships with MNCs at the technological forefront of their fields can be particularly valuable in strengthening national innovation systems and enhancing connections with global ecosystems of partners. Morocco’s automotive cluster offers several good examples. In 2018, Renault established an R&D partnership with the Mohammadia School of Engineers in the automotive, energy, and environmental fields that included an academic chair and degree programs for hundreds of students. Groupe PSA, whose brands include Peugeot, Citroën, DS Automobiles, Opel, and Vauxhall, also opened a technical and R&D center in Tangier that employs more than 500 engineers and technicians and that has built relationships with nine Moroccan universities. A number of global technology giants also have been helping to develop innovation hubs in several African countries, including Rwanda, Ghana, and Nigeria.[[61]](#footnote-61)

**2.4 The Main Actors Regulating the Business Environment**: Main actors regulating the business environment in Africa include national governments, regional economic communities (RECs), financial institutions and multilateral lending institutions like the IMF and World Bank, as well as private sector bodies responsible for licensing and self regulation like the National Business Owners Associations.

**2.5 Key Findings**:

* Creating a favourable business environment requires a large number of factors, which are regulated by fragmented areas of law including contract, competition, commercial, property, intellectual property, and labour law.
* Competitiveness—the set of institutions, policies, and factors driving productivity—is a key determinant of sustainable growth and provides a path for effective integration into the global economy.
* Enabling the business environment will require the integration of various areas of law including contract, anti-trust, labour, customs, and IP laws. Relevant laws that will need to be integrated at the multilateral level include: the WTO’s GATT, GATS, and TRIPS Agreements; the International Labour Organization’s (ILO) regulations; and the SDGs. At the continental level harmonization will have to be made between the AfCFTA, and RECs.
* Creating an enabling business environment will require coordination between the different objectives of these laws, and the deletion of conflict between the different tiers of law. This is best achieved by adopting an integrated/functionalist approach to law, whereby the rules of business law are interpreted, alongside other relevant rules, so as to achieve the underlying public policy goals. For this principle to be effectively applied, a framework for business regulations must be contextualized to suit the socio-economic conditions of the countries to which they are to apply.

Economies are more competitive when businesses are more competitive. And businesses are more competitive when: • the rules of the game are clear – and fair, • employees are skilled, •the cost of services to the business sector (transport, electricity, etc.) are reasonable, • consumers are accessible – within each country and across the continent. As regards Africa, the above principles, according to Francisco Ferreira, Chief Economist for Africa at the World Bank, translate into six conditions which concern both the private sector and the public authorities equally: political stability and better governance; macroeconomic stability/ less debt; human capital; reduced production costs; equitable distribution of the benefits of growth; industries built on strong comparative advantage.[[62]](#footnote-62)

Having identified the factors and principles that effect the business environment,[[63]](#footnote-63) the following section examines the unique characteristics of the business environment in Africa, and how they can be accommodated in business regulations, to support an enabling business environment under AfCFTA.

**3.0 The Current Business Environment in Africa: Opportunities and Challenges**

**3.1 Characteristics of the Private Sector in Africa**

The private sector is the part of the economy that is run by individuals and companies for profit and is not state controlled. The private sector plays an important role in development economics as generator of income and employment for communities.[[64]](#footnote-64) In Africa, the private sector is characterized by informal inventions, flexible procedures or non-regulation, small size enterprises, weak inter-firm linkages, low level export competitiveness and low technological capability. These characteristics are not catered for in customary trade agreements that tend to focus on protecting formal innovations and the removal of trade barriers, without the commensurate attention to the building of local productive capacities and private sector development. [[65]](#footnote-65) Consequently, for FTAs to enable business in Africa, it is necessary that they contain differentiated (flexible) policies, which do not inhibit the powers of SMEs to utilize traditional knowledge, and which support local biodiversity and informal trading systems.[[66]](#footnote-66)

**3.1.1 Prominence of the Informal Economy, Traditional Knowledge, and Indigenous Industries**

Generally, the informal sector is understood as all economic activities that are carried out without formal registration including name registration, commercial registration with a government office, trade licensing and tax registration.[[67]](#footnote-67) Though these enterprises are considered illegal because they’re not registered with the government, they play an important role in job generation and invention to the private sector, especially in developing countries. For example, corporations like Microsoft began as unregistered businesses, before transforming into registered companies. The informal sector accounts for 40 % of Africa’s economy—more than in any other region except Latin America.

Innovation in Africa is occurring mostly in the informal sector and in the absence of strong IP institutions. Trade and IP regulations need to shift to embrace both the formal and informal home-grown technologies, as there is a symbiotic relationship between the two.[[68]](#footnote-68) A lot of the trade between African countries takes place informally. It is estimated that informal cross border trade represents 43 percent of official GDP, therefore being almost equivalent to the formal sector. [[69]](#footnote-69) For an IP and trade treaty to be effective in advancing food security in Africa, it should not hinder informal trade between countries in a manner as to limit business growth and inventiveness.

Indigenous firms, particularly small and medium-sized enterprises, play a key role in all market-driven economies: as employers, as suppliers of basic goods and services, and as partners to larger firms in supply and service chains. Inappropriate regulation creates obstacles to this process by raising the costs of business entry and growth. In particular, regulation and inadequate institutions for property rights and the rule of law create barriers to transition from the subsistence and very small-scale economy to the modern more productive sector. Regulatory costs bear most heavily on the smallest firms, which are almost exclusively indigenous enterprises, and which account for a substantial share of employment. These regulations act as a barrier to development by keeping a large proportion of the population out of the formal economy. They also promote corruption. Modern day business enterprises in Africa and the transition countries suffer regulatory barriers which were largely absent in 18th and 19th Century Europe and North America when these areas were industrializing. Moreover, regulatory costs now in most respects (and in relation to incomes), seem to be much higher in the developing world than in the advanced countries.[[70]](#footnote-70)

Within Africa, certain countries, such as Uganda, Ghana and (to a lesser extent) Tanzania outperformed their neighbours during the period 1995 to 1999 in establishing indigenous industries. Research on 10 countries in the 2 regions in Africa found a strong correspondence between per capita GDP growth and the degree to which their governments had put in place machinery and policy measures to promote indigenous private sector development.

**3.1.2 Large Numbers of Small and Medium Scale Enterprises, Monopolies**: Most African private enterprises are small; very few are medium and large ("the missing middle" and "the missing big"). Small firms are less productive than larger ones, particularly in manufacturing. Small and medium-sized enterprises (SMEs) in Africa struggle to survive and grow into large firms, largely due to financial constraints(AfDB 2019). Even so, SMEs are considered the backbone of African economies, accounting for about 90 per cent of all private enterprises and accounting for more than 60 per cent of employment in most African countries (ITC, 2018).[[71]](#footnote-71) Consequently, the World Intellectual Property Organization’s (WIPO) development agenda[[72]](#footnote-72) recommends that for trade and IP regulations to advance development, special provisions must be made to support small and medium-sized enterprises (SMEs), research institutions, and anti-competitive practices in developing countries and Least Developed Countries (LDCs).[[73]](#footnote-73)

Contemporary IP agreements require the opening up of markets to facilitate free trade, which has often resulted in monopolization of African markets by international companies. For example, studies indicate that the Monsanto (now Bayer) DuPont, and Syngenta companies dominate over 53% of the global market for seeds.[[74]](#footnote-74) This gives them enormous power to control markets and pricing, what consumers eat, and what gains farmers receive for their crops and livestock. For farmers, this means fewer options and higher prices for their major input—seeds.[[75]](#footnote-75) Thus, an enabling business environment should provide for special and differential treatment for SMEs, as well as protection from foreign monopolies.

It is necessary to observe that if African countries do not establish regional markets before opening to EU imports, they run a high risk of displacing or substituting previously efficient regional suppliers with less competitive EU marketers. This could undermine any opportunity to develop industries in goods that can be traded regionally. Indeed, one of the key rationales for regional integration is that small African economies might be able to develop industries. But the EPAs could make this difficult unless mitigating measures are taken.[[76]](#footnote-76) Aid for trade is also offered under the EPA. But this is not a viable method for sustainable growth and food security in Africa.[[77]](#footnote-77)

**3.1.3 Less Value-Added Production:**

Currently, Africa accounts for just [2% of global trade](https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=520). And only 17% of African exports are intra-continental, compared with 59% for Asia and 68% for Europe.[[78]](#footnote-78) Intra-Africa trade has historically been low. In 2019, only 12% of Africa’s $560 billion worth of imports came from the continent. African countries have also been trapped in the lower levels of the global economy by selling low-value raw materials and buying higher-value manufactured goods. The lack of value-added production is seen as one of Africa’s major challenges for development.[[79]](#footnote-79) It also accounts for African businesses relatively weak performance in the global value chain trade (averaging at 8% of GDP, compared to 11% in developing Asia and 14% in high-income countries over 2000-2015) and having fewer exports.[[80]](#footnote-80) Africa largely continues to supply raw materials to countries at the high end of global value chains (GVCs), while other developing regions deepened regional trade in GVCs. The African continental free trade agreement seeks to reverse this.

By adding value to agricultural products, local farmers and small and medium enterprises (SMEs) in Africa can increase trade, as semi-processed goods can be granted IP protection and traded instead of raw material. This will facilitate intra-regional trade and reduce reliance on imported foods, so as to increase food security in the region.

**3.1.4 Weak Inter-Firm Linkages**: Mergers and acquisitions (M&A) continue to play key roles in the growth of businesses and serve important economic functions in rewarding competitive firms. In a merger two firms combine their operations to varying degrees, with both firms retaining control. In an acquisition one firm obtains a controlling stake or the entirety of a target firm. M&A activity enables firms to achieve economies of scale through specialization and bulk purchasing, lowering operating costs. It also enables firms to secure limited resources they otherwise could not obtain. Producers are more able to secure access to primary resources to enhance production. This has happened in Chinese-led acquisitions in foreign markets targeting agricultural companies or meat, pork and poultry producers (M&A Worldwide, 2017). M&A activity enhances technological capacity. With technology allowing companies to develop a competitive edge, M&A activity has sped technological innovation in the target company due to knowledge transfer.

However, it must be highlighted that given the potential harms to consumers or their-anticompetitive effects, M&A work well in the presence of a robust and functioning competition regime, which is often lacking in African RECs and national laws.

In 2019, the total value of announced deals in Africa decreased to $23 billion from $25 billion in 2018, an 8 per cent decrease. The majority of these deals involved partnerships with firms outside Africa, as corporations found it easier to connect with foreign companies. One major drawback of M&A activity is acquiring firms crowding out smaller industry constituents, creating oligopolies. This practice stifles innovation and dramatically reduces competition, ultimately at the cost of the consumer. So, mergers and acquisitions can only be a benefit for emerging markets, through rapid development of industries, if a strong trade competition regulation framework is in place to ensure that a M&A does not come at the expense of innovators and smaller businesses.

**3.1.5 Lack of Export Competitiveness**

Africa accounts for 21.2% of the world’s land and 13.7% of the world’s people, but only 2.6% of the world’s economic activity. Understanding the causes of this disparity is of utmost importance in creating an enabling environment for business. One explanation is that African goods lack export competitiveness, as they are mainly limited to exporting raw agricultural produce or unrefined minerals with little value-added production and specialization, thus making them less competitive in global or even continental markets.[[81]](#footnote-81) Production of a similar set of homogeneous products, which are in high demand in developed countries, may provide little incentive to export to a neighboring African country. On the other hand, countries that specialize in services tend to export relatively more to other African countries. This indicates that diversifying the economy out of natural resources and into services is one way to promote intra-African trade.[[82]](#footnote-82)

The intra-continental trade share in Africa is only 12%, compared to 47% in North America, 53% in Asia, and 69% in Europe. The lack of intra-African trade is not simply due to the fact that Africa is a large continent with many developing countries. In other words, the common gravity terms of distance and economic size alone cannot explain the lack of trade between African countries. As greater distances exist between African countries and Asian countries, yet trade with those countries is larger than intra-African trade.

A 2020 empirical study, analyzing the possible explanations and identifies factors that promote trade between African countries, found that intra-African exports disproportionately increase with road infrastructure, trade agreements, and a less corrupt trading system. Diversifying the domestic economy away from natural resources and towards services is also associated with more intra-African trade. Recent evidence by ECA shows that when African countries trade with themselves they exchange more manufactured and processed goods, have more knowledge transfer, and create more value.[[83]](#footnote-83) As such, export diversification and product sophistication will need to be promoted in any policy aimed at enhancing the business environment and promoting African economic integration.[[84]](#footnote-84)

While trade agreements can increase bilateral trade flows by reducing tariff barriers, the type of FTA can affect the type of trade (exports or imports) into a country. For example, a recent study examines how different types of trade agreements (non-reciprocal, preferential, and customs unions) affect bilateral exports to African and non-African countries. The results show that *exports to African countries increase with preferential trade agreements, but export to non-African countries do not*.[[85]](#footnote-85) This indicates that though preferential trade agreements between African countries may be an effective way of promoting intra-continental trade, different strategies will be needed to advance the export competitiveness of African enterprises.

**3.1.6 Limited Research, Innovative Capacity, and Intellectual Property Protection**

Investment in research and development (R&D) and innovation supports the production of new and improved technologies to address local needs, while creating opportunities for business growth and employment. While there is no shortage of entrepreneurs in Africa, there are few opportunities for companies to expand or develop their innovative ideas. Africa does not have groups of financiers ready to invest in innovative Africa-grown ideas. The continent’s venture capital market is poorly developed. This lack of financing leads to limited research and fewer IP protected inventions. With the exception of South Africa, the number of patent applications - a traditional marker of innovative activity - recorded by African inventors is woefully low, reflecting the need to actively invest in developing effective national innovation ecosystems across the continent. Generally, in Africa IP is not generally recognized – by financial institutions or right owners - as a valuable capital asset that can be used as collateral to obtain business finance.[[86]](#footnote-86) AU business policy must consider ways to encourage academia, industry and governments to work together to improve awareness of the economic benefits that can flow from strategic use of IP. Such collaboration is central to justifying and securing research funding.[[87]](#footnote-87)

The idea underlying the protection of ideas as intellectual property is that of ensuring that inventors are rewarded and reap gains from their innovations. It is widely understood that SMEs are important creators of IP and users of the IP system. Left unprotected, a promising invention or service may be lost to larger competitors with the means to more effectively commercialize them. However, many entrepreneurs in African countries are not able to reap the benefits of their innovations, as inventions are easily misappropriated and copied by other businesses who undersell them with few consequences.[[88]](#footnote-88) This is not due to a lack of IP regulation, which exists in most African countries, but rather to three fundamental problems: (i) the lack of awareness and cost of registering IPRs; (ii) the lack of inclusion of informal and incremental innovation in the definition of an “innovation” under current IP regimes, making them non-protectable; and (iii) the lack of implementation of IP laws. An effective business in Africa will require increasing awareness of the value of IP, and creating specialized systems protecting innovation by SMEs, implementing strong laws in deterring potential infringement, and technical support on turning ideas into business assets with real market value and funding follow-on innovation.[[89]](#footnote-89)

**3.1.7 Prominence of the Agricultural Sector**: Agriculture is the most important sector of the African economy and will have to be its driving engine out of poverty. “It accounts for 65% of the continent’s employment and 75% of its domestic trade.”[[90]](#footnote-90) It provides employment for about two-thirds of the continent’s working population and for each country contributes an average of 30 to 60 percent of gross domestic product (GDP) and about 30 percent of the value of exports.[[91]](#footnote-91) However, in contrast to developed countries, except for a few countries with sizable European populations (such as South Africa, Zimbabwe, and Kenya) farming in Africa is dominated by smallholder subsistence farmers, with little use being made of technologies that enhance agricultural productivity, like tractors and genetically modified seed varieties, as subsistence farmers cannot afford the costs.[[92]](#footnote-92) Women form a majority of the agricultural work force in African countries.[[93]](#footnote-93) Thus, empowering smallholder farmers, by improving their access to credit and agro-technology, is especially important for enabling sustainable business growth in Africa.

Despite the prominence of agriculture in African economies, the business environment seems to be unfavourable, as the agricultural sector is facing the following challenges: production levels have remained low in comparison to population growth, resulting in high levels of food insecurity levels in countries in Sub-Saharan Africa; African countries remain prominently importers (rather than exporters) of agricultural products from countries outside the continent; small businesses have found it difficult to migrate to medium or larger size firms; and the sector has been unable to compete in domestic and global markets with agricultural products imported from other regions, especially Asia.[[94]](#footnote-94) Studies have linked these challenges to certain characteristics of African agricultural businesses, namely: access to fewer financial resources, such as credit and subsidies; lack of access to and knowledge of agricultural technologies and data required for greater productivity; less information regarding markets; and less value-added production by domestic agricultural businesses in Africa required to migrate up the value chain; than their counterparts in Asia, Europe and America.[[95]](#footnote-95) Considering the fact that digitalization and precision farming play an important role in contemporary agriculture, and that interconnections of the global economy require value addition to agricultural products to make them viable for competition, enhancing the business environment will require African countries to adopt policies that specifically deal with these issues.

**3.2 Challenges to Doing Businesses in Africa**

**3.2.1 Lack of Credit**: Trade finance concerns financial activities involved when a buyer purchases goods or services from a seller in international and domestic trade transactions: the World Trade Organization has called trade finance a “lubricant” of trade. In Africa, domestic and international banks account for more than 30 per cent of trade transactions, while bank-intermediated trade finance is estimated at just 20 per cent of the continent’s total trade (Orbitt, 2019). Nearly all commercial banks in Africa engage in trade finance, generating an estimated 17 per cent of bank income, according to the African Development Bank. But Africa’s large corporations absorb a huge share of this trade finance, while SMEs and first-time applicants face significant challenges in accessing credit from banks (Orbitt, 2019). Among the main obstacles limiting SME access to trade finance are the increasing compliance and regulatory burden. There is need to enhance the capacity of the local financial services sector to support trade in Africa.[[96]](#footnote-96)

**3.2.2 Customs and Border Management: Double Taxation**

A border post can be defined as the “location where one country’s authority over goods and persons ends and another country’s authority begins.” It is the location where a multitude of government agencies (i.e. Revenue Authority – Customs; Immigration; Security – Police; Ministry of Agriculture; Ministry of Health; Bureau of Standards, etc.) are involved in the various document and goods controls, the calculation and collection of duties and taxes, as well as immigration. The multiplicity of those agencies operating on both sides of the same border doubles the bureaucracy at border posts, which translates into congestion, delays and costs, creating obstacles to the free flow of people, services and goods.[[97]](#footnote-97)

According to the 15th report by the Improved Road Transport Governance Initiative (IRTG), there are between 1.8 and 3.2 checkpoints per 100 km along corridors in West Africa. Further, the bribes collected by customs, police, gendarmerie, and other uniformed services range from US$ 3 to US$ 23 per 100 km (close to US$ 200 per average trip). The Abidjan–Bamako corridor has the highest number of checkpoints and levels of bribery, which is principally a legacy of the 2011 political crisis in Côte d’Ivoire, especially in the northern region of the country. A consignment of goods moving along the West African corridors can expect significant delays, ranging from 18 to 29 minutes per 100 km, which equates to 7 hours of delays per average trip.[[98]](#footnote-98)

Businesses often face the challenge of being taxed on both sides of the border. The 2021 report of the International Food Policy Research Institute on agricultural trade in Africa finds that non-tariff measures (NTMs), such as sanitary and phytosanitary measures, technical barriers to trade, and price and quantity controls, pose some of the biggest constraints on Africa’s agricultural exports. Regarding intra-African trade, the report finds that NTMs are even more restrictive to trade than tariffs.[[99]](#footnote-99) Thus, AU countries and RECs need to redesign current customs and border management policies to ensure that they enhance rather than hinder trade. The lengthy procedures for clearing goods at border posts could be addressed by the introduction of comprehensive automated systems for document checking and clearing.

**3.2.3 Inadequate Power Generation**: About 590 million people in Africa lack access to electricity, and for those with access, the quality is generally poor and reliability unacceptably low compared with other regions of the world (ECA, 2020a). More African firms identify inadequate and unreliable power, above any other factors, as their major constraint. Some 79 per cent of firms in Africa experienced electricity outages between 2007 and 2018, and the average effective cost of electricity for manufacturing enterprises in Africa is close to 20 cents per kilowatt-hour, about four times higher than industrial rates elsewhere in the world (AfDB, 2018). The high cost and unreliability of electricity in Africa debilitates private sector development in several ways. It affects manufacturing production, intensifies the cost of operating businesses, reduces government revenue, limits diversification among firms and forces them to focus on less energy-intensive activities (ECA, 2018b). [[100]](#footnote-100)

The requirement of SDG 7, ensuring access to affordable, reliable, sustainable and modern energy for all, also presents challenges to industrial businesses, as green energy is more expensive and many African countries rely heavily on fossil fuels. With the global push to de-carbonize national economies, particularly the power sector, the interdependence of countries through electricity trade will become increasingly important. Countries are now, not only looking to develop their own clean energy capacity, but will in future, also seek to harness that of neighbouring countries through cross-border power trade.[[101]](#footnote-101) Though Regional Economic Communities in Africa have established five power pools to facilitate trade, the power infrastructure (transmission lines and associated infrastructure) necessary to facilitate this trade is however, either wholly lacking, or inadequate.[[102]](#footnote-102)

Despite these challenges, UNECA exhorts that the energy challenge in Africa can be overcome, since the continent has sufficient resources and limitless opportunities to develop clean or renewable energy. Energy demand in Africa is expected to increase dramatically due to population growth, a growing middle class, urbanization and climate change (ECA, 2020a). The gap between demand and supply is a chance for the private sector to invest in the energy sector, to power industrialization and to stimulate growth, employment and trade, especially given the prospective benefits of AfCFTA for intra-continental trading without duplication of taxes (ECA, 2020a).[[103]](#footnote-103)

**3.2.4 Lack of Interconnectivity**: Mobile Phones[[104]](#footnote-104), ICT[[105]](#footnote-105) and Roads:

Information and communications technology (ICT) is a transformational driver of economic and social progress. The growth of mobile telephony across Africa has been a notable success story improving people’s lives in rural and urban areas. Although telecommunications costs in Africa have been falling sharply in recent years, they are still higher than in other developing regions. For instance, mobile and internet telephone charges in Africa are about four times higher than those in South Asia, and international call prices are more than twice as high (AfDB, 2018). It is estimated that 75 per cent of the population in Africa does not have internet access, and so does not have access to the knowledge, information and services that the internet can bring.4 For example, affordable ICTs in agriculture could enable farmers to register their land, access credit, use land and water more efficiently and obtain weather, crop and market information (Sy, 2017).

To make internet connectivity as widespread and affordable as mobile telephones will require substantial public and private sector investment. But to date the flows of private investment into ICT in Africa have benefitted only a few countries where the required infrastructure is already well developed. An enabling environment needs to be introduced and managed so that the private sector delivers services equitably to all Africa’s people, irrespective of age, gender, location or economic position. For example, uncompetitive pricing policies of mobile telephone operators—such as charging more for calls to competitor networks—that make ICT in Africa relatively expensive could be eliminated.[[106]](#footnote-106)

Connectivity is an essential requirement for building an enabling business environment. Yet, many African countries and cities remain disconnected both physically and digitally as the following examples illustrate: Africa is by far the least computerized region in the world (Castells, 2000; Jensen, 2006). In the first instance, Africa often lacks the minimum infrastructure required for using computers, such as electrification. Where electricity supplies are nonexistent or unreliable, efforts to supply electronic equipment to a country or region become futile. The critical aspect is, however, networking capability to link to the internet and other global communication networks. Networking capability requires telecommunications infrastructure and network connectivity. However, many schools, universities and research centers on the African continent have no internet access at all. Where basic ICT infrastructure does exist, networks are mostly meager and fragile in comparison with world standards. The consequence is that, although 14.1% of the world’s population live in Africa, Africa houses only 2.1% of the internet users in the world (Hyde-Clark & Van Tonder, 2011). Furthermore, in South Africa – one of the most connected countries in Sub-Saharan Africa – only 15% of households have a working computer and only 5% of households have internet access. In addition, Sub-Saharan Africa has the lowest teledensity in the world and a large unmet demand for telecommunication services. It is not only a problem of basic connectivity, but also of bandwidth. The reality is that even Africa’s most well-equipped centers of excellence have less bandwidth than a home broadband user in Europe and North America (Jensen, 2006). The most important reason is the low penetration of fiber-optic cables that have a vast capability of transferring data (Song, 2005). North Africa is however in a better position than the rest of Africa as it has access to a web of cables criss-crossing the Mediterranean.[[107]](#footnote-107)

Internet users in emerging economies cannot create added value even when they have access to the internet, ICT devices and applications. Cullen (2001) points out that although conditions to ensure physical access to the internet are essential, they are not sufficient alone to achieve the “full benefits” of digital technology. Thus, improving the atmosphere for doing business in Africa will also require enhancing affordable access to digital education and skill training.[[108]](#footnote-108)

Transport is a catalyst for sustainable economic development and growth. Some 3.6 per cent of firms in Africa identified transport as the main obstacle to business. Poor road, rail and port infrastructure increase cost, transit times and breakage or spoilage. Road freight tariffs in Africa are two to four times higher per kilometre than those in the United States, and travel times along key export corridors two to three times higher than those in Asia (AfDB, 2018). According to the World Bank Enterprise Survey (2007–2018), 1.9 per cent of the value of products is lost to breakage or spoilage during shipping to domestic markets in Africa. Increased connectivity would facilitate and grow domestic, regional and international trade, lower the cost of doing business and make African nations more competitive, both within the continent and globally.[[109]](#footnote-109)

**3.2.5 Less Educational Capacity Building and Brain Drain**:

Capacity is the ability of people, organisations and society as a whole to manage their affairs successfully. Capacity building is the process whereby people, organisations and society as a whole unleash, strengthen, create, adapt and maintain capacity over time. Several studies acknowledge the important role that advancing educational capacity and skills plays in the improving the business environment.[[110]](#footnote-110) In this paper, educational capacity building will be defined as the development of education levels and technical skills needed to support skilled businesses, especially in the manufacturing, digital and ICT sectors. Building educational capacity would not just require increasing the number of educational institutions and graduates, but enhancing their qualitative skills.

Though Africa has vastly increased its educational capacity and skills, as is evidenced by the large growth in literacy levels and tertiary educational institutions, statistics indicate that the continent still lacks skilled workers in comparison to other continents.[[111]](#footnote-111) Some researchers observe that the increase in quantity of graduates has not come along with increasing quality and innovation. Most AU countries have established a right to education. To make this right more effective, requires further reforms to aid capacity building in Africa. Specifically, the requirement for foreign companies to ensure that a certain percentage of their personnel are made up of local home trained scientists. This method was utilized effectively by China in building the skills of its local population that helped revive its economy. Also, rather than sending nationals abroad to study courses, foreign universities should be encouraged to establish universities in Africa. For example, the African-American Institute is now financing a training program at McGill University and a University in France, to train African students at the masters level in economic management. But they have to move their course to universities in Africa within three years. That means they have to train the faculty in Africa.[[112]](#footnote-112) Capacity building would also require continuous training of staff. Provisions making it compulsory for countries to assign a certain proportion of taxes to educational development, and public-private partnerships could be useful to provide extra funding for Africa’s Least Developed Countries (LDCs). It is also important that academic institutions work with the private sector to ensure that research and resulting inventions are aligned to the needs of businesses. These policies will help build up local institutions and make them more fitting to meet the needs of businesses.

According to [Merriam-Webster](http://www.merriam-webster.com/dictionary/brain%20drain), brain drain is defined as, “a situation in which many educated or professional people leave a particular place or profession and move to another one that gives them better pay or living conditions.” The [Journal of the Royal Society of Medicine](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1275994/) reports that brain drain stems from a wide range of economic, social and political conditions. Most of these conditions are observed in developing countries where the careers of citizens are stifled from issues such as poverty, political instability and lack of technology.[[113]](#footnote-113)

Brain drain, which is the emigration of skilled nationals, results in a depletion of skilled human resource in the countries of origin, and is particularly acute in sub-Saharan Africa. Brain drain negatively affects the business environment in two ways: (i) Inability to sustain high skilled initiatives, as enterprises are less likely to obtain steady capable labour needed for sustained growth. For example, statistics from the Mo Ibrahim Foundation indicate that on average, it cost each African country between $21,000 and $59,000 to train a medical doctor. Since 2010, nine countries – Ethiopia, Kenya, Malawi, Nigeria, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe – have lost more than $2.0 billion from training doctors who then migrated. Annually, it is estimated that Africa loses around $2.0 billion through brain drain in the health sector alone.[[114]](#footnote-114) (ii) Reduced innovation, investments, entrepreneurship and job creation, as the best brains generally help foster innovations relevant to the market start up their industries in other countries that enjoy the resulting jobs and capital generated from investments. Also, companies tend to focus their research on the markets where they located. For example, analysts have linked the slow rate of research into and production of innovative medicines to treat the ailments of Africans to the habit of Western pharmaceutical companies to focus on ailments in their own area, rather than on tropical diseases like malaria which kill much larger number of people annually, then on other markets with the biggest potential to drive up their revenues. Africa’s medicine cabinet consists largely of generic drugs—meaning that most medications will have been on the market for at least a decade before people in Africa can gain access to them.[[115]](#footnote-115)

The African Union Migration policy framework (2018-2027) makes several recommendations on how to curb brain drain on the continent. These include generating gender-responsive economic development programmes to provide gainful employment, professional development, and educational opportunities to qualified nationals in their home countries. While African countries must put in place the necessary mechanisms to implement these recommendations, they will have to be complemented by adherence to merit-based recruitment procedures, development of infrastructure and provision of incentive mechanisms to attract and retain highly qualified African nationals.[[116]](#footnote-116) Rwanda offers an example of how these policies can be utilized to improve the business environment by African countries.[[117]](#footnote-117)

**3.2.6 Difficulty of Movement: People**: Most of the RECs that form the basis for the AfCFTA, already have protocols for free movement of peoples within each region. For example, under the ECOWAS visa, ECOWAS citizens holding an ECOWAS passport can travel freely between countries in the region for a maximum of 90 days. While this may foster individual trips and tourism, it does not adequately meet the needs of favourable business environment, where travel for work will likely require a much longer stay. This shortcoming was anticipated by ECOWAS, which in the third phase of implementing its protocol, focused on the facilitation of business through the right of Community citizens to establish enterprises (have access to, carry out and manage economic activities) in member states other than their states of origin. Its realization was intended to occur seamlessly, following the five years dedicated to implementing the right of residence. However, the right of establishment has not yet been meaningfully implemented in the sub-region.[[118]](#footnote-118) Despite adopting the Protocol on Free Movement, Right of Residence and Establishment, ECOWAS states have tended to be protective of their domestic business. West African states have not harmonized their immigration forms and level differing fees for the ECOWAS residence permit (fees range from 30,000 CFA in Benin, to $205 in Liberia).[[119]](#footnote-119) These factors may act as impediments to the freedom of movement and establishment of businesses by countries within the territory, which remains quite low.[[120]](#footnote-120)

With the AfCFTA requiring the free movement between all countries in the African Union, provisions will have to be made establishing its supremacy over previous regional agreements, and harmonization made in the application process/forms and fees between African countries. Enabling the business environment will not just require the free movement of peoples, but granting the right of residence and establishment to all businesses registered in Africa. It is interesting to observe that three of the countries that have consistently obtained high levels of investment and maintained business growth in Africa, are those that allow fellow Africans entry without visas.[[121]](#footnote-121) Establishment of a common data base for referral would be especially useful in achieving this goal. Provisions will have to be made that balance the ease of doing business, with protections to prevent the swamping of larger more successful economies like South Africa, Egypt, and Ghana, by their less robust neighbours.

**3.2.7 Difficulty in Financial Transactions, and Inconvertibility of Most African Currencies**: In the African Union, the financial sector is still developing; its shortcomings are reflected in the difficulties faced by households and corporations to acquire credit. Alfaro et al. (2004) and Choong, Yusop and Soo (2004) have pointed out that inadequate development of the financial sector either in the market aspects or relating to institutions restricts the readiness of an economy to enjoy the benefits accruing from foreign direct investment (FDI) spillovers. The benefits of other forms of capital inflows can also be reduced as a result of an inadequate development in the financial sector. Compared to other regions and countries in Africa such as South Africa and Egypt, financial sector development in West African (ECOWAS) countries was identified as lowest. For example, between 2001 and 2017, domestic credit to the private sector as a percentage of GDP in Egypt averaged 37%, whereas in South Africa it stood at 142%. However, in Nigeria, domestic credit to the private sector as a percentage of GDP averaged 13.03% between 2001 and 2017, and it was 4.85% in Sierra Leone in that period.[[122]](#footnote-122)

**3.2.8 Reliance on the Dollar for Intra-Continental Trade:**

Due to the lack of a single currency and because of the instability of most African countries, trade between African countries is largely carried out using the American dollar. This process increases the costs of doing business as fees had to paid for the conversion of African currencies to the dollar, then another fee for the conversion to the currency of the receiving country. This resulted in an estimated loss of close to $5 billion in payment charges annually which also helped to undermine trade among African countries.[[123]](#footnote-123)

Scholars emphasise that the western credit ratings systems being used to determine credit ratings where the environments are completely different. This is analogous to comparing apples with oranges. Enabling the business environment in Africa will require creating a system that relies less on the dollar, or other currencies for doing business.

**3.2.9 Lack of Implementation of Trade Laws: Judicial Systems**: Court impartiality is essential to business confidence. When courts are believed to be impartial and court decisions are properly enforced, businesses are more likely to engage in contractual transactions such as credit with suppliers and clients, confident that they can rely on a fair and timely legal resolution in case of dispute. In addition, confidence in an impartial judiciary able and willing to penalize wrongdoing also discourages business corruption. In enhancing the business environment, it is essential that trade laws are implemented and contracts between parties are given effect.

Major differences have been observed in the level of implementation of trade laws by common law and constitutional law countries in Africa, with the latter seen to be more effective. A viable business environment will require the building of judicial reforms that will enable courts to implement continental trade laws domestically.

**3.3 Key Findings**

* Internally, the private sector in Africa is characterized by less value-added production; export competitiveness, being low on the global value chain; weak inter-firm linkages; limited research, innovation and capacity building; less IP protection; and the prominence of the agricultural sector, SMEs, and the informal economy.
* External factors that affect the business environment include the lack of free movement; excessive customs and border controls; inadequate power generation; lack of connectivity; difficulty in cross-country financial transactions; reliance on the dollar for intra-continental trade; and the lack of enforcement of regional and continental trade regulations.
* Currently these factors are governed by a multiplicity of laws (such as labour law, migratory policy, financial regulations, IP) and institutions separate from international economic law.
* Enhancing the business environment will require an integrated approach, that allows for factoring the internal and external socio-economic factors into continental economic law.
* Though provisions for free movement are contained in the RECs, their implementation differs largely based on the economic capacity of countries. National economic capacity strongly influences migratory policy and freedom of movement. Free movement will require the economic advancement of states, imposing an external (continental) policy will not be adequate.
* One size does not fit all in applying economic and trade laws to advance national development. Hence, provision must be made for differential application of laws that allow countries to adopt strategies suited to their socio-economic context.
* Though the current business environment in Africa offers some challenges, it also offers a lot of new opportunities for private sector companies in sectors that are already saturated in other continents, like power production, ICTs, and manufacturing.

The following section examines the relevant multilateral and regional laws and institutions applicable to business in Africa and how they can be integrated, without conflict, to support an enabling business environment under AfCFTA.

**4.0 The Role of Multinational and Regional Organizations in Promoting Business in Africa**

Institutions are the humanly devised constraints that structure political, economic, and social interaction. In Africa some of the institutions that significantly affect the business environment include the banks, multilateral trade organizations and RECs. Scholars have identified a positive relationship between the quality of institutions governing business, and the growth of trade and development. However, while significant research has been carried out examining how institutions affect economic growth at a national level (e.g., Acemoglu & Robinson, [2008](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934); Easterly et al., [2006](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934); Rodrik, [2004](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934)), less research has been done focusing on continental and regional institutions in Africa. The impact of the quality of institutions on economic growth is also contingent on the role of corruption. The level of development of a country and a region may also be strongly correlated with its overall institutional quality (Rodrik, [2004](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934); Rodríguez-Pose, [2013](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934)).

Two approaches are adopted in analysing the impact of institutions on the business environment: firstly, the potential impact of national institutions is projected based on fixed indexes. The World Governance Indicators (WGI) from the World Bank (Kaufmann et al., [2009](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934), [2011](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934)) have become the most widely used indicator for analysing the effects of institutions on trade. Secondly, case studies have been made that carried out empirical analysis of the link between institutions and various measures of economic development. This research will adopt the former method, using indicators developed for the African context.

Broadly, institutions can be categorized into two qualitative categories: inclusive and extractive institutions. Acemoglu et al. ([2001](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934)) and Acemoglu and Robinson ([2012](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934)). Inclusive institutions, are those aimed at including the widest possible strata of society in economic and political life, which lead to well-functioning formal institutions, such as property rights, the accumulation of human capital within countries, resulting in higher economic growth. In contrast, extractive institutions are those aimed at excluding the majority of society from the process of political decision-making and income distribution. Exclusive industries often focus on the extraction of resources, benefiting elites and hampering economic growth. The presence of extractive institutions in a place is also expected to dampen trade flows (Beverelli et al., [2018](https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934)). Inclusive institutions, by contrast, are deemed to enable and accelerate trade and sustainable development.[[124]](#footnote-124) Because they offer higher levels of social inclusion, inclusive institutions are considered preferrable for African countries.

The following segment examines the relationship between international and regional trade institutions and Africa’s business environment, based on their level of adoption of African Governance Indicators (AGI), and their level of inclusiveness of African development interests.

**4.1 The Role of National Laws and Policies in Influencing Business an Enabling Business Environment in Africa**

**4.2 The Role of Multilateral Organizations in Promoting Business in Africa**

Because countries must consider previous agreements in negotiating new agreements, the provisions of multilateral treaties will influence business regulation at the regional level. Multilateral agreements relating to IPRs, plants, biodiversity and genetic resources in many cases provide the initial framework on which regional IP laws and policies are developed. Some of the recent changes in IP laws in African countries have been traced to attempts to conform to multilateral standards of TRIPS or the UPOV.[[125]](#footnote-125) Consequently, multilateral treaties play an influential role in determining subsequent policy space for domestic and regional implementation of IP regulations.

**4.2.1 The WTO and WIPO**

The largest multilateral organization regulating trade, the WTO plays a prominent role in influencing business through its GATT, GATS and TRIPS agreements that establish international standards for trading goods, services, and intellectual property. Also, the WTO *Agreement on Subsidies and Countervailing Measures* (the SCM Agreement) regulating trade in all goods, including IP protected and agricultural products, elaborate and expand upon the provisions of the GATT. The Paris and Berne Conventions saw the creation of international secretariats, which were merged in 1893 to form the United International Bureaux for the Protection of Intellectual Property (known by the French acronym of BIRPI). [[126]](#footnote-126) In a 1967 treaty, BIRPI was superseded by a new organization, the World Intellectual Property Organization (WIPO), which became a specialized agency of the United Nations in 1974, and is one of the main global organizations administering multilateral IP regulations.[[127]](#footnote-127)

Following the adoption of the WTO-TRIPS Agreement, WIPO sought to increase its global relevancy by negotiating agreements dealing with issues resulting from new technologies not addressed under previous agreements. Adopted in 1996, the WIPO Copyright Treaty (WCT) was one of such treaties, which deals with the protection of works and the rights of their authors in the digital environment.[[128]](#footnote-128)

The WTO sets minimum standards of IP and trade protection for member countries, and carries out compulsory judicial decisions affecting trade between countries. Technical support is also given to countries. Generally, the treaties and regulations of these institutions are granted superior hierarchy above continental and national trade laws.

*Though providing some special and differential treatment for developing countries and LDCs, the global trade rules are not considered as suitable for developing countries circumstances for three reasons*:

Despite the huge trade volumes – and profits – generated by globalisation, Africa’s share of global trade since 1970 [has fallen from 4.4% to 2.7%](https://bit.ly/2ZIejPD). This is partly because binding supply-side constraints have limited Africa’s exports largely to natural resources and primary commodities. But unfair trade rules also have undermined Africa’s foreign-trade growth in sectors where the region could benefit from comparative advantage. For starters, persistent import barriers in developed economies – including [tariff escalations](https://bit.ly/3mzOfA3) and stringent standards for final goods – have limited Africa’s ability to move up value chains.

Shifting rules are another obstacle to Africa’s effective integration into the global economy. In particular, advanced economies do not allow developing countries to adopt the industrial policies that they themselves used to transform their production structures and diversify their exports. The University of Cambridge economist Ha-Joon Chang described this phenomenon as rich countries “[kicking away the ladder](https://anthempress.com/kicking-away-the-ladder-pb)” with which they had climbed to the top.

But perhaps the most serious indictment against the WTO system is the agricultural subsidies developed-country governments provide, at the expense of millions of Africa’s poorest farmers. These subsidies not only depress world food prices, making it difficult for African producers to compete, but also lead to excess production being dumped in African markets, which wipes out local industries and thus threatens food security.[[129]](#footnote-129)

A recent survey commissioned by the Pan-African Private Sector Trade and Investment Committee (PAFTRAC) of over 200 African CEOs – including leaders of multibillion-dollar firms, start-ups, and other fast-growing businesses – revealed a clear consensus on the need to reform the WTO. And a majority of those who report that trade is an important growth driver for their business also stress that unfair trade practices severely constrain their companies’ expansion. For example, Ghana and Côte d’Ivoire produce 70% of the world’s cocoa, but until recently accounted for less than [5% of the global processed cocoa market](https://brook.gs/32wRD6C).[[130]](#footnote-130)

Thus, while keeping the provisions of the WTO will be important in creating an enabling business environment in Africa, it is most important that this be done in a manner that maintains the flexibilities provided under the agreements for SMEs and developing countries. A sustainable business environment requires not just free, but also fair trade between participating countries.

**4.2.2 The UN System**

Through its unique capacities as the world’s premiere vehicle for international cooperation, the UN system plays a crucial role in coordinating assistance of all kinds — to help Africa help itself. From promoting the development of democratic institutions, to establishing peace between warring nations, the UN is present on the ground supporting economic and social development and the promotion and protection of human rights.

The ability of African countries to gradually consolidate more proactive joint positions during WTO negotiations has been credited to the help of UN organizations. They were assisted by a dedicated programme of information and capacity building and the framing of a 'positive' negotiating agenda, largely under the auspices of the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP) [1998, 1998b, 1999], and the UNECA.[[131]](#footnote-131)

*The main gain that UN system is that it has adopted the view that the granting of business and trade rights should also advance developmental goals*. This can be seen in the adoption of the SDGs and the New Partnership for Africa’s Development. Keeping this requirement that trade advance local development will be important in creating an enabling business environment in Africa.

**4.2.3 The ITC, IMF and World Bank**: Multilateral development banks (MDBs) are financial institutions created by governments via international treaties to provide financing and technical assistance for the purpose of development. Then World Bank and the International Monetary Fund (IMF) are examples of MDBS, while The International Trade Centre (ITC) is a subsidiary of the United Nations Conference on Trade and Development (UNCTAD) and the World Trade Organization (WTO) that provides technical assistance on global trade to businesses in developing countries.

The World Bank and the International Monetary Fund (IMF) are the two most powerful institutions in global trade and finance. These institutions provide countries with loans, based on conditions that they make certain adjustments to their markets, trade, and financial institutions. The most well known example of these are the structural adjustment programs. SAPs require governments to: cut public spending,(including eliminating subsidies for food, medical care and education); raise interest rates, thus reducing access to credit; privatize state enterprises; increase exports; and reduce barriers to trade and foreign investment such as tariffs and import duties. These measures are supposed to generate export-led growth that will attract foreign direct investment and can be used to reduce debt and poverty. These conditions affect the business environment, as they determine the conditions under which trade takes place. ACP countries were persuaded to adopt World Bank-imposed structural adjustment programmes (SAPS) under the increasing management and supervision by the EU of its financial assistance.[[132]](#footnote-132)

Despite offering a source of income, the World Bank and IMF policies have been criticized as being inappropriate for developing countries, because the high interest rates charged keep the countries perpetually in debt.[[133]](#footnote-133) For example, currently African countries spend large percentages of their annual income on servicing World Bank and IMF loans. The reforms adopted under the SAPs did not foster economic growth in Africa.[[134]](#footnote-134) In Nigeria claims were recently made that the country now depends on the IMF, World Bank to pay the salaries of workers.[[135]](#footnote-135) Unstable inadequate income and employment are paramount to an enabling business environment. This point was poignantly related by one economist in the following words: "The World Bank says the price you charge for rice is too high… you must allow rice imports". But if rice is at one CFA franc on the market and “if the 300,000 families have lost their job, thus their income, what will they buy? How will they live?"[[136]](#footnote-136)

The International Trade Centre (ITC), a subsidiary of the United Nations Conference on Trade and Development (UNCTAD) and the World Trade Organization (WTO), provides technical assistance on global trade to businesses in developing countries through its ‘Aid for Trade’ program.[[137]](#footnote-137)Aid for Trade is the name we give to development assistance that builds the productive capacity of countries and companies to trade.

Economist Joseph Stiglitz denounced the fund as a primary culprit in the failed development policies implemented in some of the world’s poorest countries. He [argues](https://www.globalpolicy.org/social-and-economic-policy/the-three-sisters-and-other-institutions/internal-critics-of-the-world-bank-and-the-imf/50588-interview-with-joseph-stiglitz.html?itemid=id#942) that many of the economic reforms the IMF required as conditions for its lending—fiscal austerity, high interest rates, trade liberalization, privatization, and open capital markets—have often been counterproductive for target economies and devastating for local populations.[[138]](#footnote-138)

Considering these facts, creating an enabling business environment would require that any loans taken from these institutions be critically analyzed to ensure that they actually suit the context in which they apply, as one size does not fit all in developing an enabling business environment. It might also be useful to adopt policies requiring that the loans be made in the form of infrastructural development, which is the method adopted by China in its contemporary loans to African countries. This would reduce the possibility of loans being misappropriated by corrupt government systems and ensure that they produce substantial developments that positively affect the common man on the street.

**4.3 The Role of Continental and Regional Regulations and Organizations in Advancing Africa’s Business Environment**

**4.3.1 The African Union**

**Background**:On 21 March 2018 during an extraordinary summit held in Kigali, 44 member states of the African Union (AU) signed the Agreement Establishing the African Continental Free Trade Area (AfCFTA).[[139]](#footnote-139) In July, 2018, during the 31st African Union summit held in Nouakchott, 5 additional member states of the African Union signed the Kigali Declaration, by which they committed to sign the Agreement of the African Continental Free Trade Area once they had undertaken necessary national consultations.[[140]](#footnote-140)

A free trade area is a form of economic integration whereby countries reduce or abolish all trade impediments among themselves, but retain their individual policies and trade barriers with the outside world. All the tariffs and quantitative restrictions on substantially all trade are eliminated. Establishing a free trade area in Africa is about liberalising intra-regional trade among countries in the continent. [[141]](#footnote-141) The creation of a free trade zone means that each member country has the power to determine or fix its own tariff rates on imports from non-member countries. It also means that the rules of origin are designed in such a manner that preferential treatment is confined to goods or services emanating from within the free trade area. By so doing, member states are able to derive benefits from the preferential trading arrangements.[[142]](#footnote-142)

The emerging African free trade area is part of the AU’s regional integration strategy to overcome the constraint of small and fractioned markets and economies in Africa. The establishment of free trade areas is consistent with the international trading system of the WTO, as provided in Article XXIV of the General Agreement on Tariffs and Trade (GATT) of 1947, the Enabling Clause and Articles V and V(bis) of the General Agreement on Trade in Services (GATS). The AfCFTA is a mega-regional agreement which will encompass the 55 member countries of the AU and eight recognized Regional Economic Communities (RECs).[[143]](#footnote-143) This will be one of the world’s largest free-trade areas in terms of the number of countries, covering more than 1.2 billion people and over $4 trillion in combined consumer and business spending if all 55 countries join. Phase II of the AfCFTA negotiations will focus on investment, IP rights and competition policy with the draft legal texts being due for submission to the Assembly by January 2020.[[144]](#footnote-144)

In the preamble of AfCFTA, member countries of the African Union state their determination to build upon their rights and obligations “under the Constitutive Act of the African Union of 2000, the Treaty Establishing the African Economic Community of 1991 and, where applicable, the Marrakesh Agreement Establishing the World Trade Organisation of 1994.” They also acknowledge several regional economic communities (RECs), including ECOWAS, as the building blocs upon which AfCFTA will be established. This hints at a desire to conform with existing multilateral and regional trade agreements relevant to Africa.

**4.3.2 The Regional Economic Communities**

Regional trade agreements (RTAs) are expanding in number and in the range of subjects they cover.[[145]](#footnote-145) Studies show that around 80 per cent of all intra-African trade flows through agreements made by regional economic communities (RECs), which dominate other trade arrangements.[[146]](#footnote-146) ECOWAS is one of the five RECs in Africa responsible for 67 per cent of all intra-African traded volumes in 2015.[[147]](#footnote-147) The large number of RTAs engaged in by West African countries, creates additional layers of regulation relating to IP and trade. This raises the issue of how the multiple layers of law can be harmoniously coordinated, and how the differing objectives of the agreements can be reconciled.

Moreover, contemporary RTAs applicable to West Africa go beyond regulating tariffs, to cover multiple policy areas that affect food security and agricultural production, including competition policy, government procurement rules, and IPRs. [[148]](#footnote-148) This raises another issue of how to balance regional discretion with the requirement for coherence in the multilateral regime? The next section analyses these issues by examining the general nature and functions of RTAs.

**The Common Market for Eastern and Southern Africa (COMESA)**

The largest regional grouping in Africa, COMESA includes 20 countries of North, Central, and Southern Africa. It was established in 1994, replacing the Preferential Trade Area created in 1981. About half the member countries eliminated tariffs on intraregional trade in 2000, subject to rules of origin that have never been fully agreed upon. Goals for 2004 were full trade liberalization and establishment of a common external tariff. COMESA’s progress in eliminating tariffs has been more rapid and complete than most other developing country groupings. Nevertheless, COMESA does not have an effective conflict resolution mechanism, and individual members have been able to treat imports from other members arbitrarily. Uncertainty about such matters and about political stability in some countries has meant that few businesses have been willing to invest based on access to a COMESA-wide market.[[149]](#footnote-149)COMESA treaty revised established a regional court. Provision of the agreement relevant to business environment include Articles 151, 153, 156-159, Chapter 26, Articles 161 and 164.

**The Community of Sahel-Saharan States (CEN-SAD)**

The Community of Sahel-Saharan States (CEN-SAD) was **established on 4 February 1998,** following the Conference of Leaders and Heads of States held in Tripoli, Libya. CEN-SAD became a regional economic community during the thirty-sixth ordinary session of the Conference of Heads of State and Government of the Organization of African Unity, held in Lomé, Togo, from 4 to 12 July 2000.[[150]](#footnote-150) CEN-SAD was established in February 1998 by six countries, but since then its membership has grown to 29. One of its main goals is to achieve economic unity through the implementation of the free movement of people and goods in order to make the area occupied by member states a free trade area. At the international level, CEN-SAD gained observer status at the [UN General Assembly](https://en.wikipedia.org/wiki/UN_General_Assembly) in 2001 and concluded association and cooperation accords with the [United Nations Economic Commission for Africa](https://en.wikipedia.org/wiki/United_Nations_Economic_Commission_for_Africa) (ECA) and with UN specialized agencies and institutions such as [UNDP](https://en.wikipedia.org/wiki/UNDP), [WHO](https://en.wikipedia.org/wiki/WHO), [UNESCO](https://en.wikipedia.org/wiki/UNESCO), [FAO](https://en.wikipedia.org/wiki/FAO), and the [Permanent Interstate Committee for drought control in the Sahel](https://en.wikipedia.org/wiki/Permanent_Interstate_Committee_for_drought_control_in_the_Sahel).

All CEN-SAD member countries are also participating in other African economic unions, that have the aim to create a common [African Economic Community](https://en.wikipedia.org/wiki/African_Economic_Community). The envisioned Free Trade Area of CEN-SAD would be hard to practically implement, because it is overlapping with the envisioned [customs unions](https://en.wikipedia.org/wiki/Customs_union) of the [Economic Community of West African States](https://en.wikipedia.org/wiki/Economic_Community_of_West_African_States) (ECOWAS/CEDEAO), [ECCAS](https://en.wikipedia.org/wiki/ECCAS) and [COMESA](https://en.wikipedia.org/wiki/COMESA) and other [trade blocs](https://en.wikipedia.org/wiki/Trade_bloc) more advanced in their integration.[[151]](#footnote-151) There are questions whether its level of economic integration qualifies it under the enabling clause of GATT. The Community has partnership  agreements with many regional and international organizations with the aim of  promoting common and shared action in political, cultural, economic and social  field. This status was confirmed by the decision of the Assembly/AU/Dec.112  (VII) of the 7th Conference of Heads of State and Government of the African  Union.

The establishment of a continental economic union, that  complements the local development plans of AU member states and RECs, should remove all restrictions  hampering the integration of the member countries through the adoption of  measures that provide for:

1. Free movement of persons, capitals and interests of nationals of member States;
2. Right of establishment, ownership and exercise of economic activity;
3. Free trade and movement of goods, commodities and services from member States;
4. The promotion of external trade  through an investment policy in member States.
5. The increase of means of land, air and maritime transport and communications among member States and the execution of common projects.
6. The same right, advantages and obligations granted to their own citizens to nationals of the signatory countries in conformity with the provisions of their respective constitutions.
7. The harmonization of educational, pedagogical, scientific and cultural systems of the various cycles of  education.[[152]](#footnote-152)

The objectives of the CEN-SAD generally agree with the factors identified as useful for creating an enabling business environment in African countries. However, the region does not support the idea of a single currency or monetarized union for African countries.

**The East African Community (EAC)**

The East African Community (EAC) is an intergovernmental organisation composed of six countries in the [African Great Lakes](https://en.wikipedia.org/wiki/African_Great_Lakes) region in [eastern Africa](https://en.wikipedia.org/wiki/Eastern_Africa): [Burundi](https://en.wikipedia.org/wiki/Burundi), [Kenya](https://en.wikipedia.org/wiki/Kenya), [Rwanda](https://en.wikipedia.org/wiki/Rwanda), [South Sudan](https://en.wikipedia.org/wiki/South_Sudan), [Tanzania](https://en.wikipedia.org/wiki/Tanzania), and [Uganda](https://en.wikipedia.org/wiki/Uganda). [Uhuru Kenyatta](https://en.wikipedia.org/wiki/Uhuru_Kenyatta), the president of Kenya, is the current EAC chairman. The organisation was founded in 1967, collapsed in 1977, and was revived on 7 July 2000. The capital of the EAC is [Arusha](https://en.wikipedia.org/wiki/Arusha), Tanzania.

In 2008, after negotiations with the [Southern African Development Community](https://en.wikipedia.org/wiki/Southern_African_Development_Community) (SADC) and the [Common Market for Eastern and Southern Africa](https://en.wikipedia.org/wiki/Common_Market_for_Eastern_and_Southern_Africa) (COMESA), the EAC agreed to an expanded free trade area including the member states of all three organizations. The EAC is an integral part of the [African Economic Community](https://en.wikipedia.org/wiki/African_Economic_Community).

The EAC is a potential precursor to the establishment of the [East African Federation](https://en.wikipedia.org/wiki/East_African_Federation), a proposed federation of its members into a single [sovereign state](https://en.wikipedia.org/wiki/Sovereign_state). In 2010, the EAC launched [its own common market](https://en.wikipedia.org/wiki/East_African_Community#Common_market) for goods, labour, and capital within the region, with the goal of creating a common currency and eventually a full political [federation](https://en.wikipedia.org/wiki/Federation). In 2013, a protocol was signed outlining their plans for launching a monetary union within 10 years. In September 2018 a committee was formed to begin the process of drafting a regional constitution.[[153]](#footnote-153)

The key aspects of the customs union established by the EAC include:

1. a Common External Tariff (CET) on imports from third countries;
2. duty-free trade between the member states; and
3. common customs procedures.

Different rates are applied for raw materials (0%), intermediate products (10%) and finished goods (25%), the latter percentage is fixed as the maximum. This represents a significance decrease from what was previously the maximum in Kenya (35%), Tanzania (40%) and Uganda (15%). However, this customs union is not yet fully implemented, because there is a significant list of exclusions to the Common External Tariff and tariff-free movement of goods and services. Technical work is also needed to harmonise and modernise the customs procedures in the EAC's major ports of entry.[[154]](#footnote-154)

The expected revenue benefits are understood to be minimal by many analysts, based on comparative-static simulation exercises demonstrating the one-off impacts of the immediate introduction of the CU's full tariff package. The findings suggest an increase in intraregional trade that is largely the result of trade diversion, not trade creation, with some aggregate welfare benefits in Kenya and Tanzania but welfare losses in Uganda. From a trade-integration perspective, the EAC may not be the best-chosen unit, because the current trade between the three countries is small compared to their external trade, and the EAC's 105 million citizens do not represent a large market in global terms, given the very low average incomes. The provisions of the EAC relevant to business are Articles 127-129.

**The Economic Community of Central African States (ECCAS)[[155]](#footnote-155)**

Like other RECs the ECCAS eliminates customs duties between member states, while establishing a common customs tariff to goods imported from third countries. (Articles 28-29). However, there are two provisions of the ECCAS agreement that might prove problematic in establishing an enabling environment for trade. These are Article 31 (Imbalance of Trade), which permits countries to take action to stop trade where the reduction or elimination of duties and levies lead to an imbalance of trade. Article 31.1 states that:

“1. For the purposes of this article, trade is imbalanced if: a) imports of any particular product by a Member State from another Member State increase significantly; b) this increase in imports causes or would cause serious damage to production which is carried on in the territory of the importing Member State.”

This provision in effect would allow countries to override the private rights of companies if they begin to sell more goods in a certain state. This does not concur with the principle of fair trade identified as conducive for business. Thus, it would be advisable that the provision be revised to fulfill the requirements of AfCFTA.

Article 35 adopts the MFN principle, but not the NT principle. This leaves room to favour national corporations over foreign enterprises. This differs from the AfCFTA provisions which require equal treatment of both national and foreign goods for business facilitation.

Secondly, the ECCAS contains several overlapping provisions. Given that all CEMAC members are in ECCAS, regional trade policy is based on the harmonisation of the ECCAS and CEMAC trade areas (AfDB, 2011). However, efforts to harmonise trade classifications, tariffs and legislation are still on-going as part of steps to align customs procedures between the two. In the meantime, intra-regional trade is centered on the concept of ‘shared territoriality’. CEMAC’s Generalised Preferential Tariff is applied in CEMAC-zone members, and ECCAS tariffs applied on extra-regional imports among non-CEMAC members. This aims “to avoid conflicts with existing institutions, given ECCAS’ failure to meet the time frame of its treaty and annexed protocols” (AU Commission, 2013). The AfDB identifies overlapping memberships and the delay in establishing a harmonised Common External Tariff (CET) between ECCAS and CEMAC as one of the main explanations for the poor intra-regional trade (AfDB, 2011).6[[156]](#footnote-156) This will require amending of the provisions in order to fulfill the harmonization requirements of AfCFTA.

Article 6 of the Treaty Establishing ECCAS indicates the creation of a free trade area and a customs union in twenty-years. In July 2004, ECCAS launched its free trade area with the aim of establishing a customs union of common external tariff by 2008. The timetable for establishing the free trade area was however postponed due to the weak domestication of agreed procedures by member States[[1]](file:///C:\Users\igebretensay\Desktop\ORIA\FINAL%20VERSIONS\ORIA%20EDITED%20versions%20(plus%20AMU)\SRO%20edited\DONE\Economic%20Community%20of%20Central%20African%20States%20-%20Master%20(SRO,REC).docx#_ftn1). On average, member States reduced only 34 per cent of tariff lines on intra-ECCAS tariffs to zero, making ECCAS the region to have the lowest share of intra-regional trade in terms of gross domestic product compared to Africa’s five sub-regions[[2]](file:///C:\Users\igebretensay\Desktop\ORIA\FINAL%20VERSIONS\ORIA%20EDITED%20versions%20(plus%20AMU)\SRO%20edited\DONE\Economic%20Community%20of%20Central%20African%20States%20-%20Master%20(SRO,REC).docx#_ftn2). To meet the integration challenges, ECCAS Member States adopted in 2007 a strategic integration plan and a vision called the ECCAS Strategic Vision at the Horizon 2025 that aims at building a competitive regional environment to attract private investments in growth areas. In March 1994, UDEAC was replaced by CEMAC which is a customs and monetary union between six of ECCAS member States, namely: Cameroon, Central African Republic, Chad, Congo, Gabon and Equatorial Guinea. The monetary union is operating, however, the operationalization of the customs union has not yet been realized.[[157]](#footnote-157)

Notwithstanding these efforts, it should be pointed out that many challenges still need to be addressed in order to achieve an appreciable level of regional integration in Central Africa.

At the political level, understanding and rapprochement among countries, in line with the spirit of the African Union, represent the greatest challenge to regional integration in  
Central Africa. The region is made up of fragile states, landlocked countries, and forest countries, that see greater gain in rivalry, rather than collaboration. Densification of basic infrastructure, improved interconnections of national transport networks between Central African countries, an increase in per capita electricity consumption (currently 12.5 kWh compared to 17.3 for the continent), improved access to ICT (per 1000 inhabitants there are 10.2 Internet access lines, 21.6 mobile telephone lines and 3.6 fixed telephone lines compared with 61.8, 37.6 and 32 , 4 respectively for the continent) are major challenges that the region will need to resolve in order to promote the emergence of a dynamic and competitive private sector.

In terms of trade and integration, the priority activities to be implemented relate in particular to the effective implementation of a number of decisions, in particular: (i) Protocol on freedom of movement and the right of establishment (ii) establishment of the compensatory mechanism, (iii) adoption of a common CEMAC / ECCAS TEC, (iv) elimination of tariff and non-tariff barriers, and (v) adoption of agricultural and industrial policies.[[158]](#footnote-158)

**The Economic Community of West African States (ECOWAS)**

Founded in 1975, ECOWAS is a union of fifteen West African countries, whose goals are “to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations-among Member States and contribute to the progress and development of the African Continent.” of ‘fostering and accelerating the economic and social development of countries in order to improve the living standards of their peoples, through effective economic co-operation and integration, based on a policy of self-reliance.[[159]](#footnote-159) This indicates that ECOWAS adopts the instrumentalist approach, as the overall goal of the rights granted under the treaty is to foster socio-economic development of countries in order to improve people’s living standards. The methods adopted by ECOWAS include policy harmonization, trade liberalization, free movement of goods, customs and monetary union, and a common market (Article 3.2). However, studies have rated ECOWAS poorly in achieving the various target dates set for achieving these goals.

With regard to the private sector, ECOWAS allows for ‘the promotion of joint ventures by private sector enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments; and the adoption of measures for the integration of the private sectors, particularly the creation of an enabling environment to promote small and medium scale enterprises.[[160]](#footnote-160) The provisions most relevant to businesses are contained in chapter VIII (Cooperation in Trade, Customs, Taxation, Statistics, Money and Payments), which removes quota, quantitative or like restrictions or prohibitions and administrative obstacles to trade among the Member States, establishes a common external tariff in respect of all goods imported into the Member States from third countries; allows for free movement of good between countries.

The National Treatment principle is upheld in Article 40 of the ECOWAS Agreement which states that: “Member States shall not apply directly or indirectly to imported goods from any Member State fiscal charges in excess of those applied to like domestic goods or otherwise impose such charges for the effective protection of domestic goods. Member States shall eliminate all effective internal taxes or other internal charges that are made for the protection of domestic goods not later than four years after the commencement of the trade liberalisation scheme referred to in Article 54 of this Treaty.”

The main business regulation of the ECOWAS FTA is the Economic Trade Liberalisation Scheme (ETLS) aimed at liberalising trade within the ECOWAS region. This aims to a) eliminate between member states customs duties and other charges of equivalent effect on imports and exports; and b) eliminate quantitative and administrative restrictions on trade among members (Treaty of Lagos, 1975). ETLS was adopted by ECOWAS in 1983 and entered into force in 1990 with the strong support of Ghana and Nigeria, who both aimed to export their industrial products in the region and foster their bilateral trade. It aims at removing internal tariffs on unprocessed goods and handicraft products (expanded to industrial products in 1990). However, for industrial and artisanal manufactured goods, as well as for agricultural products, livestock, mining and fishery, the ETLS holds strict Rules of Origin, favouring local production. Although it was not accompanied by a monitoring and evaluation mechanism, it provided a compensation mechanism right at the outset to offset some of the tariff revenue losses member states would face. The ETLS was meant to be implemented progressively over a ten-year-period, with a zero rate of duty and tariff in all member states by December 2000. In practice, however, the implementation of the ETLS was rather disappointing, as recognised also by the ECOWAS Commission.[[161]](#footnote-161)

The 1975 treaty also foresees to “establish a common external tariff structure and commercial policy towards non-member countries” (Treaty of Lagos, 1975). The ECOWAS common external tariff (CET) was adopted in October 2013 after years of intense negotiations and built on lessons learnt from the ETLS. The ECOWAS CET is largely based on the West African Economic and Monetary Union’s (also known by its French acronym UEMOA) CET, which was set up as early as 2000. However, while the UEMOA CET contains four tariff bands, the ECOWAS CET includes five, adding one more higher band to the original design. The tariff bands are set at 0%, 5%, 10%, 20% and 35%. The fifth tariff band is meant to protect sensitive industries and is the result of a strong push by Nigeria. Very well aware of some of the key challenges that the West African economies face in implementing the CET (especially for agriculture), ECOWAS designed trade defense measures, which consist mainly of safeguard measures to temporarily restrict imports for certain products; countervailing duties to counteract the effects of subsidies; anti-dumping measures to counteract unfair practices; and additional protection measures. The implementation of the ECOWAS CET started in January 2015. So far 10 of the 15 ECOWAS countries have implemented the ECOWAS CET: Benin, Burkina Faso, Côte d’Ivoire, Ghana, Guinea-Bissau, Mali, Niger, Nigeria, Senegal and Togo. The delay experienced in the remaining five countries is explained by the Ebola outbreak (e.g. Sierra Leone), elections (Cape Verde), but also the fact that there was a delay in transmitting the Portuguese version of some CET documents. Further, Côte d’Ivoire has maintained the top rate of 20% (instead of 35%) for duties and taxes applied to some imports including, for example meat from third countries.[[162]](#footnote-162) Despite containing provisions that legally agree with both the AfCFTA and WTO Agreements, studies have identified lack of implementation of its provisions as a major problem of the ECOWAS CET.

In spite of the trade facilitation measures introduced by the ECOWAS Inter-State Road Transit (ISRT) Convention, which allows the transportation of goods by road from one Customs Office in a Member State to another Customs Office in another Member State through one or more Member States free of duties, taxes and restrictions while in transit, such as the common customs bond and logbook system, it is not speeding up intra-regional trade in the way that it should.[[163]](#footnote-163) Free movement of goods is incomplete in the region, as both tariff and non-tariff barriers to trade between member states still persists. For example, in a 2012 study by the ILO, several companies reported that shipping a container from Benin or Senegal to a European or American port was less cumbersome for them than shipping it across a land-border to a neighbouring country. The main obstacles mentioned were poor infrastructure as well as harassment, long waits and charges at intra-ECOWAS borders and sometimes even along the road. Companies frequently complained about arbitrary charges at the border and customs charges on products that should not carry any customs duty under the ECOWAS agreements. One company director pointed out that due to the EU’s “Everything but Arms” initiative, market access conditions were more favourable for his products in Europe than within the region.[[164]](#footnote-164) A report by the ECOWAS Secretariat states that 174 roadblocks existed along the road linkage Lagos-CotonouLomé-Accra-Abidjan-Ouagadougou in 1999. The eight francophone countries that form the West African Monetary Union (UEMOA), a subset of ECOWAS, maintain a common currency. These countries have considerably more monetary stability than other West African countries. ECOWAS had proposed monetary union of the non UEMOA countries, to be followed in 2004 by integration into a single monetary zone, but is yet to achieve those objectives.[[165]](#footnote-165)

While some progress has certainly been made in reducing tariffs, they have not been fully eliminated. Progress towards removing non-tariff barriers, such as seasonal import and export bans, has been even slower. Both problems require advocacy by the private sector and ECOWAS, as well as other partner programmes/ projects, because these barriers have constituencies that want to see them maintained. Domestic industries that benefit from the protection that trade barriers provide and customs agencies that generate revenues (formal and informal) from tariffs and fees are both likely obstacles to change.[[166]](#footnote-166) Regarding the free movement of peoples, citizens of ECOWAS countries still need to obtain visas to travel to other ECOWAS states. Most companies mentioned difficulties to access finance as a major obstacle to their operations, regardless of the destination of their exports.[[167]](#footnote-167)

The ECOWAS treaty is less detailed than other regional treaties like the East African and South African ones, and seems to leave the implementation of its aspirations to national laws. ECOWAS adopted the principle of functional cooperation which means that regional organisation only requires 'delegated, conditional and limited authority' from its member states. This means in practice that ECOWAS has limited authority over member governments. Therefore, ECOWAS has limited means to enforce the effective implementation of policy at national level, which remains member states’ responsibilities. This power imbalance between ECOWAS and the member states is reinforced by the absence of active dispute and binding sanction mechanism attached to trade policies.[[168]](#footnote-168) Providing a good environment for business in ECOWAS states would require giving the treaty’s provisions the teeth to bite, by creating detailed rights and consequences in national regulations relating to free movement of persons and goods, and for the protection of business rights. Recommendations on how this may be achieved are provided in part V of this article.

**The Inter-Governmental Authority on Development (IGAD)2**

The Intergovernmental Authority on Development (IGAD) in Eastern Africa was created in 1996 to supersede the Intergovernmental Authority on Drought and Development (IGADD) which was founded in 1986 to mitigate the effects of the recurring severe droughts and other natural disasters that resulted in widespread famine, ecological degradation and economic hardship in the region. Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda - took action through the United Nations to establish the intergovernmental body for development and drought control in their region. Eritrea became the seventh member after attaining independence in 1993 and in 2011 South Sudan joined IGAD as the eighth member state. The Summit endorsed the decision to enhance regional cooperation in three priority areas of food security and environmental protection, economic cooperation, regional integration and social development peace and security.[[169]](#footnote-169)

As stipulated in Article 7 of the Agreement Establishing IGAD, the aims of IGAD include: • Promote joint development strategies and gradually harmonize macro-economic policies and programmes in the social, technological and scientific fields; • Harmonize policies with regard to trade, customs, transport, communications, agriculture, and natural resources and environment, and promote free movement of goods, services, and people within the region. • Create an enabling environment for foreign, cross-border and domestic trade and investment.

IGAD’s focus for regional economic cooperation and integration is to create an open, unified, regional economic space for the business community – a single market open to competitive entry and well integrated into the continental and global economies. In the transport and infrastructure sub-sector, the IGAD interventions are based on the Horn of Africa Initiative (HOAI). The HOAI was designed to provide the IGAD Region with badly needed connectivity but guided by a broad regional policy that calls for a safe, secure and efficient integrated infrastructure system responsive to the needs of the people and the economy and to strengthening of regional integration by unlocking small scattered markets along the region and creating a bigger regional market space that will enhance IGAD’s economic competitiveness. Therefore, the main thrust for the IGAD regional infrastructure is based on the HOAI and goes in line with the AU PIDA strategic framework for 2040. The IGAD Free Trade Area (FTA) and the Minimum Integration Plan envisaged in the six stages for the accomplishment of the African Economic Community (AEC), which include the creation of a free trade area and customs union in each of the eight regional blocks by 2017 that is too ambitious to achieve. The implementation of the IGAD FTA entails the establishment of Free Mobility Regime through the implementation of a Protocol for the Free Movement of Persons. This aims to reduce travel restrictions persisting in the region and to facilitate movement, the right of establishment of business and employment, residence, the acquisition of work permits, and pastoral mobility.

In the industry sub-sector IGAD is scaling up industry activities like minerals resources processing and development, agro-processing, cotton, textiles and apparels, metal processing and fabrication in conjunction with its member states. The successful implementation of these industry activities will enhance regional integration and economic cooperation and value addition. More importantly it will add value to the living standards of citizens in the member states as it boosts intra-African trade.[[170]](#footnote-170)

It is worthy to note that IGAD Strategy Pillars are consistent with the pillars of the UN sustainable development goals (SDGs) in general and the AU-agenda 2063 in particular. Enhanced regional co-operation in these closely inter-linked Pillar areas of the Strategy would add value to, and complement the efforts of IGAD Member States in their development endeavours.

**The South African Development Community (SADC)**

SADC was originally established as a grouping of “frontline” states to reduce economic dependence on South Africa. With the end of apartheid, South Africa became a member, and SADC’s focus became one of economic integration, encompassing such sectoral issues as transportation, communications, and energy, in addition to free trade. Nine SADC members are also members of COMESA. Though some steps have been taken toward harmonizing COMESA and SADC nomenclature and procedures, the two institutions still operate at substantial cross purposes. Nevertheless, the size and stability of the South African market provides a more reliable basis for investment in smaller SADC countries than any other RTA grouping discussed here. A Southern Africa Customs Union (SACU) that includes South Africa, Botswana, Lesotho, Namibia, and Swaziland further complicates SADC. These five countries maintain a customs union where goods flow freely and tariff revenues are shared based on a mathematical formula. The SACU countries also have a single monetary unit, the South African rand. The United States and SACU announced in late 2002 the intention to negotiate a free trade agreement in 2003.[[171]](#footnote-171)

**The Arab Maghreb Union (AMU).**

The Arab Maghreb Union (AMU) traces its origins to the Marrakech Treaty signed in 1989 by its five founding members: Algeria, Libya, Morocco, Tunisia and Mauritania. The AMU was created to advance economic integration, strengthen peace and cooperation, and deepen intra-regional trade amongst its member states.

To date, the Arab Maghreb Union’s (AMU) efforts at economic development have been to look outwards, firstly at their European Union (EU) and thereafter select Arab and sub-Saharan countries for trading partners, rather than their immediate neighbours. AMU countries are partied to a variety of European and Arab-led initiatives focused on building closer economic ties and deepening cooperation. This has disincentivized efforts to deepen integration amongst themselves. Competing domestic interests and higher economic gains outside the region, combined with political deadlocks amongst AMU members, have resulted in neglect for regional integration efforts within the Maghreb. Despite these challenges, the African Union (AU) has identified the AMU as one of the building blocks to drive the AfCFTA’s continental vision for integration.[[172]](#footnote-172)

When measured against other African RECs, the AMU performs best on macro-economic integration and weakest on free movement of persons (Figure 3). To date, Tunisia, Morocco, Algeria and Libya have all been rated as amongst the least committed countries to the AfCFTA process owing to their restrictions on the free movement of persons – in contrast to their Southern African counterparts.34Mauritania is the only country offering visa-free travel for its Maghreb neighbours. Tunisia has made important progress in opening its borders for travel and modernising its visa system by issuing electronic visas.35 However, opportunities for job seeking in neighbouring states remain stifled across the region, partially as a result of the Maghreb’s enduring status as an emigration region. The free movement of persons is a vital requirement for the creation of any free trade area, including the AfCFTA. Future, long-term regional development cannot occur without support and buy-in for the AfCFTA’s vision of a single market. This includes supporting labour mobility, visa-free travel, and job creation for the AMU’s nationals.[[173]](#footnote-173)

Implementing AfCFTA will also require the AMU countries to change their focus from expanding trade with European and Arab countries, to deepening intra-continental trade within Africa. Morocco and Tunisia have both adopted this strategy. In 2017, Morocco re-joined the AU and requested to join ECOWAS. In 2018 Tunisia joined the Common Market for Eastern and Southern Africa (COMESA).39 Their actions illustrate a desire to build deeper relations with sub-Saharan African countries and to leverage their relatively diversified economies to its full exporting potential with its other African trading partners. Pre-COVID, Senegal, Mauritania, Cote d’Ivoire and Nigeria ranked as the top African export markets for Moroccan products, covering a wide range of agricultural products, machinery and chemical goods.40 Tunisia has also begun developing expertise in higher-value goods and services including higher education services, information technology and medical services (which could be advanced through medical tourism.41 Diversification of trading partners has two key benefits for Morocco and Tunisia: (i) it enables them to move away from a vertical integration trading model that has largely dominated trade with the EU to date and (ii) the ability to leverage above-average industrialisation and manufacturing capacity to garner new consumers across West African markets.[[174]](#footnote-174)

The provisions for enabling the business environment in the above agreements are comparatively summarized in the table below.

**Ease of Doing Business in Africa: Comparison of Eight RECs**

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | COMESA | CEN-SAD | EAC | ECCAS | ECOWAS | IGAD | SADC | AMU |  |
| Easy Registration/ less red tape |  |  |  |  |  |  |  |  |  |
| Stability and Predictability of Laws |  |  |  |  |  |  |  |  |  |
| Ease of Financial Transfers:  Common Currency  One-stop Banking System |  |  |  |  |  |  |  |  |  |
| Single/United Taxation Duties |  |  |  |  |  |  |  |  |  |
| Free Movement of Labour |  |  |  |  |  |  |  |  |  |
| Single/United Customs Duties |  |  |  |  |  |  |  |  |  |
| Enforcement of Multilateral Business Rights, Competition and Trade Regulations |  |  |  |  |  |  |  |  |  |
| Special and Differential Treatment for SMEs and Agriculture |  |  |  |  |  |  |  |  |  |
| Access to Credit tied to Upholding Democratic and Development Principles |  |  |  |  |  |  |  |  |  |
| Supporting Intra-African trade vs. International Trade |  |  |  |  |  |  |  |  |  |
| United Judiciary/ Special Court for Trade Rights |  |  |  |  |  |  |  |  |  |
| Traditional Knowledge and Informal Sector Protection |  |  |  |  |  |  |  |  |  |
| Flexible Implementation/ Based on Functionalist and Developmental Theories |  |  |  |  |  |  |  |  |  |

**4.3.3 The ATI, Afreximbank, AfDB, and Other African Lending Institutions[[175]](#footnote-175)**

Access to funds has frequently been cited as the biggest factor disfiguring the business environment in Africa. Previous studies indicate a positive correlation between access to finance and business growth. In recent years, African countries have made great efforts to improve their investment climate, while GDP growth and foreign direct investment (FDI) flows have registered a positive trend.[[176]](#footnote-176) This has been facilitated by continental as well as international lending institutions.[[177]](#footnote-177) The role that prominent continental lending institutions (including the ATI, Afreximbank, and AfDB), play in determining the business environment is examined in this section.

**The African Development Bank (AfDB)**

Founded in 1964, the AfDB is comprised of three entities: the African Development Bank (ADB), the African Development Fund (ADF), and the Nigeria Trust Fund (NTF). As the continent’s   premier multilateral development institution, the AfDB has a multifaceted role. The AfDB operates in 55 countries and has [35 country offices](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/AfDB_Annual_Report_2017_EN.pdf)in Africa working on topics such as health, education, infrastructure, and natural resource governance. The AfDB provides loans and equity investments to its regional member countries based on various eligibility criteria. Beyond financial resources, the [AfDB](https://www.afdb.org/en/about-us/corporate-information/history/) provides valuable assets, including data and knowledge, expert advice, and convening power.

The AfDB is a multilateral development bank that focuses on advancing businesses for African countries. Multilateral development banks (MDBs) are financial institutions created by governments via international treaties to provide financing and technical assistance for the purpose of development.[[178]](#footnote-178) Like other multilateral development banks, such as the World Bank and the Asian Development Bank, the AfDB consists of two parts: a Bank and a Fund. The Bank gives loans to creditworthy African countries (mainly middle-income countries) on commercial terms. The Fund, on the other hand, gives loans on preferential terms or even outright grants to poorer African countries (low-income countries). The ADB group of financing bodies includes the African Development Fund, which grants interest-free loans to impoverished African countries, and the Nigeria Trust Fund. The ADB has five associated institutions through which public and private capital is channeled, one of which is the African Import-Export Bank (Afreximbank).[[179]](#footnote-179)

The AfDB is currently implementing a 10-year strategy for 2013–2022, focused on two objectives: i) inclusive growth and ii) green growth for Africa, which means prosperity that is more equally shared and meets the needs of present generations without compromising the wellbeing of future generations. This also involves considering social, economic, and environmental aspects in the development of countries. To achieve these objectives, the AfDB has set five operational priorities (infrastructure development, regional economic integration, private sector development, governance and accountability strengthening, and skills and technology training) and three areas of special emphasis (fragile states, gender, and agriculture and food security). In 2016, the AfDB revised its 2013–2022 strategy and operational priorities to include the “High 5 Goals”, which are five priority areas intended to align the AfDB’s strategy with the Sustainable Development Goals (SDGs):[[180]](#footnote-180) The Bank’s vision for private sector development is founded on a conceptual framework that links entrepreneurship, investment, and economic growth with the Bank’s ultimate goal of poverty alleviation.[[181]](#footnote-181)

Though loans for development projects, particularly from multilateral development banks like the AfDB, can help countries: i) overcome market failures and provide the security needed to attract private investment to projects with high financial and development returns; and ii) support investments and policy reforms needed to strengthen social development outcomes and create the conditions for dynamic, sustained economic activity,[[182]](#footnote-182) they are often seen as high risk investments, with high interest rates that accelerate debt accumulation of countries.

Despite the successes of the AfDB, its advanced learning has not led to sustainable business growth in the lives of peoples. Funding alone is not enough. Creating an enabling business environment also needs provisions for accountability, equitable distribution, and the ability to think outside the box. Thus, new approaches need to be looked at by the bank to fostering the business environment.

**The Afreximbank**

The African Export-Import Bank (Afreximbank) is a Pan-African multilateral financial institution with the mandate of financing and promoting intra-and extra-African trade. Afreximbank was established in October 1993 and owned by African governments, the African Development Bank and other African multilateral financial institutions as well as African and non-African public and private investors. The Bank was established under two constitutive documents, an Agreement signed by member states, which confers on the Bank the status of an international organization, and a Charter signed by all Shareholders, which governs its corporate structure and operations. Afreximbank deploys innovative structures to deliver financing solutions that are supporting the transformation of the structure of Africa’s trade, accelerating industrialization and intra-regional trade, thereby sustaining economic expansion in Africa. At the end of 2019, the Bank’s total assets and guarantees stood at USD$15.5 billion and its shareholders funds amounted to US$2.8 billion. Voted “African Bank of the Year” in 2019, the Bank disbursed more than US$38 billion between 2016 and 2020. Afreximbank has ratings assigned by GCR (international scale) (A-), Moody’s (Baa1) and Fitch (BBB-). The Bank is headquartered in Cairo, Egypt.[[183]](#footnote-183)

The role of Afreximbank in enhancing the business environment is best show cased in its policy that makes it possible to make international transfers between African countries using local currencies. Trading between countries has been expensive as the exchange rates provided by financial companies like Western Union and Moneygram have been very poor. Traders often resort to buying dollars, then pay for sending them and their conversion to local currencies. To address the situation, Afreximbank has partnered with the African Continental Free Trade Area (AfCFTA) Secretariat to launch the [*Pan-African Payments and Settlement Systems*](https://papss.com/) (PAPSS), a platform that facilitates instant cross-border payments in local currencies between countries.[[184]](#footnote-184)

The *Africa Trade Finance Survey Report[[185]](#footnote-185)* highlighted the potential of Afreximbank for boosting intra-African trade through the involvement of alternative lenders. The report noted that Multilateral development banks (MDBs) and development finance institutions (DFIs) have rolled out billions of support across the continent, with Afreximbank [signing off](https://www.gtreview.com/news/africa/afreximbank-approves-us3bn-coronavirus-package/) on its US$3bn Pandemic Trade Impact Mitigation Facility (PATIMFA) in late March. In late 2020, the [bank also announced](https://www.gtreview.com/news/africa/afreximbank-itfc-and-badea-launch-us1-5bn-pandemic-response-facility-in-africa/) a separate US$1.5bn pandemic response facility with backing from the International Islamic Trade Finance Corporation and the Arab Bank for Economic Development in Africa.[[186]](#footnote-186)

However, the report urges for greater dialogue between Afreximbank and the governments of African countries is needed to enable the bank play a more effective role. This role includes taking more risks, easing credit access criteria, and using government guarantee schemes to scale up liquidity to struggling banks, in efforts to protect small and medium enterprises and save jobs.

**The African Trade Insurance Agency**

The African Trade Insurance Agency, also known as ATI, was established in 2001 by seven [COMESA](https://en.wikipedia.org/wiki/COMESA) countries and with the technical and financial backing of [The World Bank](https://en.wikipedia.org/wiki/The_World_Bank) to provide insurance against political and commercial risks in order to attract [foreign direct investments (FDI)](https://en.wikipedia.org/wiki/Foreign_direct_investment) into the region. ATI is Africa's only multilateral investment and credit insurer and as of 31 December 2019 it had supported trade and investments into Africa valued at over US$62 billion since inception and for H1 2020, ATI recorded US$6.5 billion in Gross Exposures and US$390.8 million in equity.

ATI was created in 2001 to help drive much needed investment insurance [capacity](https://en.wikipedia.org/wiki/Capacity_building) to Africa in order to support higher levels of foreign direct investments. Seven COMESA countries obtained a grant from the World Bank to conduct a study to look at factors contributing the low levels of FDI to their countries. The study revealed political risk to be the main constraint and the primary concern of prospective investors. The study expanded into a World Bank project (The Regional Trade Facilitation Project I) from which ATI was created. ATI launched in 2001 in Kampala, Uganda and opened its doors in Nairobi, Kenya, ATI's head office. ATI has 18 member countries and 11 other corporate shareholders like the ADB, UK Export Finance (UKEF), SACE, Chubb and Atradius. India became the first non-African member country to become a shareholder through its government backed export credit agency ECGC.[[187]](#footnote-187)

Together, the AfDB, Afreximbank and ATI, play an important role in creating an enabling business environment in Africa by providing insurance for investors; providing credit and finance to enterprises, boosting investments; and providing fiscal advice to governments. Maintaining this three-pronged approach will be vital to advancing a favourable environment for doing business in Africa.

**The Africa Finance Corporation (AFC)**

The AFC is a multilateral financial institution, created by African sovereign states to provide pragmatic solutions to Africa’s infrastructure deficit and challenging operating environment. AFC actively pursues these solutions by developing and financing infrastructure, natural resources and industrial assets for the enhanced productivity and economic growth of African states.

The AFC takes a special interest in financing infrastructural development in African countries. In the organizations own words: “Today, across Africa – lack of access to reliable power, inferior transport networks and poor telecommunications infrastructure are limiting economic growth and sector development, preventing millions of Africans from fulfilling their potential. By providing diverse solutions, risk capital and the expertise needed, AFC is helping to fill the continent’s infrastructure void and drive sustainable economic growth.”[[188]](#footnote-188)

**4.3.4 External Bilateral and Regional Agreements**

Many countries and regions in Africa have undertaken bilateral agreements with other countries. A prominent example of these is the proliferation of Economic Partnership Agreements (EPAs) signed between the European Union and Africa’s Recs. The European Union has touted EPAs as drivers of change and important instruments to boost economic relations between Africa and Europe because they remove tariff and non-tariff barriers to regional and international trade and prepare the ground for deeper disciplines that encourage investment in value-adding sectors. Boosting trade and investment and encouraging the creation of regional value chains, EPAs should be used as building blocks to continental free trade in Africa.[[189]](#footnote-189) The Cotonou agreement presents Economic Partnership Agreements (EPAs) and trade liberalization as the only viable method for achieving development, an assumption that a Canadian study relating to Africa continues to challenge.[[190]](#footnote-190)

Another example is the African Growth and Opportunities Act. The AGOA[[191]](#footnote-191) is a US law based on which the USA maintains preferential non-reciprocal trade agreements with 39 countries in Sub-Saharan Africa. Under AGOA the US maintains a list of countries eligible to receive benefits.[[192]](#footnote-192) The list however is not permanent, but subject to the wish of the US president. AGOA was drafted predominantly by US policymakers and subsequently imposed on African countries as a ‘take it or leave it’ position. African countries have little or no ability to negotiate more favourable terms therein. As such, AGOA could be better described as a forceful imposition, rather than as an agreement between the US and African countries. [[193]](#footnote-193) The provisions of the Agreement adopt the TRIPS- plus standards of the UPOV agreement, rather than the IP standards contained in TRIPS.

The greatest challenge that these bilateral and regional treaties place to business under AfCFTA, is that they further encourage fragmentation of the market, and offer different standards from those that exist under AfCFTA.[[194]](#footnote-194) Businesses are faced with multiple laws, adopting different standards that all apply to the same place.[[195]](#footnote-195) While the U.N. Economic Commission on Africa projects that intra-African trade is likely to increase by 52.3 percent under the AfCFTA, it acknowledges that the tariff line approach for liberalization of goods adopted under the AfCFTA agreements could negatively impact African countries along the following considerations:[[196]](#footnote-196) The risk that less trade will be offered to African counterparts than what has been agreed with the members of the European Union under EPAs (generally 80 per cent of imports to be liberalized). Improving the business environment under the AfCFTA, would require the discouragement of EPAs, while encouraging African countries to use the united platform provided by the AfCFTA. [Questions: why are African countries opting for EPAs, over centralized agreements like the WTO TRIPS, GATT and other agreements? What can be done to change this? Recent studies have highlighted the lack of flexibility in multilateral trade agreements (to contextualize conditions to suit their domestic socio-economic challenges and public interest goals) as the primary reason why African countries are preferring EPAs over multilateral regimes. Thus, for AfCFTA to ensure that it maintains relevant, it must ensure that it provides flexibilities, in the form of exceptions to provisions, that make the agreement practically applicable by African states. Efforts will also be needed into communicating the benefits of the AfCFTA to African policy makers.

**4.4** **Addressing Conflicts between Regulations**: Because AU countries are regulated by a number of fragmented regional and multilateral agreements whose subject matters overlap, but which vary greatly in overall objectives, creating an enabling business environment necessitates development of a framework that integrates multilateral interests like increased global trade with regional development interests in Africa. This may be achieved by applying the conflict of laws principles of international law found in the Vienna Convention on the Law of Treaties (VCLT).

In the preamble of AfCFTA, member countries of the African Union state their determination to build upon their rights and obligations “under the Constitutive Act of the African Union of 2000, the Treaty Establishing the African Economic Community of 1991 and, where applicable, the Marrakesh Agreement Establishing the World Trade Organisation of 1994.” They also acknowledge several regional economic communities (RECs), as the building blocs upon which AfCFTA will be established. This hints at a desire to conform with existing multilateral and regional trade agreements relevant to Africa.

Given the integral role that RECs are envisioned to play in securing the objectives of AfCFTA, it was essential that the agreement conceive of a way to preserve greater levels of regional integration that in some instances have been built over decades. That ethos is reflected in Article 19 of AfCFTA on conflict and inconsistency with regional agreements. Article 19 provides the following:

‘1. In the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement.

2. Notwithstanding the provisions of Paragraph 1 of this Article, State Parties that are members of other regional economic communities, regional trading agreements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves.’

In the event that any trade agreements between two or more AfCFTA member states fall outside the ambit of ‘regional’ agreements under Article 19, any inconsistency between such agreements and AfCFTA will need to be resolved on the basis of the lex posterior rule under Article 30 of the VCLT.[[197]](#footnote-197) Article 30 provides that:

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

It is also important to note that in international law where there is a conflict between rules, the more specific rules will take precedence over more ambiguous rules (*lex specialis*); or the more recent of the con­flicting obligations prevails over the older one (*lex posterior*). The AfCFTA adopts WTO standards relating to NT,[[198]](#footnote-198) MFN,[[199]](#footnote-199) anti-dumping,[[200]](#footnote-200) safeguards,[[201]](#footnote-201) SPS[[202]](#footnote-202), TBT[[203]](#footnote-203), and sustainable development measures in language that simply refers to the relevant WTO Agreement, without providing details.

This vaguer language of the AfCFTA is likely to carry less weight in legal interpretation than the more detailed provisions found in the WTO Agreements. Also, because such transplantation of laws often leaves out the corresponding limits of IP protection and other checks and balances operating in the law of the transplanting country or institution, they are likely to prove unworkable within a short time in the receiving countries.[[204]](#footnote-204) This approach is not considered beneficial for advancing the business environment in African countries.[[205]](#footnote-205)

In the event of any inconsistency between any regional agreement and the AfCFTA, the provisions of the latter shall prevail.[[206]](#footnote-206) However, the AfCFTA Agreement shall not nullify, modify or revoke rights and obligations under pre-existing trade agreements that State Parties have with third parties.[[207]](#footnote-207) Similarly, Article 22 (Exceptions) of the AfCFTA restricts the use of exceptions, by stating that “No provision in this Agreement shall be interpreted as derogating from the principles and values contained in other relevant instruments for the establishment and sustainability of the AfCFTA, except as otherwise provided for in the Protocols to this Agreement.” This adherence to a one size fits all approach greatly reduces the utility of the AfCFTA as a tool for differentiation, which is an important characteristic necessary for harnessing regional trade agreements to support development in African countries. African countries do not have a common judicial body to interpret conflicts between laws. Thus, it is advisable for a common judicial body to be established under the African Union that will help in harmonizing the numerous multilateral, regional and national laws.

Though there is no established hierarchy between agreements made under the WTO and those created under other organizations like the WIPO**-**UPOV, the UN-CBD, and the AU’s African Model Law,[[208]](#footnote-208) various articles of the AfCFTA seems to create a hierarchy by requiring conformity with WTO provisions. For example, Part III, Article 3 of *AfCTA’s Protocol on Trade in Services* states that countries will “pursue services trade liberalisation in line with Article V of the GATS.” Similarly, *AfCTA’s Protocol on Trade in Goods* (preamble and Articles 7, 8 and 17-19) adopt the standards for anti-dumping and countervailing measures, along with global safeguard measures, contained in various provisions of the WTO GATT Agreement 1994 and the WTO Agreement on safeguards. The AfCFTA focuses on retaining norms of previous trade agreements, thus restricting its ability to question the suitability of such provisions for supporting innovation and public interest in the African context. This ‘no questions asked’ approach of AfCFTA to the WTO Agreements requires the adoption of WTO standards for trade and IP protection, without allowing for further development of differentiating exceptions and limitations to granted under Articles 7-8 TRIPS. This reduces the flexibility of African countries to adopt alternative regional agreements.

However, questioning of previous trade regimes is necessary for drawing up a framework for trade suitable for forming an enabling business environment in Africa. It should not be presumed that WTO-plus standards and laws, which were mainly drawn up by developed countries for their industrialized economies, would be suitable for lesser developed African economies based on smallholder agriculture.[[209]](#footnote-209) The importance of harmonizing relations between various bilateral, regional, and multilateral trade related agreements cannot be denied. However, this should be done in a manner that achieves the objectives of the AfCFTA, which includes advancing intra-regional trade and the development of African businesses.

**4.5 Challenges of Domesticating Multilateral Agreements**:

Countries that have negotiated FTAs have undertaken obligations for their concrete implementation. The provisions contained in the AfCFTA will have no legal power at the domestic level, until individual countries enact laws that legitimately recognizes and enforces these rights, and also develops structures and institutions that makes it possible to implement such rights. This process of enacting laws at the domestic level to substantiate treaty obligations is what is described as domestication. Several provisions and obligations under the AfCFTA Agreements require enacting domestic laws for them to be operational if such laws are not already in existence. For example, to operationalize some of the provisions and obligation on liberalization of market access and the most favoured nation principle, a state party with restrictive practices on competition and market access like quotas or nationality requirement for foreign service providers will need to enact a law or amend its laws to remove such restrictions. Same applies to customs regulations, tariffs, and non-tariff barriers to trade. The enactment of national laws on specific trade-related issues to facilitate the implementation of a country’s obligation under the AfCFTA is different from a wholesale enactment of the AfCFTA Agreement as a domestic law.

Domesticating obligations from trade agreements like the AfCFTA Agreement may necessitate adjustments in domestic policies and laws. It may involve amendments or promulgation of new laws to eliminate certain forms of customs processes and valuation, duties, dumping or subsidies, creation of a designated authority with powers to monitor and regulate service providers in compliance with the AfCFTA obligations. Rules and mandatory standards around non-tariff barriers like technical standards and qualifications, sanitary and phytosanitary requirements require enactment of laws to fulfill the obligations of transparency and for use in monitoring and enforcing compliance of products and services standards of trading partners that enter the market.[[210]](#footnote-210)To adequately equip itself to give effect to obligations under the trade agreements, State parties incorporate the substance or key obligations of a trade agreement which compliance require legislative interventions. This is achieved by the enactment of independent implementing national laws that incorporate the specific obligation or obligations. The enactment could be a consequential amendment to existing laws or newly promulgated laws to give effect to a country’s trade obligations.

Domestication of multilateral and regional trade treaties in African countries has generally been slow due to the politicization of issues. For example, where the president signs a treaty, but the members of an opposing political party hold the majority in the senate, the opposition may vote against the reforms. Greater attention should be paid to re-orienting policy makers and also providing incentives to local industries to advocate for the domestication.

Two principles should guide the implementation and reform process, required to domesticate AfCFTA provisions: Firstly, *one size does not fit all* in implementing treaty obligations. Thus, the use of flexibilities should be encouraged, so as to accommodate the different socio-economic contexts of countries to which it must be applied. Secondly, reducing costs is more business friendly. As such, preference should be given to domestication policies that would permit a country to implement the AfCFTA at minimal cost.

In implementing IP and trade agreements, African countries should maintain the flexibilities in existing agreements (like the WTO TRIPS and RECs) that accommodate their development needs. For example, the Doha Ministerial Declaration on the TRIPS Agreement and Public Health (2001) grants developing and Least Developing Countries (LDC) flexibility to use compulsory licensing to access essential medicines during emergencies like the Covid pandemic. This expanded the scope of Article 31 TRIPS. Compulsory licensing is when a government allows someone else to produce a patented product or process without the consent of the patent owner or plans to use the patent-protected invention itself. This would allow countries that are unable to manufacture pharmaceuticals (and that cannot afford expensive imports) to let their local manufacturers, or manufacturers located in another country, to copy and produce cheaper versions of the Covid vaccine so as to offset the pandemic. The Doha Declaration also confirms the freedom of Members to establish their own regime for the exhaustion of IPRs, thus leaving countries with the possibility of choosing their domestic approach to parallel imports. Such flexibilities, along with other exceptions and limitations to IPRs provided for businesses in LDCs and developing countries (such as using patents for teaching and research, commercial experimentation, prior use) should be maintained in domesticating the agreement.[[211]](#footnote-211) Parties should also bear in mind that they are not obliged to implement higher protection and enforcement measures than those provided in the FTA (see for example, 15.1, CAFTA) and that the objectives and principles of TRIPS (Articles 7 and 8) should guide the implementation and reform process.[[212]](#footnote-212)

To accelerate the domestication of continental and regional treaties, the African Union should apply the following methods: • Actively seek the cooperation of domestic businesses (who sponsor and hold significant control over politicians) to champion the domestication process • Carry out orientation exercises among policymakers, highlighting the benefits of the AfCFTA and other relevant treaties; • Minimize the costs of domestication by providing model frameworks; • Require timely disclosure and transparency from countries during the domestication process; • Provide technical support to policy makers• Cooperate with other regulatory or economic institutions.

**4.6 Key Findings and Conclusions**

* The level of development of a country and a region is strongly correlated with its overall institutional quality.
* Contemporary regulation of Africa’s business environment is highly fragmented, being regulated by several areas of law; and multiple national, regional, continental and multilateral treaties and institutions.
* These laws often overlap and are unclear. Many of the treaties are soft laws that make declarations, without placing legal obligations on countries. As such, they cannot be implemented until enacted into domestic laws by states. Several treaty provisions have remained unimplemented by governments of African states, though they are signatories.
* Thus, for AfCFTA regulation to be more effective in creating an enabling business environment, specific provisions must be put in place for greater harmonization of laws; resolving conflicts between laws; and for domestication of the provisions.
* At the regional level, institutions constitute a source of comparative advantage. Institutions affect more the capacity of regions to participate in *inter- than in intra-national trade*. This positive effect differs by sector and level of development.[[213]](#footnote-213) Existing REC related institutions have regulations that have remained unimplemented and yet to be domesticated by national governments. Hence, developing the strength of institutions under the RECs is very important.
* The main shortcomings of Africa’s contemporary institutions have been their lack of inclusivity, their lack of strength, and their being built based on economic models not suited to African businesses, which are mostly infantile compared to businesses in western countries or Asia.
* Accordingly, enhancing the business environment in Africa will require specific provisions for advancing the inclusivity of these institutions, their political and economic independence/ strength, and ensuring that they are built on economic models appropriate for African countries.

**5.0** **A Model Framework for Creating an Enabling Business Environment in Africa**

**5.1 Theories and Principles Governing Business Rights in Africa**

**5.1.1 The Functionalist/ Instrumentalist Approach**:

Instrumentalism views business rights as privileges granted to attain certain socio-economic objectives, including food security.[[214]](#footnote-214) The conception of trade and competition law as a means to an end, rather than an end in itself, allows for teleological interpretation where the provisions of the law are continually examined for their purpose and effect.[[215]](#footnote-215) Instrumentalism, (also connoted by the term functionalism) encompasses “the view that a thing does not have a 'nature' or 'essence' or 'reality' apart from its manifestations and effects and apart from its relations with other things.”[[216]](#footnote-216) In other words, instrumentalism involves assessing laws and policies based on the consequences/effects that they bring about.

Instrumentalism does not view business rights as inherent and absolute rights, but as instruments designed to attain specific objectives.[[217]](#footnote-217) In other words, business rights are “instruments of public policy which confer economic privileges on individuals or institutions solely for the purposes of contributing to the greater public good.” [[218]](#footnote-218) The grant of legal privileges being: “a means to an end, not an end in itself.”[[219]](#footnote-219) Other theories hold that rights should be respected because it is fitting to do so, and not because of the good consequences that will flow from them.[[220]](#footnote-220) By contrast, within an instrumental theory good consequences are the justification for promulgating and enforcing rights. As noted by the *Stanford Encyclopaedia of Philosophy*:

A status-based justification thus begins with the nature of the right holder and arrives immediately at the right. *The instrumental approach starts with the desired consequences (like maximum utility) and works backward to see which rights-ascriptions will produce those consequences.* Consequences, if grave enough, justify the qualification of individual rights. Instrumental theories describe rights as instruments for achieving an optimal distribution of advantages.”[[221]](#footnote-221)

Instrumentalism is endorsed by the relatively new constitutional theory of money and the Law and Political Economy (LPE) philosophy. The LPE theory argues that politics and the law play constitutive roles in the creation of the economy and the distribution of power within in it. Thus, it rejects the presumptions of classical economic theories (which dominate the development frameworks of international organizations like the WTO, IMF and World Bank) that the economy is apolitical; that stronger business rights are good and will automatically lead to development; and that government needs to play a protective role in regards the economy to make it more “efficient”.[[222]](#footnote-222)

The Legal Realists, in their battle against laissez-faire ideology in the late nineteenth and early twentieth centuries,[[223]](#footnote-223) elevated an explicitly functionalist account of law as serving varying social aims rather than embodying perennial and abstract concepts. They also showed that law is never absent from economic life but rather generates the order of rights that market advocates invoke to defend the boundaries of the economy. Most fundamentally, in response to the laissez-faire claim that markets could and should be free from state coercion, they showed that legally constituted and distributed coercion is the sine qua non of market relations.[[224]](#footnote-224)

Applying instrumentalist theory to business rights would require the adoption of three principles: i) Effectiveness, (ii) Balancing of interests; and (iii) Differentiation.

**5.1.2 The Effectiveness Principle**: The principle of effectiveness states that the basic rights of business remain ineffective, unless and until they are backed up by rights guaranteeing the conditions by which businesses can actively execute these rights. For example, in places where access to capital is limited and risky, merely granting the right to trade would be ineffective, unless backed up by the rights to credit and investment insurance, to grant enterprises the confidence to exercise the first right. Similarly, in sectors that require a highly skilled workforce, like industrial manufacturing, simply providing the right to competition would have little effect, unless supported with the right to a functional educational system, or the right to free movement of people, that provides a highly skilled workforce.

Based on the functional approach, governments could also rely on other rights, especially those of indigenous peoples or freedom of (commercial) speech, a general freedom to act (but of course limited by rights of others), and equality / non-discrimination rights. Such rights, if relevant, could be said to include elements of a right to do business if the latter is instrumental for the realisation of these rights.

**5.1.3** **Balancing of Interests Principle**: this principle requires that the rights of business and local development objectives should be mutually supportive. Recognizing the underlying public policy objectives of AfCFTA, and other multilateral FTAs, business rights must be effective in advancing public interest goals and domestic development, not only corporate interest. This would require granting business rights to include a proportional requirement of corporate responsibility for human rights and sustainable development goals. The need for balancing of interests should encompass the entire value chain, both upstream and downstream.[[225]](#footnote-225)

Agenda 21 stresses the role that balancing plays in sustainable development by emphasizing that trade and environment policies must be mutually supportive[[226]](#footnote-226) and that laws be contextualized. Para 8.13 of the Agenda stipulates that: “Laws and regulations suited to country-specific conditions are among the most important instruments for transforming environment and development policies into action, not only through ‘command and control’ methods, but also as a normative framework for economic planning and market instruments.”[[227]](#footnote-227)

African countries should be wary of adopting a too business-friendly approach, as this is likely to be picked up and claimed primarily by multinational and other major companies, rather than local business communities those who need most support.

Some jurisdictions (including the EU Fundamental Rights Charter) include a ‘freedom to conduct a business’ as a (quasi) human / fundamental right: based on e.g. German constitutional doctrines of freedoms to undertake a profession / earn a living, this right covers the ability to earn / make a living and associated activities and under the EU Charter seems to be available for legal entities (companies, etc) as well. It can be distinguished from a right to property which covers what already has been earned / acquired.

An IP-related case where this right has played a role is *SABAM vs Netlog*, a 2012 decision by the European Court of Justice (CJEU) where the CJEU relies on the right to conduct a business as one aspect relevant in its decision holding comprehensive monitoring systems which copyright owners had asked internet service providers (the relevant protected businesses here) to install in order to prevent copyright infringements online. Along similar lines, there is also the *UPC Telekabel Wien* judgment by the CJEU. And there is now the draft Art.12 of the new (EU) Digital Services Act (DSA) which seems to be based on the rights of digital service providers (online platforms) to conduct a business, balancing those with user rights, as well as the rights of others involved.

However, granting of such sweeping rights to businesses only benefits countries which have developed strong capabilities in certain industries. For African countries, whose ITC and manufacturing companies are still at infant stages of development, it is advised that they do not over grant rights or freedoms to businesses, that their domestic companies are incapable of utilizing. Balancing should be made between the economic rights of multilateral businesses on the one hand, and domestic ECOSOC rights, SDGs, and public interest on the other.

**5.1.4 The Differentiation Principle**:

Provision: *One size does not fit all in applying business and trade rights to attain national development, thus every country shall be ranted flexibility to adapt the methods for implementing the provisions of this Bill, to suit their socio-economic context*.[[228]](#footnote-228)

*Based on Article 5 of the AfCFTA, the provisions of this Bill shall be governed by the principles of variable geometry, flexibility, special and differential treatment and preservation of the acquis. Thus, where enterprises adopt flexible methods based on this principle, they shall not be considered as discriminatory in contradiction to the Bill of Rights.*

This need for flexibility is described by the term differentiation. Differentiation is based on the theory that laws and policies cannot be assessed in a vacuum, but must be considered in the context to which they apply.[[229]](#footnote-229) The principle of differentiation states that the law should not be applied to parties that are dissimilar in the same manner, but must be interpreted and applied in a manner that recognises and accommodates such differences. This principle allows for more flexible interpretation of business regulation, where not just the ordinary meaning, but also the specific context in which the law is applied, are taken into account in implementing its provisions.[[230]](#footnote-230) This allows for business regulation to be applied in different ways in order to achieve diverging goals.

Differentiation is provided for in Article 5 of the AfCFTA, which states that the treaty shall be governed by the principles of variable geometry, flexibility, special and differential treatment, and preservation of the *acquis*.[[231]](#footnote-231) Further, Articles 7 & 8 of the WTO TRIPS agreement secures policy space for states to implement trade and IP treaty provisions in light of the sustainable development objective. Since the provisions do not specify one specific method by which the sustainable development goal is to be achieved, states retain substantial discretion in giving effect to a Bill of Rights objective.[[232]](#footnote-232)Each of these principles allows for countries to be treated differently, based on their levels of economic development, and geographical locations.

Having identified the theoretical justifications and principles for allowing freedoms to do business, the following section examines the ways in which the functionalist approach and its principles may be applied in designing contemporary trade and IP regulations and policies, to enhance the atmosphere for doing business and investing in Africa. I also provide examples of best practices adopted by countries that reflect these principles. Against this background, the following freedoms, or rights, should be adopted in African laws to make them more inclusive:

**5.2 De-Risking the Trade and Investment Climate in Africa**

**5.2.1 Freedom to Conduct Business, Right of Establishment, Efficient Business Registration and Licensing**

**Provision**: *The freedom to conduct business in accordance with continental (AU), regional and national laws and practices is recognized,*

*Every citizen and legal enterprise of an AU member state has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State*

*Enterprises registered in one Member state shall have the right to freedom of establishment to take up and pursue activities as self-employed persons and to set up and manage undertakings, in other member states.*

*Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the AU shall, for the purposes of this provision, be treated in the same way as natural persons who are nationals of Member States. ‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.[[233]](#footnote-233)*

*The standards for business registration and licensing shall be harmonized across the RECs within 10 years. Where differences exist after the stated period, the principle of equivalency shall apply, whereby registration and licensing in any recognized REC shall be considered as equivalent and give businesses the right to operate in other RECs.*

*The AU Council should set up procedures for the one step registration of business enterprises.*

**Policy Recommendation- One step process and Freedom of establishment:** Effective practices for implementing this principle can be found in the practice of the Democratic Republic of Congo, Cameroun, Togo, and Gabon, countries which ranked highly on the 2020 OHADA ease of doing business report for Africa. The countries made starting a business easier and less expensive by reducing the time and costs for company incorporation, reducing the minimum capital requirement, introducing an online platform for company name search, reducing the registration fees and allowing entrepreneurs to pay the fees directly at the one-stop shop. Notices of incorporation are also published online.[[234]](#footnote-234) Adopting a single one step process and harmonizing standards between RECs would be useful in this regard.

Another policy for implementing this policy can be found freedom of establishment provision found in Articles 49, 54 and 58 of the *Treaty on the Functioning of the European Union* (TFEU). The provisions confer freedom of establishment not only to natural persons holding EU nationality, but also to legal persons (corporations and registered businesses). A company enjoys freedom of establishment if it has been formed in accordance with the laws of one of the member states and if its registered office, central place of administration or central place of business in within a member state of the EU. Freedom of establishment aims to guarantee the benefit of national treatment in the host Member State, by prohibiting any discrimination based on the place in which companies have their headquarters. It would require companies to be treated in the same way as a natural person who is a national of a Member State, where that company or firm wishes to establish a branch in a Member State different from that in which it has its seat.

Freedom of establishment would mean that once registered in an African Union member state, a business can carry out business in other AU states without re-registering. Companies can pursue business by the setting-up of agencies, branches or subsidiaries, or by taking part in the incorporation of a company in another AU country.[[235]](#footnote-235) This would greatly advance the free movement of corporations and reduce the red tape, important factors for enhancing the business environment. It also applies the principle of equivalency, by allowing for adherence to required procedures in one state, to be accepted by other states and regions with similar conditions.

Considering the variation in tax regimes and economic capabilities of AU countries, it is suggested that AU states maintain their states should be allowed to maintain their flexibilities as a necessary part of contextualized regulation. Thus, businesses would still have to pay whatever taxes are due in the state that they are operating. This would apply the principle of differentiation discussed in section 5.1. Also, it is suggested that operation of roadside services or businesses be considered as falling within the concept of 'establishment'. This wider definition of establishment would allow participants in the informal sector, which forms a large proportion of business activity in African countries, to participate, on a stable and continuous basis, in the economic life of a Member State other than their State of origin, without having to register afresh. To ensure that profit is brought to the host community, and to discourage an influx of dead businesses, ‘establishment’ should be defined to require the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period. Consequently, the registration of a vessel does not necessarily involve establishment within the meaning of the Treaty, in particular where the vessel is not used to pursue an economic activity or where the application for registration is made by or on behalf of a person who is not established, and has no intention of becoming established, in the State concerned.[[236]](#footnote-236)

**Policy Recommendation- Establishing and AU Investment and Trade Court over Regional Court Systems:** Though the capacity of regional courts to act as an investment tribunal, because they have jurisdiction to adjudicate on various categories of potential disputes between investors and their member host states, has been established. Yet, *the regional court’s ability to act is divided between its various jurisdictions and the ambit of its powers is unclear*, as a result both of ambiguities and inconsistencies in the drafting of the Court’s Protocol and the regional Supplementary Act on Investments, and of divergences in the Court’s own jurisprudence. Thus, the current situation is by no means optimal. The regional Court may be an available forum, but is it a desirable one, particularly when an investor might have the option of bringing its claims under an applicable bilateral investment treaty or free trade agreement? It is proposed that the AfcFTA could promote a more enabling investment environment in Africa by establishing a single continental investment and trade court with jurisdiction that covers that of the regional courts.

**5.2.2 Right to Equitable Competition along with Free Markets**:

*Provision: A key objective of the Bill of Rights is to maintain and encourage competition in Africa in order to promote the efficiency and adaptability of the economies of African states, in order to expand opportunities for African countries participation in world markets while at the same time recognizing the role of foreign competition in Africa, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the African economy and in order to provide consumers with competitive prices and product choices.[[237]](#footnote-237)*

*The rights granted for free trade shall be interpreted and implemented in a manner so as to advance the above objective in African countries, and AfCTA member states shall put in place provisions to maintain fair and equitable competition between states.*

**Dominant Firm:** A firm is dominant in a market if: (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power.

It is prohibited for a dominant firm to— (a) charge an excessive price to the detriment of consumers or customers; (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so; (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act— (i) requiring or inducing a supplier or customer to not deal with a competitor; (ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible; (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract; (iv) selling goods or services at predatory prices; (v) buying-up a scarce supply of intermediate goods or resources required by a competitor; or (vi) engaging in a margin squeeze.

If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable.[[238]](#footnote-238)

It is prohibited for a dominant firm in a sector designated by the Minister to directly or indirectly, require from or impose on a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons, unfair— (i) prices; or (ii) other trading conditions. (b) It is prohibited for a dominant firm in a sector designated by the Minister to avoid purchasing, or refuse to purchase, goods or services from a supplier that is a small and medium business, or a firm controlled or owned by historically disadvantaged persons, in order to circumvent the operation of paragraph (a).[[239]](#footnote-239)

Price Discrimination by dominant firm as seller prohibited

1. Price discrimination by a dominant firm, as the seller of goods or services, is prohibited if: (a) it is likely to have the effect of (i) substantially preventing or lessening competition; or (ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively;

(b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and (c) it involves discriminating between those purchasers in terms of- (i) the price charged for the goods or services; (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services; (iii) the provision of services in respect of the goods or services; or (iv) payment for services provided in respect of the goods or services[[240]](#footnote-240)

It is prohibited for a dominant firm to avoid selling, or refuse to sell, goods or services to a purchaser that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of this subsection.[[241]](#footnote-241)

Where used appropriately, competition, or antitrust, law enhances the business environment in three ways:

* prohibiting agreements or practices that restrict free trading and competition between business, especially cartels;
* banning abusive behavior by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in this way may include [predatory pricing](https://en.wikipedia.org/wiki/Predatory_pricing), [tying](https://en.wikipedia.org/wiki/Tying_(commerce)), [price gouging](https://en.wikipedia.org/wiki/Price_gouging), and [refusal to deal](https://en.wikipedia.org/wiki/Refusal_to_deal); and
* supervising the mergers and acquisitions of large corporations, including joint ventures, to ensure that they do not lead to countries becoming vulnerable and over dependent upon any one supplier.

**Policy Recommendation- Balancing competition rights with public interest and SDGs:** Previous analysis in sections 3 and 4 indicates that primary objectives of competition law in African countries should include balancing open access with the need for inclusiveness and equitable distribution of benefits; shoring up local companies, with less technological capacity and skills, to viably compete in African and global markets; and ensuring that users rights are not compromised by business activity. This will require two-sided regulations that will tie the grant of competition rights to public interest. For example, state aids and subsidies should only be granted where the companies increase their technological capacity, and trading in African and international markets. Subsidies should be reduced annually. Also, the privatization of state-owned assets should be made compulsory, as state owned corporations have proved to be less viable than private firms. Independent sector regulators should be established to ensure the transparency of such processes.

A good example of how this may be implemented is the adoption of the ‘Production Linked Incentive Scheme for Promoting Domestic Manufacturing of Medical Devices’ subsidy scheme by India in 2020.[[242]](#footnote-242) The scheme provides financial incentive to selected companies, for a five-year period, that are able to meet set rates of investment and incremental sale for medical products manufactured in India.[[243]](#footnote-243) Subsidies are based on annual increases in sales and productivity by companies, they are not automatically granted as is the case in some African countries. The initial refusal by India to apply free markets and IP laws to its pharmaceutical industry, has been credited with the growth in competitiveness of the pharmaceutical industry in the country.[[244]](#footnote-244)

Also in 2020, to combat the challenges caused by the Covid shutdown, the Competition Authority of Kenya (“CAK”) published a cautionary note warning manufacturers and retailers that were implicated in price fixing, or any sort of price manipulation behaviour, that they would be subject to an administrative penalty of up to 10% of their turnover. Further, the CAK ordered the removal of exclusivity clauses in agreements between manufactures and distributors of maize flour, wheat flour, edible oils, rice, sanitizers and toilet paper. Exclusive distribution agreements between market players interfere with the allocation of favorable prices in relation to essential goods. The CAK highlighted that the negative effects of such agreements may be further exacerbated during a pandemic.[[245]](#footnote-245)

A 2021 review of competition and antitrust regulations in African countries found that most of the RECs in the continent haven’t provided detailed regulations relating to competition. Even where regional regulations are provided the majority of countries are yet to enact laws implementing these at the national levels.[[246]](#footnote-246) Thus, it is suggested that the business environment in Africa will be advanced by providing regulations clarifying the relationship between national and regional competition authorities, and stating specific timelines for the domestication of regional competition laws.

**5.2.3 Improving Access to Credit and Free Movement of Finances:**

*Provision: Private enterprises have the right to free movement of finances, in a legal manner, in carrying out their business.*

*In order to support this right, states shall put in place fiscal and legal institutions and policies necessary to facilitate the free movement of funds. Private enterprises should actively participate in the design and maintenance of such institutions and policies.*

*Access to capital markets to fund operations is essential to private sector participants. Restrictions in access to local markets and obstacles to international capital movements should, taking into account macroeconomic policy considerations, be phased out by member states*.[[247]](#footnote-247)

Countries with well functioning domestic capital markets find it both easier and cheaper to involve private enterprises – particularly international operators – in their infrastructure sectors. Where exchange rates are fully convertible and capital can easily move in and out of the host country, infrastructure operators fund their operations at competitive international rates and consequently need to shift no “financing premium” onto the domestic infrastructure users.[[248]](#footnote-248)

**Policy Recommendation-Adoption of a Common Currency under PAPSS and One-Stop Banking:**

1. **Adopting of a Common Currency**

Following its emergence as an economic superpower that held the largest share in international trade, the United States dollar has become the main currency in which central banks liked to save their spare cash. At the end of 2011, the world’s central banks held $11 trillion in reserves between them, 60% of which were held in dollars.[[249]](#footnote-249) This is disadvantageous to intra-African trade as African currencies are valued much lower than the American dollar and trade between countries is made more difficult as they must wait to buy and sell foreign currencies.

The diversity of currencies has been identified as a challenge to intra-African trade. Two solutions are proposed to resolve this: (1) The adoption of digital currencies such as Bitcoin; and (2) The adoption of a common currency backed by trade.

When all countries attached their currencies to gold, they also effectively attached them to each other.[[250]](#footnote-250) As African countries still have significant goldmines, backing up their currencies based on gold, rather than the dollar, would make them less reliant on foreign currencies, granting them greater independence and stability.

The eight francophone countries that form the West African Monetary Union (UEMOA), a subset of ECOWAS, maintain a common currency. These countries have considerably more monetary stability than other West African countries. ECOWAS had proposed monetary union of the non UEMOA countries, to be followed in 2004 by integration into a single monetary zone, but is yet to achieve those objectives.[[251]](#footnote-251)

**Adoption of a common currency under the PAPSS**: The role of Afreximbank in enhancing the business environment is best show cased in its policy that makes it possible to make international transfers between African countries using local currencies. Trading between countries has been expensive as the exchange rates provided by financial companies like Western Union and Moneygram have been very poor. Traders often resort to buying dollars, then pay for sending them and their conversion to local currencies. To address the situation, Afreximbank has partnered with the African Continental Free Trade Area (AfCFTA) Secretariat to launch the [*Pan-African Payments and Settlement Systems*](https://papss.com/) (PAPSS), a platform that facilitates instant cross-border payments in local currencies between countries.[[252]](#footnote-252)

The launch of the Pan-African Payment and Settlement System (PAPSS) is expected to reduce dependence on third currency such as dollar, Euro, Pounds, for intra-African transactions, Godwin Emefiele, governor of the [Central Bank of Nigeria](https://www.cbn.gov.ng/) (CBN), said it will also reduce the need for correspondent banks, and amplify intra-African trade significantly. Prior to the launch of PAPSS, trade between African nations was largely invoiced and executed in third currencies, thereby subverting and destabilising domestic foreign exchange markets. As a percentage of total trade, intra-African trade is expected to increase to 35 percent from 15 percent over a five-year period with the infrastructure provided by PAPSS as payments and settlement bottlenecks are resolved.[[253]](#footnote-253)

1. **One-stop Banking System**

Africa has the second-highest cost-to-asset ratio of any region in the world, at 3.6 percent—and this has worsened in the recent past. This high cost is partly due to the multiplicity of actors involved in financial transactions. The 2018 Global Banking Report, which analyzes eight banks in Africa that have made dramatic improvements in cost-to-asset ratios, recommends that these costs can be reduced through adopting end-to-end digital transformation and one-stop banking systems.[[254]](#footnote-254)

One-stop-shop refers to the idea of carrying out all transaction at a specific location, meaning that all the requirements a client has can be carried out at that location.[[255]](#footnote-255) For example, a one-stop banking system may be able to offer you not only personal banking services and loans, but also investment advice, investment vehicles and insurance policies. In banking this could include allowing a single institutional body or digital system established by the AU to coordinate financial transactions between countries, rather than the fragmented regional systems. All cross-border issues would be handled by this system One-stop banking would allow for a single body that would take care of taxes and currency issues. This would be much cheaper for businesses and reduce the probability of double taxation for companies.[[256]](#footnote-256) Adopting this approach would benefit both borrowers and lenders. For borrowers/lenders it would allow accessing solutions that meet their varied needs via one provider, with positive implications for pricing and flexibility. From an investor perspective it provides greater credit control, with better protection and higher potential returns for the risks incurred, together with the ability to enforce strong banking standards across the whole supply chain.[[257]](#footnote-257)

1. The *Africa Trade Finance Survey Report[[258]](#footnote-258)* highlighted the potential of Afreximbank for boosting intra-African trade through **the involvement of alternative lenders**. The report urges for a more prominent role to be played by banks in financial regulations so as to ease financial transfers between African countries to enable the business environment. This role includes taking more risks, easing credit access criteria, and using government guarantee schemes to scale up liquidity to struggling banks, in efforts to protect small and medium enterprises and save jobs.

**5.2.4 Right to Intellectual Property, Technology Transfer and Local Adaptation:**

*Provisions*

*Article 1*

*Private enterprises have the right to apply for intellectual property protection for any original creation of the human intellect such as artistic, literary, technical, or scientific creation, of which they are the inventors, for a limited period of time. Unique products, processes, machines, or chemical compounds are inventions. Enterprises may obtain protection for inventions that are****useful, new****and****inventive****. Improvements to existing processes, products, machines, or compositions can also be protected. This protection shall be granted in the forms of patents, copyrights, trademarks, trade secrets, industrial designs, and other IPRs, in accordance with the minimum standards of the WTO-TRIPS Agreement.*

Article 2

*1.  Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.*

*2.  Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.*

*3.  Members may also exclude from patentability:*

*(a)  diagnostic, therapeutic and surgical methods for the treatment of humans or animals;*

*(b)  plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.[[259]](#footnote-259)*

Article 3

*1.  A patent shall confer on its owner the following exclusive rights:*

*(a)  where the subject matter of a patent is a product, to prevent third parties not having the owner’s consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;*

*(b)  where the subject matter of a patent is a process, to prevent third parties not having the owner’s consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.*

*2.  Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.[[260]](#footnote-260)*

*AU country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.[[261]](#footnote-261)*

*The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.[[262]](#footnote-262)*

Protecting IPRs is required in the provisions of the WTO’s TRIPS Agreement, which the majority of AU Member states are signatories to, and the WIPO’s UPOV Agreement. However, the standards required for IP protection may shut out local inventions that are mostly improvements. At this stage, most African countries would enhance business by not adopting the full standards of the TRIPS Agreement.

For African states that are mostly importers rather than producers of technology, and where food security and creating employment for smallholder farmers remain top priorities, this paper recommends that mandatory flexibilities be adopted which prevent the use of IPRs to the detriment of food security and other public interest considerations. More specific and obligatory balancing instruments include provisions for farmers’ rights, transition periods for LDCs, exceptions and limitations to IPRs and unfair competition rules.

Balancing must also take place between regional and global IP and trade interests. Historically, countries have adopted stronger IPRs only when it is in the interests of domestic enterprises and technology.[[263]](#footnote-263) African countries should learn from the experiences of BRICS economies like India, whose initial refusal to apply IP laws to medicines has been credited with the growth of the pharmaceutical industry in the country. Similarly, China’s non-adoption of WTO TRIPS standards, which enabled local companies to begin production of their own technologies through reverse engineering and copying, has been credited for helping the country to becoming a major player in international trade.[[264]](#footnote-264)

**Policy Recommendation- Expand IPR to Include Informal Innovation and Traditional Knowledge; Tie the grant of IPR to Technology Transfer:** Article 66 of the TRIPS agreementrequires that IP protection facilitate technology transfer. However, the question of what acts constitutes a transfer of technology and when it can be said to have occurred remain elusive. The hypothesis of this study views technology transfer as processes and acts that advance the innovative capability of local farmers and scientists for domestic production, rather than just the importation of IP protected technology.[[265]](#footnote-265) Informal channels of technology transfer include imitation; the movement of personnel from one firm to another taking with them specific knowledge of their original firm’s technologies; data in patent applications and the temporary migration of people, such as scientists and students to universities and research institutes in advanced countries. What is specific to the informal transfer is that there is no formal compensation to the original owner of the technology transferred.[[266]](#footnote-266) Keeping such channels available through provisions for open access are beneficial to informal invention and reverse engineering.

**5.2.5 Right to Special and Differential Treatment for Least Developing Countries (LDCs), Small and Medium Scale Enterprises, and Industries with Multiplier Potential** (Agriculture, Digital Technologies, ICTS, and Sustainable Energy)

*Provision: State Parties shall, provide flexibilities to other State Parties at different levels of economic development or that have individual specificities as recognised by other State Parties.[[267]](#footnote-267)*

*Member states reaffirm that provisions for special and differential treatment are an integral part of the Bill of Rights. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. We therefore agree that all special and differential treatment provisions in RECs shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.[[268]](#footnote-268)*

*Member states recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral* channels, to provide strengthened and adequately resourced assistance to respond to these needs.[[269]](#footnote-269)

*Small and Medium scale enterprises may be granted to special and differential terms in terms of time and costs for adopting the standards contained in this Bill. Members may provide special considerations to infant industries located within their territory, for a limited period, until these industries mature and develop economies of scale to viably compete with competitors outside Africa.*

*These considerations may only be provided if the protected industry demonstrates that it is viable without protection, by showing in annual reviews by an independent body, that its cumulative net benefits exceeded the cumulative costs in the previous year.*

Special and differential treatment is made obligatory under Article 6 of the AfCFTA, which states that, “State Parties shall, provide flexibilities to other State Parties at different levels of economic development or that have individual specificities as recognised by other State Parties.”[[270]](#footnote-270)

The infant-industry theory states that new industries in developing countries need protection against competitive pressures until they mature and develop [economies of scale](https://www.investopedia.com/terms/e/economiesofscale.asp) that can rival their competitors'. The infant industry argument is often cited as a rationale for [protectionism](https://www.investopedia.com/terms/p/protectionism.asp) and was developed by Alexander Hamilton and Friedrich List.

The infant-industry theory is the supposition that emerging domestic [industries](https://www.investopedia.com/terms/i/industry.asp) need protection against international competition until they become mature and stable. In economics, an infant-industry is one that is new and in its early stages of development and, thus, not yet capable of competing against established industry competitors. The infant-industry theory was later improved on by the economist and philosopher [John Stuart Mill](https://www.investopedia.com/terms/j/john-stuart-mill.asp), who said that infant industries should only be protected if they can mature and then become viable without protection. Charles Francis Bastable then added a simple condition that the cumulative net benefits provided by the protected industry must exceed the cumulative costs of protecting the industry.[[271]](#footnote-271)

**Policy Recommendation- Provide exceptions, limitations and subsidies for LDCs and SMEs:** Seeing that the main methods used to protect infant industries, such as subsidies, import duties, tariffs, quotas, and exchange rate controls, are disallowed under the AfCFTA, it is suggested that African countries should create exceptions that will permit the use of these for infant industries. Moreover, research shows that in the countries that have attained high levels of economic growth over the past twenty years (Brazil, Russia, India, China and South Africa, together known as the BRICS) protecting their infant industries was an important tool in achieving this growth. Thus, African countries should provide exceptions for this. Such exceptions are permitted under Articles 7 & 8, 27 and 30 of the WTO TRIPS Agreement.

The provision that offers the greatest potential for factoring business and food security exceptions into Africa’s regional agreements is Article 23 of the 2010 revision of the Cotonou agreement, which states that:

Cooperation shall support sustainable policy and institutional reforms and the investments *necessary for equitable access to economic activities and productive resources*, particularly: The development of strategies with a view to enhancing agricultural production and productivity in ACP States by providing, in particular, the necessary financing for agricultural research, agricultural inputs and services, supportive rural infrastructure, and risk reduction and management. Support shall include public and private investments in agriculture, encouragement to develop agricultural policies and strategies, strengthening of farmer and private sector organisations, management of natural resources, and development and functioning of agricultural markets. The agricultural production strategies shall reinforce national and regional food-security policies and regional integration. In this context, cooperation shall support ACP efforts to enhance the competitiveness of their commodity exports and to adapt their commodity export strategies in the light of evolving trade conditions.[[272]](#footnote-272)

By allowing for consideration of social and non-economic objectives in business regulations, exceptions and limitations to IPRs provide important tools for balancing the private economic interests contained in business rights with public interests. To enhance flexibility, African treaties should not limit themselves to considering exceptions provided under WTO regulations, but also include exceptions based on the provisions of the ITPGRFA, the CBD, and the African Model Law. African states should utilize the exception provided under Article 27.3(b) of TRIPS to develop an alternative *sui generis* framework for IP protection more suited for the region’s food security needs.

**5.2.6 Right to Advancing Local Value Chains, Distribution Channels and Economy of Scale**

A value chain can be defined as the set of actors and activities that bring a basic agricultural product from the field to final consumption and add value at each stage of the production process.[[273]](#footnote-273) It therefore includes primary production, transformation, marketing and final consumption. In the agricultural sector, value can be added by acts carried out at the individual, farm, community, national, regional, or international levels, to achieve both social and commercial goals. [[274]](#footnote-274)

The African Union’s Abuja Resolution emphasizes that developing regional value chains for strategic agricultural commodities is essential for advancing development in the continent.[[275]](#footnote-275) Regional value chains differ from global value chains because the finished product is exported by a country within the region, either globally or regionally. Therefore, regional value chains offer countries in the region an opportunity to harness local trade and markets to boost their competitiveness and to produce and export products with higher value added.[[276]](#footnote-276) By adding value to agricultural products, local farmers and small and medium enterprises (SMEs) in Africa can increase the opportunity of obtaining some form of IP protection for their products. This will facilitate intra-regional trade and reduce reliance on imported foods, so as to increase food security in the region.

**Policy Recommendation- Require Local Working of Patents:** The African Union (AU) should consider adopting IP policies that require local working of patents, as such rules have been identified as playing an important role in advancing local value chains in India and Egypt.[[277]](#footnote-277) Local working requirements that advance national food security should not be considered as ‘discriminatory’ under Article 27.1 TRIPS, as they help fulfill the underlying public policy objectives for IP protection stated in Articles 7-8 and the preamble of the TRIPS Agreement. Public-private partnerships and partnering with academic institutions can also help African farmers improve agro-processing and value addition to agricultural products.[[278]](#footnote-278) Where public-private partnerships result in discoveries that are subject to patents and PVP, the IPRs should not exclude local farming communities from access to the inventions and sharing in any resulting benefits.

**5.2.7 Open Access to Information- The Right to Home Grown Data**

Provision: *1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authority.*

*2 Access to digital information and data generated from their businesses shall be made available to registered businesses, at an affordable price. Where access to essential data is limited due to expenses from copyright protection, open access shall be maintained by state governments.*

*3 The freedom and pluralism of the media shall be maintained*

*4 Every enterprise has the right to the protection of data concerning their company*

1. *Such data must be fairly processed for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Every corporation has the right of access to data that has been collected concerning them, and the right to have it rectified.*
2. *Where the data relating to a corporate entity has been used in developing a product, the corporation should be given compensation, or access to the utilization of such data. This especially applies to farmers whose genetic material is used to create new agricultural technologies and genetically improved seeds.*

**Policy Recommendation- Maintain Flexibilities from IPR for Open Access; Establish Local Databanks:** Open access data (generally shortened as ‘open data’) is publicly available information that can be universally and readily accessed, used and redistributed free of charge in digital form. In contrast to freedom of information which allows citizens to apply for access to data collected by the government, Open data permits the proactive publication of such data without the long red tape process and costs, in a manner that promotes free and easier access to information by the public. Adopting open access would make data collected by the government freely available in a centralized repository, which would advance business innovation and local research.

Much of the business innovation taking place in Africa is incremental and is facilitated through open access and communities.[[279]](#footnote-279) However, the provision entrenches the multilateral IP principle, found in TRIPS and the UPOV, of the separation of breeder’s rights from farmer’s rights and the proprietary control of agricultural produce. The latter idea runs contrary to the practices of smallholder farmers in Africa where open access to agricultural knowledge within a community and free exchange of farm saved seeds is the norm, and where the farmer’s right includes the right to benefit from breeding activities. [[280]](#footnote-280) This greatly reduces the potential for the agreement to support food security in Africa, as it runs contrary to the traditional agricultural processes in the region.

Considering the reliance of African countries on subsistence agriculture as the major source of food security, if the IP regulation does not increase open access among farmers (through free exchanges of and replanting of seeds); protects the rights of local communities to collectively practice traditional knowledge; and requires prior informed consent, equitable benefit sharing of gains made from locally sourced plants and genetic materials; it has not fulfilled its objectives.

Article 30 TRIPS provides for limited exemptions to the exclusive rights conferred by a patent. African countries should take advantage of this by providing research exemptions in their domestic laws to enable their public sector agricultural research to continue without the threat of infringing on patents. Activities like the sharing of knowledge by local farming cooperatives (open access); and the exchange of seeds between subsistence farmers; and research activities to create new plant varieties should be specified as private activities, with no immediate or direct commercial application, that do not prejudice the legitimate interests of the holders of patents or PBRs. Specific exceptions should also be granted for farmers’ rights.

**5.2.8 Right to Private Property, Adequate Housing, and Basic Infrastructure**

Provision: *The States Parties to the present Bill recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[[281]](#footnote-281)*

*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.[[282]](#footnote-282)*

*Everyone has the right to own, use, dispose of and bequeath their lawfully acquired possessions. No registered business entity may be deprived of their possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property by registered businesses may be regulated by law where necessary for advancing the general public interest.[[283]](#footnote-283)*

In the United States and much of the developed Western world, land ownership is facilitated through a freehold system, where ownership is by individuals and of an indefinite duration. In Africa, however, two factors have influenced the evolution of property rights outside of freehold systems. First, in the past, some communities in Africa did not think of land as something to be owned by an individual, but rather by the community for the benefit of the community. This tradition effectively prevented the emergence of personal property rights in the late 1800’s and early 1900’s, as it fundamentally conflicted with existing African cultural norms. Second, legacies of colonialism prevented large scale freehold systems for indigenous peoples and instead generally permitted only “customary” systems, where land could be used but not owned. In British colonies like South Africa, Rhodesia, and Kenya, for example, land and real property ownership was reserved for the colonialists and their favored businesses and entities, while indigenous populations in general followed a customary system. As a result, the land within many African countries today falls under different systems of property ownership.

The most effective way to boost African wealth creation is through a “freehold-like” system of land rights supported by robust documentation, better data collection, aggregation, and transparency. Thus, enhancing the business environment would require national governments to clarify laws regarding ownership of property encompassing individual, customary, freehold/collective, and state rights to property. African countries should also support the establishment of digital data banks detailing land ownership. Establishing clear ownership of property has a positive impact on the business environment for two reasons. Firstly, foreign investors gain confidence in any transaction that involves real property or real estate when they know that there is clear and transparent ownership of the property. Secondly, corruption in land and property ownership is curbed because it becomes harder to use gifts or bribes of undocumented land in return for political or business favors or to sell land more than once. Thirdly, governments gain a framework through which property taxes can be collected to fund essential government services.[[284]](#footnote-284)

The right to adequate housing is not the same as the right to property. The right to adequate housing is broader than the right to own property as it addresses rights not related to ownership and is intended to ensure that everyone has a safe and secure place to live in peace and dignity, including non-owners of property. Security of tenure, the cornerstone of the right to adequate housing, can take a variety of forms, including rental accommodation, cooperative housing, lease, owner-occupation, emergency housing or informal settlements. As such, it is not limited to the conferral of formal legal titles.[[285]](#footnote-285)

Though the rights of businesses to land and physical properties should be protected, this should be balanced with important public interests, such as the construction of a railway or pipeline. For example, in its decisions, the European Court of Justice has stated that the property as a fundamental right is described not as an absolute right, for the social function has to do with the general interest that is the basis of each treaty, that is the free and full competition.[[286]](#footnote-286)

**Policy Recommendations:**

**Adopt Policies Advancing Access to Adequate Housing:** A vast majority of African cities are becoming homes to thousands of people everyday, due to the rapid urbanisation, population explosion, migration and influx in major cities. There’s an unparalleled demand for affordable homes across Africa, particularly in regions such as Kenya, Ghana, Nigeria, Ethiopia, Nigeria, South Africa, Côte d’Ivoire and Uganda.For businesses that are mostly based in urbanized areas, the provision of accessible and affordable housing can make a big difference in enhancing the business environment. While there have been local and global investors who are investing in most affordable housing projects, it is equally important that Government bodies actively participate in meeting the requirements through various schemes and policy initiatives that are favourable to the low-income groups.

First, initial “registration” or mapping initiatives must be conducted to establish a baseline of land ownership data. This crucial first step is the most important, and many such initiatives are already underway. For example, having identified land ownership and rights as a key part of its Sustainable Development Goals, the World Bank is running services focused on helping countries title, survey, and register land and develop digital land administrative services in Mozambique and Tanzania. Similarly, The United Nations Economic Commission for Africa has established a land policy framework to help African countries conduct registration initiatives; and The African Development Bank has published comprehensive reports regarding “rethinking land reform in Africa.”[[287]](#footnote-287)

**Government housing schemes targeting low-income groups**: An example of a policy for applying this principle can be found in recent changes to Ghana’s housing policy. As at 2018, Ghana had a housing deficit of 1.7 million housing units. To address this, the ministry of housing in Ghana has proposed the delivery of 85,000 homes over the next decade. The government is also working towards facilitating creative financing schemes that improves the overall affordability and access to modern communities for all working-class citizens. The Ghana government, in 2019 budget has also announced GH¢1 billion mortgage and housing finance to leverage private capital which aims to expand access to housing and deepen the local mortgage and construction finance market to help bring down the housing deficit.[[288]](#footnote-288) Formal recognition of community-based land rights in African countries might also be useful to enhancing the environment for doing business.[[289]](#footnote-289)

**5.2.9 Right to a Functional Educational System that Provides a Highly Skilled Work Force**

*1 Everyone has the right to education and to have access to vocational and continuing training.*

*2 This right includes the possibility to receive free compulsory education.*

*3 The freedom to found educational establishments shall be carried out with due respect for democratic principles, and the right of business to a skilled competent work force*

*4 As primary stakeholders in the employment of labour, business enterprises shall be actively engaged in the negotiation and development of curriculum in institutions of higher learning, licensing and certification requirements, and educational laws and policies relevant to business development. The program of an educational institution shall not be certified unless it receives bi-annual references from companies or relevant NGOs like the union of engineers, affirming that its graduates are fit for purpose/ active engagement in the industry or sector.*

*5 STEM and digital education should take priority, by being given a greater percentage of funding, in AU member states.*

**Policy Recommendation- Connecting Universities with Private Businesses:** Business and industry are facing significant labour shortages in Africa, as the ratio of graduates in skilled areas, especially medicine and engineering, in comparison to the population, is inadequate. The graduates that are produced by the Universities often lack the skills to carry out jobs, and very few skills exist in areas of the future, such as software engineering. This indicates a strong need to revamp the educational system in African countries, as the institutions are not succeeding in building a strong skilled employable workforce that is useful for future economic growth.

Considering that a lot of the jobs currently being handled by Africans are increasingly being carried out by artificial intelligence and automation, it is advised that the governments of African states should grant greater incentives for educational institutions that focus on STEM learning and the development of digital skills.[[290]](#footnote-290) The grant of educational funding to universities should be based on their forming partnerships with private industries to provide them skilled workers. This would help institutions of higher learning to foster graduates with skills relevant to local communities and industries.

**5.2.10 Right to Benefit from Scientific Progress**

*Provision: The State Parties to the present Bill recognize the of all enterprises to enjoy the benefits of scientific progress and its applications.*

*Every enterprise has the right to the protection of moral and material interests resulting from scientific, literary, or artistic production of which it is the author, or of which its knowledge contributions have played a significant role in developing.[[291]](#footnote-291)*

*In executing this right, states shall ensure that enterprises have easy and affordable access to modern technology necessary to execute their business functions; and shall provide the capacity building training for enterprises to apply relevant technologies at subsidized rates.*

The right to enjoy the benefits of scientific progress and its applications (REBSP) is contained in Article 27 of the Universal Declaration on Human Rights (UDHR) and Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 15 states that:

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

Though most African countries are signatories to the ICESCR, the implementation of Article 15 is inadequate, as is evidenced by the digital gaps that exist in African countries.

**Policy Recommendation: A Human Rights Approach to Business Rights:** This perspective views business rights as tools to achieve socio-economic purposes, rather than as absolute rights. Thus, it will not be adequate that policies foster increased business rights, if this does not lead to socio-economic development of communities.

One strategy for this is the adoption of the provisions of the Nagoya Protocol by African countries. The *Nagoya Protocol* is a protocol to the CBD aimed at advancing the third objective of the CBD relating to fair and equitable sharing of benefits from utilization of genetic resources.[[292]](#footnote-292) It develops the legal framework and institutions to achieve the CBD’s objectives of Access to Genetic Resources (Article 15) and Traditional Knowledge (Article 8(j)), all of which are relevant tools in achieving food security. Article 5 of the Nagoya Protocol calls for fair and equitable benefit sharing; Article 6.3 requires prior informed consent (PIC), or approval and involvement of indigenous and local communities (ILCs), before commercialization of bio-genetic resources; while Article 7 requires access and benefit sharing (ABS), relating to the development of genetic resources associated with traditional knowledge, be done on mutually agreed terms (MAT) with ILCs. This would foster dissemination of the benefits of scientific progress, rather than monopolization and misappropriation of genetic resources by businesses.

**5.2.11 Right to Steady and Continuous Energy**

*Provision: 1 Every corporation has the right to steady and continuous energy.*

*2 The main duty to make energy available lies with the state.*

*3 Consequently, where a business is unable to operate due unreliable power, the businesses may seek for compensation from the government designated power supplying body. Businesses may also challenge the procedures for allocating power production if they are do not provide optimal results or result in production of energy that is detrimental to the environment.*

Stable and affordable energy access plays a key role in enabling the atmosphere for doing business. Not only is energy required for manufacturing and other sectors, but it is also important for running of businesses that they rely on the ICT such as telecommunications and internet providers. Energy also leads to the creation of new markets, businesses and job openings, which provide more opportunities for individuals to earn an income and lift themselves, their families and their communities out of poverty. A lack of a consistent access to reliable power costs businesses and the economy as a whole. According to one report, **nearly 7 out of 10 businesses cite lack of access to a reliable source of power as a main constraint to doing business, before access to finance and corruption.**[[293]](#footnote-293)

Obtaining energy in Africa has been made more challenging by the demands of the green energy, which are advocating a switch from fossil fuels, like oil and gas, to energy sources with less carbon emission, like solar and hydro, so as to sustain the environment. However, the costs of solar technologies remain relatively high for most African countries. Further, the use of green energy is being made a condition for trade in international agreements. For African countries that have large deposits of oil and gas, this would prevent them from profiteering from natural deposits, while increasing production costs for local business.

**Policy Recommendation:** The electrification of Sub-Saharan Africa (SSA) should be treated as a necessity and not merely as an aspiration, based on the measurement of short-term impacts. Sustainable Development Goal 7 (SDG7) calls for “affordable, reliable, sustainable and modern energy for all” by 2030. To achieve this goal, this research proposes that the supply of electricity to businesses be phrased as a compulsory obligation (a right), for which national governments can be sued if they fall short.[[294]](#footnote-294) Further, tax exceptions should be granted for African companies that supply electricity to other African countries and double taxation should be avoided.

**5.2.12 Right to Happiness and Well Being of the Majority of the Population (60%)**

*State Parties shall maintain the right to happiness and well-being of the majority of the population (60%).*

*In implementing this right, states shall grant enterprises substantial infrastructural improvements, access to credit, and technological knowledge necessary to support ease of doing business and sustainability in the regions where they are located.*

Though the right to happiness and well-being is basically a human right related to the individual, state parties might advocate the expansion of this right to an ECOSOC right requiring the maintenance of conditions that are necessary to the durability of business enterprises. This will be based on the theory that happiness and well-being are tied to economic progress. Countries with stronger businesses have access to greater funds needed to finance public sector institutions like hospitals and universities, that advance development and general well-being.

**Policy Recommendation:** Countries can adopt a standard that assesses the factors that contribute to business sustainability and efficiency, then require businesses to make assessments regularly based on these standards.

For example, according to the *Doing Business* (DB) 2013 report, Canada ranked third on the first subindex "Starting a business" behind only New Zealand and Australia. In Canada, there is 1 procedure required to start a business which takes on average 5 days to complete. The official cost is 0.4% of the [gross national income](https://en.wikipedia.org/wiki/Gross_national_income) per capita. There was no minimum capital requirement. By contrast, in [Chad](https://en.wikipedia.org/wiki/Chad) which ranked among the worst (181st out of 185) on this same subindex, there were 9 procedures required to start a business taking 62 days to complete.[[295]](#footnote-295)

**5.2.13 Right to Freedom of Movement and Association**:

*Provision: The state parties to this Bill recognize the right of everyone to freedom of movement and association.*

*Every registered enterprise in an AfCFTA member state has the right to:*

1. *Move to and establish itself in any African country; and*
2. *To legally pursue its business and make a profit in any African country.[[296]](#footnote-296)*

*In implementing this right, state parties to this Bill shall also remove restrictions to freedom of movement granted in the Regional Economic Communities (RECs) agreements recognized under the AfCFTA Agreement.*

*Corporations legally registered and recognized in one REC shall be recognized equivalently and have the right to operate in other RECs without further re-reistration.*

To achieve a reimagined international economic law for migration requires both the active participation of states, lawyers, migration scholars & private corporations. For the former, this would involve active liberalization of migration both in economic and political terms. And for the latter, international lawyers and international and domestic civil society must put up the resistance needed to make international economic laws and practices become more people/ human rights centric.[[297]](#footnote-297)

**Policy Recommendation:** Despite the existence of formal provisions for integration that support food security in ECOWAS agreements, the provisions remain largely unenforced by countries in the region. For example, Ghana imposes bans and restrictions, often for months at a time on unprocessed agricultural produce, while Burkina Faso imposes seasonal restrictions on maize.[[298]](#footnote-298) A USAID Gap Analysis of ECOWAS’ FTAs found that these restrictions reduced farmers’ income and compromise regional food availability and security during the off-season.[[299]](#footnote-299) To advance intra-regional trade in West Africa the principles and procedures of regional IP institutions need to be integrated, and the strength of regional trade institutions increased.

**5.2.14** **Right to Intra-Regional Trade**

Economic literature emphasizes regional integration of markets as an important strategy for facilitating the transformation of the smaller economies of Africa into a broader economic space that would enable countries to achieve economies of scale, strengthen the international competitiveness of regional companies, increase access to new technologies and investments, while serving as a buffer against external shocks and internal shortcomings.[[300]](#footnote-300) Case studies indicate that countries, or groups of countries, with the largest share of world trade are located in regions with the highest levels of intra-regional trade. [[301]](#footnote-301) A prominent example is the European Union. Therefore, to enhance the business environment in the region, it is important that Africa’s trade regulations strengthen intra-regional trade.[[302]](#footnote-302)

**5.2.15 Enabling Business Environment as a Condition for National and International Public Sector Loans**

*Provision*

*Government’s role is a critical factor in the financing of public-sector projects. The Bank will bear the commercial risk; but it may require that the host Government provide general comfort commitment as evidence of its recognition of the potential benefits of the project, to protect the Bank against government decisions and actions that may adversely affect the sustainability and success of the project, and also reassure co-lenders and even the project sponsors. In the same regard, the Bank may require the host Government to provide undertakings, such as not to revoke the corporate autonomy of the client public enterprise, alter tariffs, or change laws and regulatory provisions that affect commercial operations of the public enterprise. To facilitate its non-sovereign guaranteed public-sector lending operations, the Bank will seek prior confirmation concerning the privileges, exemptions and immunities of the Bank, including exemption from taxes, unrestricted repatriation of loan principal repayments, interest and any other income from sale proceeds of Bank’s investment or security held in the country as well as any other privileges and immunities accorded to the Bank under the Bank Agreement. Therefore, the Bank will not undertake Public-Sector NSGL operations in a MIC if that country has not signed a Letter of Assurances confirming the privileges, exemptions and immunities of the Bank in respect of such operations.[[303]](#footnote-303)*

*Before approving a Public-Sector NSGL operation, the Bank will formally notify the government so as to provide an opportunity for the government to provide its non-objection to the proposed Bank intervention. In addition to the letter of non-objection, the host Government of a Public-Sector NSGL operation may be required to give further undertakings and assurances by way of letters of assurances or letters of comforts, including commitments to undertake specific macro-economic and/or sectoral reforms or institutional changes deemed essential for project success and sustainability of the project. The undertakings and assurances would be tailored to protect the Bank from non-commercial risks, such as regulatory risks, currency transfer risks, moratorium, nationalizations or other forms of taking. In addition, a Public-Sector NSGL agreement will outline the rights, privileges and obligations of the Bank as a preferred creditor, in the event of a firm decision to restructure or privatize the public sector enterprise beneficiary of an outstanding Bank non-sovereign guaranteed loan.[[304]](#footnote-304)*

*Sustainable subnational development outcomes require ownership and commitment both on the part of the subnational governments / entities as well as on the part of the central governments who control, to a large part, the operating environment of the subnational entities. To ensure ownership by the national government, subnational finance activities must be aligned with the country’s development agenda as embodied in a national development plan or strategy. The activities shall also be reflected in the RMC’s CSP with the relevant analysis and justification. Furthermore, the Policy on Expenditure Eligible for Bank Group Financing spells out conditions that demonstrate ownership, and that are applicable to subnational governments when they contract directly with the Bank Group for sovereign-guaranteed investment projects. The Bank Group shall secure the consent of the central and state/provincial (if applicable) government(s) of the RMC(s) hosting the operation, including for non-sovereign guaranteed operations in support of public sector enterprises. When warranted, a tripartite letter of agreement between the subnational government(s) /entities, the central government(s), the Bank Group, and other financiers shall be entered into to lay out necessary actions that need to be undertaken by each Party to ensure the success of the operation.[[305]](#footnote-305)*

**Policy Recommendations:** In order to obtain international finances, AU Member States should be willing and able to undertake the necessary steps to manage their economies in a manner that fosters private sector development, by fulfilling the following conditions suggested by the African Development Bank.[[306]](#footnote-306)

African governments urgently need debt restructuring, with private creditor participation, to free up resources for development financing and return to a growth trajectory. On average, African governments are spending more on debt servicing than on combatting the health and economic crisis. Reforms in debt and public finance management are necessary to maintain access to commercial credit and also to ensure long-term debt sustainability.[[307]](#footnote-307)

Considering the fact that corruption has remained a factor of high-level concern negatively affecting the business environment in African countries, consideration could also be given to making the reduction of corrupt systems a conditions for giving loans, grants, or other forms of finance. Illicit financial flows (IFFs) continue to drain large amounts of financial resources from the continent, with severe impacts on Africa’s development agenda. As a result, Africa is unable to recover or repatriate assets consigned to foreign jurisdictions. The Africa Union (AU) has played an important role in the fight against financial corruption and stem IFFs from Africa. For example, it adopted (i) the recommendations of the *Report of the High-Level Panel on Illicit Financial Flows*, (ii) the outcomes of its 2018 theme “Winning the Fight Against Corruption – A Sustainable Path to Africa’s Transformation” and (iii) the Nouakchott Declaration on Anti-Corruption taken at the 31st Ordinary Session of the African Union, 1-2 July 2018 (African Union, 2018). In February 2020, the African Union Advisory Board on Corruption and other partners developed the Common African Position on Asset Recovery to tackle internal and external obstacles to recovering stolen assets.[[308]](#footnote-308)

The World Bank has made the provision of finances dependent on secure credit for local currency bonds. The World Bank noted that international bond flows to developing countries with maturity of at least five years began to increase around 2009 for those countries that adopted its conditions. The IMF also places certain economic conditions as a pre-requisite to obtaining its loans.[[309]](#footnote-309) This practice could be adopted by the ADB and other financial institutions.

However, care must be taken not to adopt policies that are suitable for developed countries to developing countries, as different frameworks are required for countries based on their socio-economic development levels. The challenge lies in the fact that many free trade agreements require conditions or adopt standards higher than those contained in multilateral agreements such as the WTO’s TRIPS Agreement. To help establish a regulatory framework that encourages trade and investment in Africa, more flexible policies are recommended and being adopted. For example, Canada recently negotiated Foreign Investment Protection and Promotion Agreements (FIPAs) with Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Guinea, Tanzania, Mali, Madagascar, Senegal and Zambia, which adopt less stringent conditions for loans than those required for developed countries.[[310]](#footnote-310)

**3. The controversial resource-backed lending model persists.** The [resource-backed lending model](https://elibrary.worldbank.org/doi/abs/10.1596/978-1-4648-0239-3) for financing infrastructure projects—in which the borrowing country commits future revenues to be earned from its natural resource exports to pay loans secured from Chinese creditors—still [exists](https://deborahbrautigam.files.wordpress.com/2014/02/gp_brautigamgallagher.pdf) in countries like the Democratic Republic of Congo (DRC), Ghana, and Guinea. When the going is good, this model works. It helps a high-risk borrowing country secure needed financing; it assures the creditor of repayment since the export revenues are directly deposited in an escrow account with no risk of embezzlement by corrupt actors in the borrowing country; and it allows for the speedy completion of roads, bridges, and other infrastructure projects. When the going gets tough—especially in the event of a collapse of volatile commodity prices, as so often happens—some borrowers then turn to the International Monetary Fund (IMF) for emergency assistance.[[311]](#footnote-311)

**5.2.16 Right to Trade and Investment Insurance Under the ATI Agreement**

Provision: *1 Every corporation has the right to existence, liberty and security.*

*2 Consequently, a business may not be seized by state powers, without following due process and providing adequate compensation to the owners.[[312]](#footnote-312)*

*3 Based on the ATI Agreement, corporations have the right to have their investments guaranteed by the national authorities in which they operate*

**5.2.17 Right to Participate in Consultative Processes for Balancing Investment and Environmental Concerns**

*Provisions: 1. The Member States recognise that flexible and voluntary mechanisms, such as voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships, can contribute to the achievement and maintenance of high levels of environmental protection and complement national regulatory measures. The Member States also recognise that those mechanisms should be designed in a manner that maximises their environmental benefits and avoids the creation of unnecessary barriers to investment or trade.*

*2. In accordance with its national policies, laws, and regulations, and to the extent that it considers appropriate, each Member State shall encourage: (a) the use of flexible and voluntary mechanisms to protect natural resources and the environment in its national territory; and   (b) its relevant environmental authorities, business organisations, nongovernmental organisations, and other interested persons involved in the development of criteria used to evaluate environmental performance, with respect to these voluntary mechanisms, to continue to develop and improve such criteria.[[313]](#footnote-313)*

The private sector is key to mobilising green investment and sustainable development in Africa. Climate change presents a US$3 trillion investment opportunity in Africa by 2030. 75% of the investment is expected to come from the private sector to complement public sector financing. This calls for innovative approaches to attract and steer financial ﬂows consistent with a pathway towards low-carbon and climate-resilient development.

In addition to being a force for financing, the private sector in Africa is important in mitigating climate change and implementing adaptation measures. With SMEs constituting 95% of Africa's private sector - which is the continent’s main energy user and greenhouse gas producer - ensuring that nascent and growing SMEs are not only climate-responsible but also helping curtail climate change is fundamental.[[314]](#footnote-314)

On climate financing, the Paris Agreement established market mechanisms, including cooperative approaches and a new multilateral sustainable development mechanism in the future architecture of the climate regime.

**Policy Recommendation:** Gareth Phillips, Division Manager for Climate and Environment Finance at the African Development Bank, recommends that:

*“In order to achieve tangible benefits for Africa, market mechanisms should build on those elements of Clean Development Mechanism (CDM) reform that have enhanced participation in Africa, and continue to advocate further improvement of rules.*

*Building bridges between market-based approaches and climate financing institutions is crucial to allow for rapid investments into emerging mechanisms, so that the policy instruments of the Paris Agreement can evolve in a “learning-by-doing” approach.”[[315]](#footnote-315)*

**5.2.18 Right of the Private Sector to Participate in Hearings Affecting Business Environment: Budgets, Conflict Resolution, Political Aspirants:**

*Each Member State shall promote public participation in the development and implementation of all regional co-operative activities, as appropriate, under this Article.[[316]](#footnote-316)*

The process by which an agreement is negotiated plays a key role in determining the resulting norms and their contents. Business regulations are found to be more effective in advancing the business environment where local businesses themselves are active participants in formulating them. This principle can be implemented by requiring the regular input and comments from the public sector and businesses during the process. This conforms with principle 9 of the OECD document, which requires that “Public authorities should ensure adequate consultation with end-users and other stakeholders including prior to the initiation of an infrastructure project”.[[317]](#footnote-317) ICSID.

To ensure that negotiations for future trade agreements are more inclusive, the paper suggests that AfCFTA regulations require the participation of important stakeholders in negotiation processes, especially business organizations and NGOs. Such comprehensive participation will lead to higher transparency and accountability of IP regulations.[[318]](#footnote-318)

It should be pointed out that most African countries resort to consulting the business sector after something has gone wrong. This paper proposes that a pre-natal approach could be useful, requiring consultation with businesses by even political aspirants, whose trade plans should then be critically assessed and approved (or disapproved) by the business community before they are elected.

**Policy Recommendation: Mandate Public Private Dialogue during Legislation formation** process: An example of how this can be implemented is the practice of the Mexican Federal Commission for Regulatory Improvement (COFEMER), which has incorporated direct feedback from entrepreneurs into its “Regulatory Moratorium” process. In 2004, Mexican entrepreneurs used that mechanism to argue against 63 specific formalities that, in their opinion, would have had an unnecessary high cost to doing business. After scrutiny, 62 of those 63 high-impact regulations were indeed considered as having too-high of a negative impact and were thus eliminated before they could reach the legislative process.[[319]](#footnote-319)

Effecting this right would also require that entrepreneurs have the right to prior notice, transparency and accountability on government policies and reforms relating to trade and the right of the private sector to participate in the negotiation of national concession agreements. A policy for implementing this right can be found in the *Post-Cotonou Agreement* that is to guide trade between the EU and African Caribbean and Pacific countries. There are several references, in both the foundation and the Regional Protocols, to the importance of ensuring that the relevant actors and organisations will be informed, consulted and involved, when appropriate. The Agreement also promotes the active participation of young people, including in developing, implementing and following up on policies affecting them.[[320]](#footnote-320)

**5.2.19 Right to Consumer Protection and Users Rights**

Consumer protection laws offer an important part of a reliable market economy. It attempts to balance the rights of companies with the need to protect users and consumers from being harmed by services and products. Consumer protection laws exist to prevent dangerous or unethical business practices, such as false advertising or faulty products. In enabling the business environment, consumer protection laws seek to prevent predatory lending, housing discrimination, securities fraud, privacy violations, and other unethical practices.

Protecting consumers and users’ rights is also part of the corporate social responsibility principle. It involves allowing access and benefit sharing and prior informed consent by users of products regarding the implications of a product for their health and environment. Enacting these rights greatly enhance the business environment in African states.

As Africa is a testing ground for technologies produced elsewhere in the world. Yet, too many of the continent’s inhabitants are still excluded from enjoying basic rights, nevertheless their personal information is a valuable commodity in the global market, even when - domestically - safeguards mechanisms are still terribly inadequate. So far 24 African countries, out of 53, adopted laws and regulations to protect personal data, and the number is slowly rising. The 2016 EU General Data Protection Regulation stands as a model for many, but this report advocates for a specific regulation designed to fit the economic needs of African countries. Companies may lack the finances to enforce their users’ rights through the courts. Aid should be given to them to aggressively enforce their rights in court at less cost.[[321]](#footnote-321)

**5.2.20 Right to Speedy Due Process and Fair Trail**

*Provisions*

*RELATION OF INVESTOR'S LIABILITY TO DISPUTE SETTLEMENT: In accordance with the applicable domestic law, a host State or private person or organization, may initiate actions for damages under the domestic law of the host Member State, or the domestic law of the home Member State where such an action relates to the specific conduct of the investor, for damages arising from an alleged breach of the obligations set out in this Supplementary Act. The proceedings in the domestic law Court shall conform to the procedures applicable in the Community Court of Justice.*

*PROCEDURAL FAIRNESS: In accordance with the requirements of paragraph 1, Host Member States shall ensure that their administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that does not deny administrative and procedural fairness to investors and their investments. Investors or investments shall be notified in a timely fashion of administrative or judicial proceedings and changes thereof directly relating to them, unless such notice is contrary to domestic law on an exceptional basis.*

1. *Hosts Member States shall act in a manner that does not create a denial of justice in judicial and administrative proceedings. (3) Administrative decision-making processes shall include the right of administrative appeal of decisions, commensurate with the level of development of the host Member State. Judicial review of administrative decisions should also be available through domestic or regional judicial review processes. (4) Notwithstanding the differences in administrative, legislative and judicial systems, Member States shall strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes, and shall provide review or appeal procedures to ensure that they operate in accordance with applicable domestic laws.[[322]](#footnote-322)*

Speedy settlement of legal issues is beneficial to business development. One method for doing this is the provision of special courts devoted to resolving intra-African business issues, like the AU multilateral court. Specific time limits should also be set designating the maximum times within which trade related matters should be resolved. Existing court systems can be employed in implementing these policies, as this would reduce the costs to African states.

Note that the right to a due process in criminal justice is usually applicable for individual offenders. For business entities, AU countries should consider the right to speedy trial or due process in the context of civil matters such as expropriation or nationalization and the compensation attached thereto.

**5.2.21** **The Right to Sue National Governments, RECs and the AU for Policies, and to be Sued**

*Provision RELATION OF INVESTOR'S LIABILITY TO DISPUTE SETTLEMENT: In accordance with the applicable domestic law, a host State or private person or organization, may initiate actions for damages under the domestic law of the host Member State, or the domestic law of the home Member State where such an action relates to the specific conduct of the investor, for damages arising from an alleged breach of the obligations set out in this Supplementary Act. The proceedings in the domestic law Court shall conform to the procedures applicable in the AU Community Court of Justice.[[323]](#footnote-323)*

*PROCEDURAL FAIRNESS: In accordance with the requirements of this provision, Host Member States shall ensure that their administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that does not deny administrative and procedural fairness to investors and their investments. Investors or investments shall be notified in a timely fashion of administrative or judicial proceedings and changes thereof directly relating to them, unless such notice is contrary to domestic law on an exceptional basis.*

*Hosts Member States shall act in a manner that does not create a denial of justice in judicial and administrative proceedings.*

*Administrative decision-making processes shall include the right of administrative appeal of decisions, commensurate with the level of development of the host Member State. Judicial review of administrative decisions should also be available through domestic or regional judicial review processes.*

*Notwithstanding the differences in administrative, legislative and judicial systems, Member States shall strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes, and shall provide review or appeal procedures to ensure that they operate in accordance with applicable domestic laws.[[324]](#footnote-324)*

The ultimate goal of this right/freedom is to position government institutions to earn, rather than merely ask for, the trust of the business community. This trust can be earned when government institutions openly communicate information about their privacy practices and proactively demonstrate to the entrepreneurs of African countries what measures they take to advance the rights of businesses and comply with a strong and modern law, in a manner that the private sector can easily understand. This would also aid increased accountability from governments.

**Policy Recommendation: Balance Investor Claims with Public Interests**

Investor-state dispute settlement systems, which give foreign companies the right to sue governments over investments, have been adopted by institutions like the World Bank. However, investors have also used this system not only to sue for compensation for alleged expropriation of land and factories, but also over a huge range of government measures, including environmental and social regulations, which they say infringe on their rights.[[325]](#footnote-325) Thus, it is advised that the adoption of a central claims court by for investor-state cases be approached with caution by the AU. Provisions must be put in place to ensure that public interest does not suffer by giving corporations too much power. One way of doing this is by requiring private rights to be interpreted to support human rights and sustainable development, under a functionalist approach to law. The United Nations affirms the primacy of fundamental human rights obligations over private economic rights protected in trade and IP related agreements like TRIPS.[[326]](#footnote-326) Under the latter approach, human rights can be seen as providing a ‘ceiling’ to private business rights and IPRs, specifying interests which IPRs should not interfere with.[[327]](#footnote-327)

**5.2.22 Right to Protection of Traditional Knowledge and Related Genetic Resources**

*Provision: Any access to biological resources, knowledge and or technologies of local communities shall be subject to the written prior informed consent of: i) the National Competent Authority; as well as that of ii) the concerned local communities, ensuring that women are also involved in decision making. 2) Any access carried out without the prior informed consent of the State and the concerned local community or communities shall be deemed to be invalid and shall be subject to the penalties provided in this legislation or any other legislation that deals with access to biological resources.*

*The National Competent Authority shall consult with the local community or communities in order to ascertain that its/their consent is sought and granted. Any access granted without consultation with the concerned community or communities shall be deemed to be invalid and in violation of the principle and requirement for prior informed consent as required under this Article.[[328]](#footnote-328)*

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established. (Article 7 Nagoya Protocol).

the rights of local communities over their biological resources, knowledge and technologies represent the very nature of their livelihood systems and have evolved over generations of human history, are of a collective nature and, therefore, are a priori rights which take precedence over rights based on private interests.[[329]](#footnote-329)

**Policy Recommendation: Adopting a Sui Generis System for IP Protection**

Traditional knowledge and genetic resources (TK-GR) are not covered in the TRIPS Agreement. This leaves them open for regulation at the regional level. Moreover, these subjects are evolving and important issues relevant to IP and food security in African countries. Yet, despite the significance of traditional knowledge and genetic resources to food security in Africa, current regional IP agreements do not specifically provide for protection of these areas of knowledge. A model framework for Africa must include regulations in these areas. The provisions of the African Model Law should be adopted as a *sui generis* system for protecting traditional knowledge and genetic resources.[[330]](#footnote-330)

In 1998, in an attempt to integrate their obligations under TRIPS to provide PVP, with their commitment in non-IP multilateral agreements to support food security in the African context, [[331]](#footnote-331) the Council of Ministers of the Organization of African Unity (OAU) adopted a Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and Regulation of Access to Biological Resources. The language of the Model Law indicates that because a majority of food agriculture in the continent is based on subsistence farming, using traditional knowledge and local practices like the free exchange and reuse of seeds by farmers, achieving food security in the region will require the accommodation of community rights, farmers’ rights, prior informed consent and disclosure of origin of plants and genetic materials, and access and benefit sharing obligations as a necessary part of IP regulations in Africa.

According to the Model Law, the rights of local communities over their biological resources, knowledge and technologies represent the very nature of their livelihood systems and have evolved over generations of human history, are of a collective nature and, therefore, are a priori rights which take precedence over rights based on private interests.[[332]](#footnote-332)

**Table: Summary of African Bill of Rights**

|  |  |  |
| --- | --- | --- |
| **Sector Gaps** | **Recommendations** | **Helpful Institutions & Policies** |
| * **Legal Sector** * Security and Predictability of Laws * Civil Law vs. Common Law Systems * Multiplicity of Courts * Non Enforceability of Judicial Decisions | * Single Continental Investment and Trade Court with jurisdiction over regional courts * Harmonization between AfCFTA and RECs * Integration of relevant aspects of laws | * Cf WTO courts system |
| * **Financial Sector** * Stable, Predictable and Transparent Financial Systems * Lack of Access to Credit for SMEs * Difficulty in transferring funds between countries | * Continental Financial Integration and Accountability Systems run by businesses and governments together * One stop Banking Systems * Loans to SMEs without Land Collateral * Utilizing flexibilities in World Bank and IMF regulations | * Adoption of a Common Currency under PAPSS |
| * **Infrastructural Development Sector** * Lack of Infrastructural Development * Right to Private Property | * Make infrastructural development a condition for international loans * Require a certain portion of investment be made in the form of infrastructure * A Human Rights Approach to Business Rights | * China’s loan scheme and development models * Clarify laws regarding ownership of property * EU Charter of Fundamental Rights, Freedoms, Article 17 Right to Property * The *Nagoya Protocol and CBD* * Article 15 ICESCR & Article 27 UDHR |
| * **Government and Administration Sector** * Administrative Difficulties | * Easy registration and removing red tape, adopting new technologies * One step process and freedom of establishment * Establishment of a common data base for referral * Continental registration recognized in all regions * Integrating customs, trade, and migration laws * Remove double taxation | * Protocol on Free Movement, Right of Residence and Establishment * The African Trade Observatory * The practice of the Democratic Republic of Congo, Cameroun, Togo, and Gabon * Freedom of establishment provision found in Articles 49, 54 and 58 of the *Treaty on the Functioning of the European Union* (TFEU). |
| * **Political Sector** * Lack of Security, Good Governance and Political Stability | * Involving businesses in the negotiation of trade regulations * Requiring political aspirants to present blue print for business development before elections | * The African Trade Insurance Agency * The AU’s Nouakchott Declaration on Anti-Corruption * Mexican Federal Commission for Regulatory Improvement (COFEMER), direct feedback requirement |
| * **Educational Sector & SMEs** * Lack of skilled workers * Lack of value added production * Limited research capacity and local innovation * Lack of Export Competitiveness | * Revamping educational institutions with special focus on STEM and ICT skills * Connecting research institutions directly with industries * Special and differential treatment for SMEs and informal sector innovation * Require local content in production and local capacity building in labour * Documenting and protecting Traditional Knowledge, related genetic resources, and informal trade * Public-Private Partnerships * Enhancing inter firm linkages and position of SMEs on global value chain * Right to benefit from scientific progress | * African Model Law * Article 6 AfCFTA, Infant industry clause * TRIPS Article 66, Technology Transfer and Local Adaptation Requirements * Articles 7 & 8, 27 and 30 of the WTO TRIPS Agreement, exceptions and limitations for SMEs and LDCs. * Utilize Article 27.3(b) of TRIPS to develop an alternative *sui generis* framework for IP protection * Article 23 of the 2010 revision of the Cotonou agreement, |
| * **Multilateral & Regional Institutions** * Differences between Multilateral, Continental and Regional Systems | * Establish continental systems for harmonizing regional and continental rules * Interpretation of WTO rules by TRIPS and AfCFTA objectives * Balancing domestic interest with continental and multilateral interests * Applying VCLT rules to resolve conflict of laws * Right to Intra-Regional Trade | * The AfDB 10-year inclusive growth strategy for 2013–2022 * The African Export-Import Bank (Afreximbank) |

**6.0 Advocacy Issues and Conclusion**

Considering the above analysis, the following strategies are recommended as being important for advancing an enabling environment for private business in Africa, and should be advocated for by the African Union:

* 1. Merging Business Protection with Sustainable Development Goals
  2. Reconciling Provisions in Regional Economic Partnership Agreements, with AfCFTA and WTO TRIPS Provisions
  3. Integrating Public Interest and Socio-economic rights in Continental and International Investment Law
  4. The Need for Gender Inclusivity and Poverty Reduction
  5. Protecting Informal Business Rights and Traditional Knowledge
  6. The Right and Need to Protect Continental Businesses against International Monopolies
  7. Establishing a Continental Educational Trust Fund to Produce a Skilled African Work Force[[333]](#footnote-333)
  8. Establishing an AU Court for Investment and Trade
  9. Good Governance
  10. Advancing Democracy
  11. Identifying and Advancing Key Enablers for the Effective Implementation of the AfCFTA
  12. Urging for the Adoption of the Bill of Rights as a Legal Document of the African Union
  13. Establishing a Common Currency for Africa, backed by Gold.[[334]](#footnote-334)
  14. Harmonizing the Fees for Business Ownership and Licensing Across African Countries
  15. Home grown African Research and Data Collection
  16. Infrastructural Development
  17. Advocacy Enablers Issues
  18. Risk of Free trade area being used for recycling of imported goods, rather than promotion of made in Africa products and trade
  19. Even distribution of benefits, financial inclusion, protection of local businesses
  20. Independent Judicial Commissions should be allowed to implement the Protocols as signed by the Heads of States

1. Specifically, 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 West African States (ECOWAS); the Inter-governmental Authority on Development (IGAD)2; the South African Development Community (SADC); and the Arab Maghreb Union (AMU). [↑](#footnote-ref-1)
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116. Online, at: <https://mo.ibrahim.foundation/news/2018/brain-drain-bane-africas-potential#:~:text=Brain%20drain%2C%20which%20is%20the,emigrate%20from%20Africa%20every%20year.> [↑](#footnote-ref-116)
117. Not every African country suffers significant brain drain. Rwanda, for example, holds onto their best and brightest, and at the same time attracts international talent. Rwanda [tops WEF’s list of African countries](http://mgafrica.com/article/2015-08-28-brain-drain-burundi-the-country-most-unable-to-retain-its-top-talent-rwanda-kenya-star-and-jammehs-gambia-surprises) able to retain their top talent, followed by some distance ahead of Morocco, Kenya. Ivory Coast and South Africa. Regarding international attraction, Rwanda again is number one ahead of Seychelles, Ivory Coast, The Gambia and Mauritius. Online at: < <https://blogs.lse.ac.uk/africaatlse/2016/01/18/how-severe-is-africas-brain-drain/>> [↑](#footnote-ref-117)
118. <https://www.unhcr.org/49e479c811.pdf> ,at pg 3. [↑](#footnote-ref-118)
119. Online, at: < <https://en.wikipedia.org/wiki/ECOWAS_passport>> [↑](#footnote-ref-119)
120. African nations currently trade more internationally than with each other. Intra-African trade accounts for 17% of African exports, which is low compared to 59% for Asia and 68% for Europe, according to the World Economic Forum. Online at: < <https://www.dw.com/en/africas-free-trade-area-has-a-slow-take-off/a-60288032>> [↑](#footnote-ref-120)
121. Seychelles does not require visas for citizens of African states; since 2013 Rwanda allows nationals of all African countries to obtain a visa upon arrival; while since 2016 Ghana issues citizens of AU states visas upon arrival at the country’s Kotoka International Airport. Online at: <https://circumspecte.com/2017/08/visa-free-travel-africa/> [↑](#footnote-ref-121)
122. <https://jfin-swufe.springeropen.com/articles/10.1186/s40854-020-00195-0#Sec2> [↑](#footnote-ref-122)
123. Online at: < <https://businessday.ng/news/article/pan-african-payment-system-to-reduce-dependence-on-foreign-notes/>> [↑](#footnote-ref-123)
124. Online, at: <https://www.tandfonline.com/doi/full/10.1080/00343404.2021.1873934>. [↑](#footnote-ref-124)
125. Thaddeus Manu, “Self-defeating Reasons for Signing the African Growth and Opportunities Act: Analyzing the Pressure on African Countries to Enact UPOV Convention Plant Breeders’ Rights as Opposed to Effective *Sui Generis* Regimes under TRIPS” (2015) 44:1 *Common Law World Review* 3 [Manu, Reasons for AGOA] [↑](#footnote-ref-125)
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130. Opinion: “Making the WTO Work for Africa”, *Africa Business*, September 23rd 2020. [↑](#footnote-ref-130)
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136. Mamadou Cissokho, *Discours au Congrès de la Coordination Rurale*, Caen, 28 Novembre 2002. [↑](#footnote-ref-136)
137. <https://www.un.org/africarenewal/magazine/august-2014/africa-needs-both-aid-and-trade> [↑](#footnote-ref-137)
138. <https://www.cfr.org/backgrounder/imf-worlds-controversial-financial-firefighter> [↑](#footnote-ref-138)
139. African Union (AU), *Agreement Establishing the African Continental Free Trade Agreement* (AfCFTA), Kigali draft text, March 2018, TI21086\_E. [AfCFTA]. [↑](#footnote-ref-139)
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141. United Nations Economic Commission for Africa (UN-ECA), *African Continental Free Trade Area: Towards the Finalization of Modalities on Goods-Toolkit* (Addis Ababa: UN-ECA, 2018) at 1. [↑](#footnote-ref-141)
142. Yeukai Mupangavanhu, “The protection of intellectual property rights within the continental free trade area in Africa: Is a balance between innovation and trade possible?” (2018) 15:4 *International Journal of Business, Economics and Law*, 14 at 15 [Mupangavanhu, The protection of IPRs in the CFTA]. [↑](#footnote-ref-142)
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144. African Union Decision, Assembly of the Union Tenth Extraordinary Session 21 March 2018 Kigali, Rwanda. (2018) Ext/Assembly/AU/Dec.1(X). [↑](#footnote-ref-144)
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149. Online, < <https://www.oecd.org/derec/unitedstates/35933797.pdf>>, at 10. [↑](#footnote-ref-149)
150. Online at:< <https://www.pacci.org/the-community-of-sahel-saharan-states-cen-sad/>>. The member States of CEN-SAD are:**Benin, Burkina Faso, Central African Republic, Chad, the Comoros, Côte d’Ivoire, Djibouti, Egypt, Eritrea, the Gambia, Ghana, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, the Sudan, Togo and Tunisia.** [↑](#footnote-ref-150)
151. Online at: < <https://en.wikipedia.org/wiki/Community_of_Sahel%E2%80%93Saharan_States>> [↑](#footnote-ref-151)
152. Online at: < <https://au.int/en/recs/censad>> [↑](#footnote-ref-152)
153. Online at: < <https://en.wikipedia.org/wiki/East_African_Community#Economy>> [↑](#footnote-ref-153)
154. Online at: < <https://en.wikipedia.org/wiki/East_African_Community#Economy>> [↑](#footnote-ref-154)
155. Agreement online at: < <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2401/download>>. [↑](#footnote-ref-155)
156. Online at: < <https://ecdpm.org/wp-content/uploads/ECCAS-CEMAC-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf>>, pgs 5-6. [↑](#footnote-ref-156)
157. <https://www.pacci.org/economic-community-of-central-african-states-eccas/> [↑](#footnote-ref-157)
158. Online at: < <https://www.devex.com/organizations/communaute-economique-des-etats-de-l-afrique-centrale-economic-community-of-central-african-states-ceeac-eccas-52141>>, key challenges section. [↑](#footnote-ref-158)
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160. Article 3.2(f) and (g). [↑](#footnote-ref-160)
161. <https://ecdpm.org/wp-content/uploads/ECOWAS-Trade-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf>, at 5-6. [↑](#footnote-ref-161)
162. <https://ecdpm.org/wp-content/uploads/ECOWAS-Trade-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf>, at 6. [↑](#footnote-ref-162)
163. <https://www.oecd.org/aidfortrade/47479759.pdf> , at pg 4. [↑](#footnote-ref-163)
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