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EAC Labour Unions Position Paper on the African Continental Free Trade Area (AfCFTA).

“An Equitable and Transformative AfCFTA should incorporate stronger provisions that safeguard and uphold Labour Rights”

Introduction

In 2012, the African Union (AU) took a decision on Boosting Intra-African Trade through Fast Tracking the establishment of the AfCFTA by an indicative date of 2017. On 15th June 2015, the AU 25th Ordinary Summit of Heads of State and Governments launched AfCFTA Negotiations. Covering a market of 1.2 billion people, a combined Gross Domestic Product (GDP) of US\$ 3 trillion and with capacity to boost intra-African trade by 52.3% by eliminating import duties¹, the AfCFTA aims at creating a continental market for goods and services, with free movement of people and capital, and pave the way for creating a Customs Union². The AfCFTA also envisions to promote industrialization and competitiveness of the continent by unlocking regional value chains that can enable Africa’s meaningful integration into the global economy.

The AfCFTA comprises several legal instruments/ protocols covering trade in goods, trade in services, and dispute settlement. The first phase of negotiations, covers trade in goods and services with related annexes like schedules of preferential tariff concessions on goods, concessions on services liberalization, and preferential rules of origin. Originally, Phase 2 of AfCFTA was meant to cover negotiations of protocols on Investment, Competition policy, and Intellectual Property Rights (IPRs). However, new protocols like Women and Youth in Trade and Electronic Commerce (Digital Trade) whose negotiations were initially to be conducted under Phase 3, have been pushed to Phase 2 of the AfCFTA Negotiations. Under Services Liberalization, the protocol on trade in services has prioritized five sectors for liberalization including financial services, transport, communication, professional services and tourism.

Status of AfCFTA Negotiations

On 21st March 2018, forty-four (44) Heads of State signed the Framework Agreement on the AfCFTA as well as the Protocol on Trade in Goods and Protocol on Trade in Services. As of May 2022, 54 member states (except Eritrea) are signatory parties to the AfCFTA, while 43 countries (covering 80% of AU Membership) have ratified the agreement and deposited their instruments of ratification with the African Union Commission (AUC) Chairperson³. At the East African Community (EAC) level, all Partner States have signed the AfCFTA while 5 out of

¹ https://knowledge.uneca.org/ATPC/sites/default/files/PDFpublications/qa_cfta_en_230418.pdf

² <https://www.uneca.org/stories/stakeholders-discuss-benefits-afcfta-ghana>

³ <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>



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6 (except South Sudan) have ratified. On 1st of January 2021, trading under the AfCFTA framework officially commenced following a decision by the 13th Extra Ordinary Session of the Assembly of the AU on the AfCFTA.⁴ However, critical elements to facilitate actual trading under AfCFTA are still pending, which led to trading under the pact challenging and created a deadlock. These include: preferential tariff liberalisation concessions on goods; concessions on services liberalization and preferential rules of origin.

In order to remove the deadlock on trading under the AfCFTA regime, on 29th January 2021, the 8th meeting of the AfCFTA Council of Ministers responsible for Trade agreed that: Trading under AfCFTA regime proceeds on the basis of Agreed Rules of Origin; negotiations on Trade in Services be concluded on 30th June 2022; and Phase II Negotiations be concluded by September 2022⁵. Regarding implementation of the agreement, EAC Member States are in the process of designing their respective National AfCFTA Implementation strategies, with Kenya having finalized the process in 2021⁶, while at the regional level, the EAC Secretariat is developing a Regional AfCFTA Implementation Strategy, and is conducting stakeholder consultations to inform the process.

The AfCFTA and Labour Rights

We call for the AfCFTA to contain effectively enforceable commitments on workers' rights to ensure respect for fundamental ILO conventions including on freedom of association and against child labour and forced labour. This is crucial to prevent a '*race to the bottom*' in which national labour conditions are reduced in an attempt to lower production costs so as to expand international trade and competition.

We wish to commend both the AfCFTA and EAC Secretariats for acknowledging the need to "*contribute to the promotion of human rights and international labour standards, including through provisions on transparency and corporate social responsibility/responsible business conduct*" under the guiding principles of the AfCFTA Protocol on Sustainable Investment.

However, we are concerned that AfCFTA agreement and its related Annexes and Protocols contains no mechanisms to effectively enforce fundamental labour rights or promote decent jobs. Furthermore, ACTFTA poses a number of threats to Decent Work, listed below. This underlines the importance of governments engaging with trade unions in the negotiation of the AfCFTA to address these threats.

⁴ Africa Renewal, ... Africa's free trade area opens for business, 7 January 2021 by Franck Kuwonu <https://www.un.org/africarenewal/magazine/january-2021/afcfta-africa-now-open-business>

⁵ Communiqué of the 8th Meeting of AfCFTA Council of Ministers Responsible for Trade, convened in Accra-Ghana on 28-29 January, 2022. Available from:

<https://twitter.com/AfCFTA/status/1487806904881582085/photo/1>

⁶ <https://www.uneca.org/?q=stories/national-afcfta-implementation-strategy-to-boost-kenyan-trade-and-investment>



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1. **AfCFTA threatens to Decent Work:** The deal could reduce tariffs on certain agricultural products which will allow cheaper products into markets affect the workers employed in agriculture and lead to through retrenchment, low wages, and reduced workers' benefits. This will particularly disadvantage women workers who are more likely to be displaced from stable employment in agriculture to jobs in the informal sector where exploitative conditions are common, increasing gender inequalities.
2. A poorly negotiated Electronic Commerce (E-Commerce) Protocol can lead to digital labour rights violations including: Algorithmic bias, workplace surveillance, electronic union blacklisting; and can also result into limited ability of State Parties respective domestic courts to enforce labour standards given the fact that E-Commerce provisions are against obligations for local presence of E-Commerce companies.
3. A poorly negotiated Protocol on Sustainable Investment will lead to no obligations for the much-needed requirements to employ or source locally, transfer of skills, allowing for unionization of workers among others, and could lead to violation of acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health
4. AfCFTA will bring down barriers to trade in services – such commitments could mean that governments have to withdraw regulation or practices to promote social and employment rights (such as nationalisation of public services) that could be challenged and potentially dropped as a 'barrier' to trade in services.
5. Investor-State Dispute Settlement – this is a special court system that would allow foreign investors to legally challenge governments for any actions they claim threaten their profits, this could include laws to increase minimum wages. There is a likelihood of creation of “special courts” for foreign investors thus limiting the capacity of African Governments to regulate investors and investments in regards to worker's rights.

We are concerned there has also been limited involvement of Labour Unions in the negotiations leading to the pact. We wish to note that only an inclusive AfCFTA negotiations consultation process will result into ownership of the final pact by labour unions. This is critical, especially given that the promises of the AfCFTA i.e. to create decent jobs for all; foster skills transfer and to promote innovations cannot be achieved without the engagement and consultation of Africa's trade unions.



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Proposals on a way forward

We call for governments to engage with trade unions to ensure AfCFTA promotes Decent Work and quality public services, this must include:

- a) A comprehensive chapter on Labour both in the AfCFTA text and its associated Protocols should be incorporated to cater for: definition of labour laws and visa commitments; This should involve Under Article 8 of the AfCFTA text (Status of the Protocols, Annexes and Appendices), para 3 argues that “Any additional instruments, within the scope of the AfCFTA Agreement, deemed necessary shall be concluded in furtherance of the objectives of the AfCFTA and shall, upon adoption, form an integral part of this Agreement”. EAC Partner States in collaboration with Labour Unions can leverage on this provision to demand for a dedicated Annex/Appendix/Protocol on Labour Rights of the AfCFTA.
- b) Exclusion of all public services from commitments to liberalise services in the AfCFTA to ensure that governments remain free to regulate them in the public interest
- c) No Investor-State Dispute Settlement mechanism and special courts for foreign investors should be included in the AfCFTA. Recent trade deals have contained systems that allow foreign investors to sue government for actions that threaten their profits. Such courts have been used to prevent increases in the minimum wage, as well as other employment protections⁷. Therefore, Labour Unions should ensure that AfCFTA scraps Investor-State-Dispute Settlement from trade deals to ensure workers are protected from these kinds of challenges.
- d) Tariffs retained on agriculture and other key strategic industries that employ significant numbers of workers, particularly women workers
- e) Protections for personal data from abuse and a guarantee to transparency on data use to enable workers to see how their data is used
- f) **Promotion of E-Immigration.** The AfCFTA must contain commitments that ILO fundamental conventions will be applied to all workers who move across borders using the free movement provisions in the agreement. Mobile workers must also be paid according to the collectively agreed rate that applies to their sector. State Parties should develop, update and implement legal frameworks on E-Immigration, strengthening E-Immigration infrastructure, coordination and services and build the capacity of immigration officials and border management authorities on e-immigration.

⁷ Crawford. R (2017). What would it take for trade deals to protect workers' rights?. Link: <https://www.tuc.org.uk/blogs/what-would-it-take-trade-deals-protect-workers%E2%80%99-rights>



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- g) **Implementation of Mutual Recognition Agreements (MRAs).** African Union Member States undertake to harmonise and mutually recognize academic and professional qualifications, skills obtained through experience from other member states. A comprehensive section of Mutual Recognition Agreement (MRAs)/Certificates and skills should be sought under the AfCFTA Trade in Services Annex. This should also involve easing cross border movement of persons; establishing a regional framework for social security coordination and the portability of pensions so as to manage social friction between immigrants and nationals, amongst others measures.

Conclusion

While the AfCFTA offers an opportunity to drive forward Africa's integration agenda as part of the continent's aspirations of structural transformation and inclusive development such a transformative trade agenda cannot happen without the strategic and consistent involvement of Labour Unions to ensure the agreement contains key provisions to promote Decent Work, gender equality, decent public services and mutual recognition of qualifications

With AfCFTA negotiations still ongoing, Trade Unions should demand for integration of labour provisions in the general AfCFTA text and its attendant Protocols and Annexes.

Annex 1: Key Labour rights related provisions the AfCFTA Protocols and the EAC Implementation Strategy should entail

Protocol on Sustainable Investment

Preamble: The preamble should clearly state the objective of the Protocol i.e. to "*protect and promote internationally recognized labor rights*".

Definition of Labour Rights/laws: A section defining labour laws should be included. Special focus should be paid to the following internationally recognized labor rights:

- *the right of association;*
- *the right to organize and bargain collectively;*
- *a prohibition on the use of any form of forced or compulsory labor;*
- *labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and*



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- *acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.*

Enforcement

The agreement should include a mechanism to enforce the labour commitments listed above. This should involve:

1. A fully independent dispute settlement mechanism established that would have the power to enforce commitments in the respective Trade and Sustainable development chapters. This body should be comprised of experts in labour rights, human rights and environmental rights.
 - a. Trade unions should be able to submit complaints through this mechanism for violations of workers' rights. The investigations should include fact-finding missions and public hearings where relevant stakeholders are invited to testify.
2. A monitoring body comprised in equal number of trade unions, employer groups and other civil society groups should be formed to monitor actions taken by governments in response to any complaints submitted
3. If the independent dispute settlement mechanism deems that a country has violated its commitments and failed to address the issue in a timely manner, there must be material penalties.
4. Governments must prove that they have enforced the decisions of the independent dispute settlement mechanism by enforcing the national law and international commitments on the violator, including by prosecution of executives, fines and withdrawing export licenses.
5. The independent dispute settlement mechanism should keep under review whether violations of labour standards have been effectively addressed and any awarded compensation to workers has been given.



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	<p>Performance Requirements: Performance requirements prescribe the manner in which Investors should operate in host countries/communities, thus can grant EAC Partner States the right to impose obligations on foreign investors to act in a way that is beneficial to the EAC economy and its people. Therefore, the protocol should have a section on Performance requirements that includes: <i>requirements to employ or source locally, transfer of technology and skills.</i></p> <p>Chapter on Investment and Labour: It is important for the protocol to include a dedicated chapter on Investment and Labour. By benchmarking the existing FTAs and BITs between individual African Countries and RECs with third parties; and the COMESA Treaty, this chapter will be vital in ensuring Investments accruing to AfCFTA promote human rights. This should have provisions like: <i>Labor Cooperation Mechanism; Institutional Arrangements; Application and Enforcement of Labor Laws.</i></p> <p>Mutual Recognition of Certificates: This should cover aspects of: temporary mobility, establishment in another AfCFTA State Party, systems of recognition of qualifications (both automatic recognition- <i>for professions with harmonised minimum training conditions</i>; and general recognition-<i>for other regulated professions such as teachers, translators and real estate agents</i>); <i>Minimum wage and Unionization of workers and right to collective bargaining; Elimination of discrimination in respect of employment and Occupation.</i></p>
Electronic Commerce Protocol	<p>Emerging issues in the digital workspace: The protocol should recognize and put in place mechanisms to tackle digital labour rights violations including: <i>Algorithmic bias, workplace surveillance, electronic union blacklisting.</i> The protocol should require transparency in the way data is used and protections for personal data from abuse.</p> <p>Obligations for local presence of E-Commerce companies: Without a local presence of companies, there is no entity to sue and the ability of domestic courts to enforce labour standards, as well as other rights, is fundamentally challenged.</p>



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	<p>Thus, the Protocol should have provisions with obligations for local presence.</p> <p>Fair treatment and competition rules: Online platforms are mostly built on algorithms that determine the service provider's (worker's) payment who often have low bargaining power if any. To this end, AfCFTA State Parties should establish fair treatment and competition rules, such as portability of rankings among platforms, and actively support platform workers in other ways to increase their individual right to redress and explanation and collective power.</p> <p>Data Governance/regulation of cross-border data flows: Online platforms both collect vast reams of data on people, and shape the information these people are exposed to. They should therefore be obliged to sign up to national laws on what data they can and cannot collect. Government regulation and enforcement is necessary – to protect workers, to protect personal data, to avoid market power abuses and protect economic freedom, to industrialize/digitalize.</p>
<p>Women and Youth in Trade Protocol</p>	<p>The Protocol should have a number of provisions including:</p> <ul style="list-style-type: none"> • Objective on commitment by State Parties to Internationally recognized Labour rights, especially abolition of child labour. • A review mechanism to assess the traded commodities form their source, so as to ensure traded commodities are not due to forced labour or child labour. • A labour chapter to link women and youth in trade and labour rights. • Promotion of E-immigration: AfCFTA State Parties should develop, update and implement legal frameworks on E-Immigration, strengthening E-Immigration infrastructure, coordination and services and build the capacity of immigration officials and border management authorities on e -immigration. By Implementing Integrated Border Management will facilitate free movement of goods, services, labour and persons, the Integrated Border Management promotes efficiency and effectiveness in immigration services.
<p>EAC AfCFTA Implementation Strategy</p>	<p>Mainstream Labour issues: While the strategy, under <i>Pillar 5</i>, commits to mainstream issues of Gender, Youth, Persons with Disabilities (PWD) and Technology, there is no inclusion of</p>



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Labour. For the strategy to deliver inclusive outcomes, implementation needs to consider the mainstreaming of Labour .

Mutual Recognition of Certificates: This should cover aspects of: temporary mobility, establishment in another AfCFTA State Party, systems of recognition of qualifications (both automatic recognition- *for professions with harmonised minimum training conditions*; and general recognition-*for other regulated professions such as teachers, translators and real estate agents*)

Services Liberalization capacity gaps: Partner States are yet to submit their schedule of specific commitments on the next 7 services sectors under the AfCFTA whose timeline runs to Dec 2021. This should put into consideration areas where services suppliers are weak and measures on how to support them in addressing their capacity gaps.

Enhancing Labour Union's awareness of AfCFTA: The strategy should put in place a mechanism for Partner States to establish a mechanism for Labour Unions participation, including through public advisory committees, as well as a process for the public to raise concerns directly with their respective EAC Partner States and the EAC Secretariat if they believe a State Party is not meeting its labor commitments.

Establish or maintain a senior-level Labor Committee, which will meet regularly to oversee implementation of labor commitments in the AfCFTA, and include a mechanism for cooperation and coordination on labor issues, including opportunities for stakeholder input in identifying areas of cooperation.



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