



AfCFTA and Labour Rights: Process, Issues and Proposals on a Way Forward

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Introduction to the AfCFTA

The 2012 AU Decision on Boosting Intra-African Trade and Fast Tracking the establishment of the African Continental Free Trade Area (AfCFTA) by an indicative date of 2017¹. Subsequently, on 15th June 2015, the African Union the 25th Ordinary Summit of Heads of State and Governments launched 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. The AfCFTA covers a market of 1.2 billion people, a combined gross domestic product (GDP) of US\$ 3 trillion, and will be the world's largest Free Trade Area since the formation of the World Trade Organization (WTO)². 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 Union³. According to United Nations Economic Commission for Africa (UNECA), a border-free Africa could boost intra-continental trade by 52.3 per cent by eliminating import duties⁴; this figure could be doubled if non-tariff barriers are also reduced.

AfCFTA is also envisaged to grow intra-African trade through better harmonization and coordination of trade liberalization across the continent,” possibly leading to the establishment of an African Economic Community. Trade liberalization has been a central part of mainstream policy advice for at least 32 years and one of the most prominent characteristics of globalization policy and drive. It entails removing or reducing restrictions to the free movement or exchange of goods and services between and among countries. This is done through removing or reducing tariff barriers such as surcharges and duties as well as non-tariff barriers which include quotas and licensing rules. With regards to industrialization, the agreement is expected to boost intra-African trade, promote industrialization and competitiveness and unlock regional value chains that can enable the continent's meaningful integration into the global economy.

The AfCFTA's specific objectives are to:

-  Progressively eliminate tariffs and non-tariff barriers to trade in goods
-  Progressively liberalize trade in services; cooperate on investment, intellectual property rights and competition policy
-  Cooperate on all trade-related areas; cooperate on customs matters and the implementation of trade facilitation measures
-  Establish a mechanism for the settlement of disputes
-  Establish and maintain an institutional framework for the implementation and administration of the AfCFTA.

¹ AU (2012) Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area.

https://au.int/sites/default/files/documents/32454-doc-decision_-_english.pdf

² <https://www.chamberuganda.com/sites/default/files/2020-11/FREE%20TRADE%20RELEASE.pdf>

³ <https://www.uneca.org/stories/stakeholders-discuss-benefits-afcfta-ghana>

⁴ https://knowledge.uneca.org/ATPC/sites/default/files/PDFpublications/qa_cfta_en_230418.pdf

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 the Electronic Commerce (Digital Trade) whose negotiations were initially to be conducted under Phase 3, have been pushed to be covered under Phase 2 of the AfCFTA Negotiations.

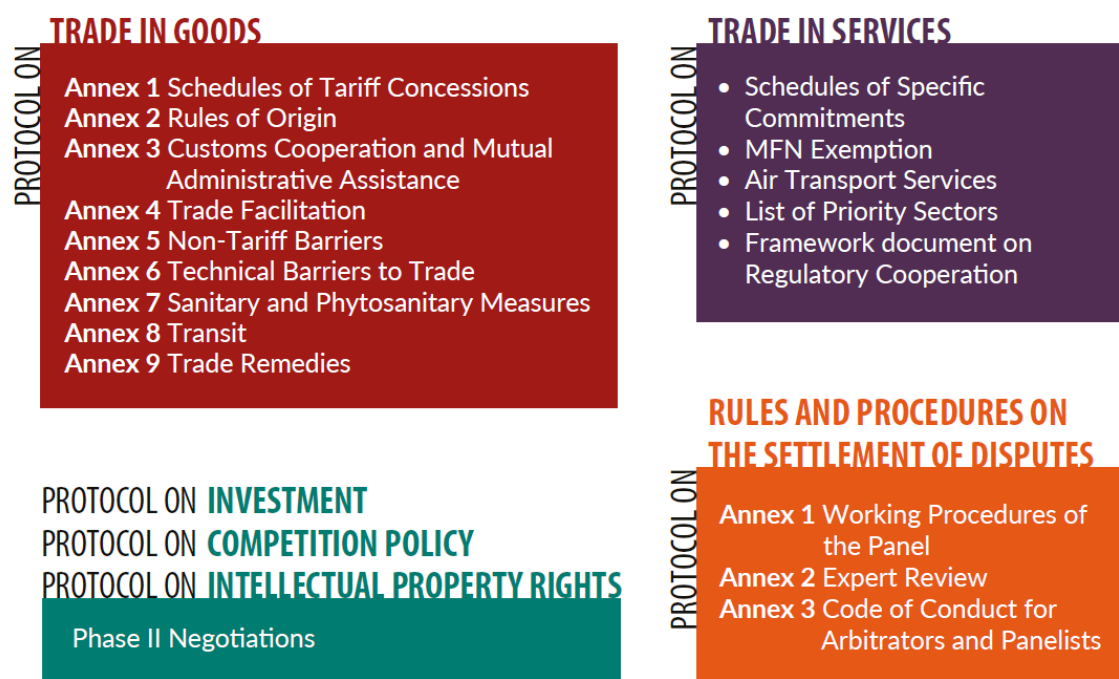


Figure 1. Original AfCFTA Negotiations Phases. **Source:** UNECA-AU-UNCTAD. Assessing regional integration in Africa | Aria IX. September 2019.

Under Services Liberalization, the protocol on trade in services has prioritized five sectors for liberalization including financial services, transport, communication, professional services and tourism. The specific commitments under these priority areas are highlighted in the table below.

| Priority Area | Specific categories/sectors |
|------------------------------|---|
| Financial services | All Insurance and Insurance related; Banking and other financial services. |
| Transport | Maritime; Internal waterway; Air Space; Rail; Road; Pipeline; Services auxiliary to transport. |
| Communication | Postal; Courier; Telecommunication; Audiovisual |
| Tourism | Hotels and Restaurants; Travel agencies and tour operators; Tourist guide services. |
| Professional services | Legal; Accounting; Taxation; Architectural; Engineering; Urban planning; Veterinary; Medical & Physio-therapis. |

Status of AfCFTA Signing and Ratification

As of 29th January 2022, 54 member states (except Eritrea) are signatory parties to the AfCFTA, while 40 countries (covering 73% of AU Membership) have ratified the agreement and deposited their instruments of ratification with the African Union Commission (AUC) Chairperson⁵. At the East African Community (EAC) level, all Partner States have signed the AfCFTA while 5 out of 6 (except South Sudan) have ratified. The Republic of Tanzania is the latest to deposit her AfCFTA instrument of ratification with the African Union Commission (AUC) Chairperson.

| EAC Partner State | Date of AfCFTA Signing | Date of AfCFTA Ratification |
|--------------------|-----------------------------|--------------------------------|
| Burundi | 1 st July 2018 | 17 th June 2021 |
| Kenya | 21 st March 2018 | 10 th May 2018 |
| Rwanda | 21 st March 2018 | 26 th May 2018 |
| South Sudan | 21 st March 2018 | Not yet |
| Tanzania | 12 th June 2019 | 17 th January 2022 |
| Uganda | 21 st March 2018 | 28 th November 2018 |

The AfCFTA is in effect for those countries that have ratified the agreement, known as State Parties. Initially set to start on 1st July 2020, the unpreparedness of State Parties and COVID-19 led to the postponement of the commencement of trading under the African Continental Free Trade Area (AfCFTA). Subsequently, on 1st of January 2021, Duty free trading under the AfCFTA officially commenced after a decision was adopted by the 13th Extra Ordinary Session of the

⁵ The Countries include: Ghana, Kenya, Rwanda, Niger, Chad, Eswatini, Guinea, Côte d'Ivoire, Mali, Namibia, South Africa, Congo, Rep., Djibouti, Mauritania, Uganda, Senegal, Togo, Egypt, Ethiopia, Gambia, Sahrawi Arab Democratic Rep., Sierra Leone, Zimbabwe, Burkina Faso, São Tomé & Príncipe, Equatorial Guinea, Gabon, Mauritius, Central African Rep., Angola, Lesotho, Tunisia, Cameroon, Nigeria, Malawi, Zambia, Algeria, Burundi, Seychelles and Tanzania. Link: <https://www.tralac.org/documents/resources/infographics/2605-status-of-afcfta-ratification/file.html>

Assembly of the AU on the AfCFTA.⁶ However, critical elements to facilitate the actual trading under AfCFTA were and are still pending which led to trading under the pact challenging. These annexes include: preferential tariff concessions on goods; concessions on services liberalization and preferential rules of origin. For example, an annex to the deal outlining the rules of origin - an essential step for determining which products can be subject to tariffs and duties - has not been completed yet, with agreed rules so far covering approximately 87.7% of total tariff lines. Regarding Tariff Concessions, the coverage of the submitted tariff offers/concession is 41 AfCFTA Member States, representing 75% of AU Membership. 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 Origin⁷.

It is also critical to note that at the national level, EAC Member State are in the process of designing their respective National AfCFTA Implementation strategies, with Kenya having finalized the process in 2021⁸. For the case of Kenya, two consultative meetings were jointly organized by the Government and UN Economic Commission for Africa, bringing together experts i.e. government officials, trade economists, university lecturers, development partners and youth and women's representatives⁹. Basing on the scope of the participants, there is clearly no indication that efforts to consult trade unions were explored by the organizers. This is despite the fact that in 2019, Trade Unions collectively demand commitment from the African Union to create opportunities for them to participate and influence trade policies and programmes at the national level and beyond¹⁰. At the regional level, the EAC Secretariat is also developing a Regional AfCFTA Implementation Strategy, with consultations being held. A closer examination of the draft Regional AfCFTA Implementation Strategy for EAC, only focus has been made to consult and address concerns of Private Sector while excluding key actors like Trade Unions and Civil Society Organisations.

Trade in Services Negotiations State of Play

Negotiations for the Protocol on Trade in Services are in an advanced stage of completion with 46 member states having submitted their Schedules of specific commitments under the 5 priority services areas. Conclusion of negotiations under the protocol on Trade in Services is scheduled for 30th June 2022 as directed by the 8th meeting of the AfCFTA Council of Ministers responsible for Trade. On Phase II Negotiations namely: Investment, Competition Policy, Intellectual Property

⁶ 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>

⁷ 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>

⁸ <https://www.uneca.org/?q=stories/national-afcfta-implementation-strategy-to-boost-kenyan-trade-and-investment>

⁹ <https://www.un.org/africarenewal/news/kenya%E2%80%99s-afcfta-strategy-places-country-strong-footing-benefit-agreement>

¹⁰ <https://www.industrialunion.org/african-unions-want-an-inclusive-free-trade-agreement>

Rights (IPR), Digital Trade, and Women and Youth in Trade, the Council of Ministers directed those negotiations on the relevant protocols be concluded by September 2022 for subsequent adoption by Heads of State and Government.

Trade Liberalization under the AfCFTA

Tariff concessions are the most important component under the AfCFTA Phase 1 negotiations, and are aimed at progressively reducing and eliminating customs duties and non-tariff barriers on goods. Under the Agreement, products are assigned to three product groups/lists, namely: 'non-sensitive' products, 'Sensitive' products and the "Exclusion List." Sensitive products are those products of strategic national importance and whose liberalization (opening up) would have an immediate negative impact on the citizens, especially workers, private sector among others. Products which are often earmarked under sensitive list are those which are often considered vital for food and nutrition security, rural development and infant industry development (especially capacity to employ local workforce). Thus, such products are always either progressively liberalized (usually over a range of 10-15 years) or excluded (not liberalized at all).

Under the AfCFTA, the difference between 'non-sensitive' and 'sensitive' products is the longer timeframe for implementation for 'sensitive' products. LDCs will enjoy a longer timeframe for implementation. Tariff liberalization under the Pact has been designed under three (3) parameters i.e. 90% (outright liberalization); 7% (progressive liberalization) and 3% (exclusion list). In terms of timeframe for implementation, tariffs on non-sensitive products are to be eliminated after five years (non-LDCs) or 10 years (LDCs). Tariffs on sensitive products to be eliminated after 10 years (non-LDCs) or 13 years (LDCs). This is illustrated under the table below.

| Product Group | Level of Ambition for all State Parties | Timeframe for Implementation | | |
|-------------------------------|--|------------------------------|----------|--|
| | | Non-LDCs | LDCs | Special Needs/G-7 |
| Non-Sensitive Products | Not less than 90% of tariff lines | 5 years | 10 years | 10 years for 85% of tariff lines. 15 years for additional 5 percent of tariff lines (may be phased from year 11 to year 15) |
| Sensitive Products | Not more than 7% of tariff lines | 10 years | 13 years | 13 years |
| Exclusion List | <ul style="list-style-type: none"> Not more than 3% of tariff lines⁸ | | | |

| | |
|--|---|
| | <ul style="list-style-type: none"> • Exclusion list shall at maximum constitute 10% of the value of imports from other African countries based on a 3-year reference period (2014-2016 or 2015-2017). • Subject to a review process after 5 years |
|--|---|

Currently trade liberalization is carried out through regional trading blocs—East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC), Economic and Monetary Community of Central Africa (CEMAC) and the Economic Community of West African States (ECOWAS) —which run separate customs union.

Proposed Tariff Offers (of select products) by EAC Partner States

EAC Partner States have been engaged in development of their tariff concessions/offers by considering which products to out-rightly liberalize, progressively liberalize or exclude from liberalization. The table below shows a sample of comparison of how Partner States have considered their lists:

| Country | Tariff offers per category | | |
|-----------------|--|---|---|
| | A (outright liberalization) | B (Progressive Liberalization) | C (Exclusion list) |
| Uganda | Goats' meat; Cuts and Offal (fresh or chilled); Potato starch; Cassava starch (manioc) | Tilapia; Peas; Beans; Pineapples; Avocados; Watermelons; Papaws (Papaya); Maize; Sesame Oil; Textile fabrics; Roofing tiles; Cocoa powder | Tomatoes (fresh or chilled); carrots and turnips; Made up Fishing Nets; Butter; Dairy |
| Kenya | Goats' meat; carrots and turnips; Potato starch; Cassava starch (manioc) | Tomatoes (fresh or chilled); Peas; Beans; Watermelons; Papaws; Maize; Sesame Oil; Textile fabrics; Roofing tiles; Butter; Cocoa powder | Hand-Made Fishing Nets |
| Tanzania | Goats' meat; Tomatoes (fresh or chilled); Peas; Beans; Watermelons; Papaws; Maize; Sesame Oil; Roofing tiles | Tilapia; Pineapples; Avocados; Potato starch; Cassava starch (manioc); Textile fabrics; Butter; Cocoa powder | Cuts and Offal (fresh or chilled); Made up Fishing Nets |

| | | | |
|---------------------------------|--|---|----------------------|
| Rwanda | Tilapia; Tomatoes (fresh or chilled); carrots and turnips; Peas; Beans; Watermelons; Papaws; Maize; Potato starch; Sesame Oil; Made up Fishing Nets; Textile fabrics; Cocoa powder | Goats' meat; Cuts and Offal (fresh or chilled); Cassava starch (manioc); Roofing tiles; Butter | |
| Burundi | Goats' meat; carrots and turnips; Potato starch; Cassava starch (manioc) | Tilapia; Tomatoes (fresh or chilled); Peas; Beans; Watermelons; Papaws; Maize; Sesame Oil; Textile fabrics; Roofing tiles; Butter; Cocoa powder | Made up Fishing Nets |
| South Sudan¹¹ | Not Known | Not Known | Not Known |

General Implications of AfCFTA on Worker's rights and welfare.

Like any Free Trade Agreement, there will be economic gains and losses from the AfCFTA liberalization. While the AfCFTA itself has been signed and is being ratified by an increasing number of African countries, the Parties have yet to negotiate the tariff concessions under the AfCFTA. Therefore, impacts can only be estimated on the basis of models. The most often used type is the so-called Computable General Equilibrium Model (CGE)¹². Generally, the CGE simulations that have been employed paint a rosy picture of the AfCFTA. Indicators such as GDP, employment and intra-African trade would increase for the continent. The CGE model-based analysis assuming a full liberalization of all tariffs on all products found out that the largest gains are expected from South Africa (\$5.7 billion), followed by Nigeria (\$2 billion) and Kenya (\$1.3 billion)¹³. In terms of trade, the AfCFTA is expected to increase total African exports to the world by 4.0 per cent (or \$25.3 billion) in 2022 while intra-African trade would increase by 52.3 per cent (or \$34.6 billion), mainly in agriculture and food, industry and services sectors¹⁴.

¹¹ South Sudan is yet to submit her Tariff Offers to the EAC Secretariat. Thus her data is currently unknown

¹² CGE models are a class of economic models that use actual economic data to estimate how an economy might react to changes in policy, technology or other external factors.

¹³ Hans Grinstead Jensen and Ron Sandrey, The Continental Free Trade Area – A GTAP assessment, TRALAC, 2015.

¹⁴ UNCTAD, Modalities for tariff negotiations towards a Continental Free Trade Area (CFTA): Some key issues for consideration. Available from https://unctad.org/system/files/official-document/ditc2015misc3_en.pdf

Some headline Africa-wide results include the following:

- 📊 GDP would grow by 0.66-0.97% and employment by 0.82-1.17% (Saygili, Peters, and Knebel-2018)¹⁵
- 📊 Real wages would increase, and increase more for ‘unskilled’ labourers (0.74 percent in agriculture, 0.8% in non-agricultural sectors) compared to ‘skilled’ labourers (0.54 per cent (Mevel and Karingi, 2012))¹⁶
- 📊 Growth in intra-African trade is estimated at 24 to 33 percent (Saygili et al.,2018). There appears to be consensus that the share of intra-African trade would not double within the next 10 years as wished by AU member states. This finding prompted Mevel and Karingi (2012) to argue for measures complementary to tariff elimination

However, it is important to note that Trade liberalisation under the AfCFTA is still premised on the orthodox theory of comparative advantage, which theorizes that each country will find a competitive area of production with which to trade, balancing out trade inequalities in the longer term. It is also premised under the assumption that the loss in export and tariff revenue will as a result of trade liberalization will be offset by increased trade among State Parties.

At the onset, there has been contestations among African Union Member States on how to agree on rules that will serve not only the diverse immediate interests of member states but also the broader picture of economic transformation in Africa as envisaged by the Heads of State when they launched the negotiations of the AfCFTA in Johannesburg, South Africa, in 2015. Related to the rules are weak productive bases of most African economies and with few sectoral linkages between countries. Hence the rules must be appropriately defined to suit the African reality. If loosely defined, some African economies will see their markets flooded with foreign products and the much-needed economic transformation will be a mirage. The flooding of these markets with cheap imported goods will result into competition with domestic industries, which can have dire implications to workers as the outcompeted domestic industries resort to laying off of workers (fewer jobs), lower wages and poor working conditions. This is what happened in 2018 when cheap powdered milk imports from the EU to West Africa affected the dairy sector in Burkina Faso, Mali, Chad, Niger, Cameroon, Senegal¹⁷, leading to loss of livelihoods by workers along the dairy value chain. With the EU looking to East Africa, Kenya and Tanzania¹⁸ have been cautioned of the same fate like witnessed in West Africa. On the other hand, if they are too strict,

¹⁵ Saygili, Peters, & Knebel. (2018). African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions. UNCTAD Research Paper No. 15.

¹⁶ Mevel, S., & Karingi, S. (2012). Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of the Continental Free Trade Area followed by a Continental Customs Union.

¹⁷ <https://www.euractiv.com/section/development-policy/news/how-eu-powdered-milk-threatens-african-production/>

¹⁸ <http://www.cibusnutrition.com/2018/06/07/east-africa-dairy-sector-at-stake-as-europe-floods-market-with-cheap-powder-milk/>

they can also be counter-productive and frustrate the smooth operation of potential and existing regional value chains¹⁹.

Therefore, whereas the AfCFTA is expected to boost economic growth, it is likely to be associated with costs, as its benefits may not be evenly distributed across and within countries. One of the predicted immediate negative impacts of the AfCFTA on EAC Member States is revenue losses estimated by UNCTAD to USD 4.1 billion in the short-run²⁰. Current simulations portray that countries like Uganda, Burundi, Rwanda and South Sudan will experience a reduction on their income due to increased competition, loss of tariff revenue. Simulations reveal that each EAC country will experience a loss with varying levels and proportions depending on the quantities of imported goods involved. In absolute amounts, Kenya will incur the largest tariff revenue loss of US\$ 14.2 million, followed by Uganda with US\$ 13.5 million, Tanzania US\$ 5.3 million, Burundi US\$ 4.3 million and finally Rwanda US\$ 3.9 million.²¹ Loss of revenue will have dire challenges on Government's provision of social services like health, education, water and sanitation, infrastructure among others which are indispensable tool in promoting worker's welfare.

The AfCFTA may also lead to trade creation for majority of EAC economies. According to UNCTAD (2018)²², trade creation is the reduction in the domestic production of goods, which are substituted by imports from partner countries. With simulations showing potential for "trade creation" effects induced by the AfCFTA, for local industries in such economies, this could result into negative effects on workers' jobs, incomes and livelihoods. It has to be noted that AfCFTA will also increase imports. In the case of the EAC for instance, there are substantial imports from South Africa but no corresponding level of exports²³ – without AfCFTA and without any trade agreement between EAC and Africa. The question is whether the AfCFTA will further reinforce this trend, or reverse it. What is needed for such countries to realize the benefits of the AfCFTA is to: reduce non-tariff barriers to trade; improve economic complementarity through diversification of exports and production, and through increased manufacturing, boosting industrial production, supporting technological innovation, building supporting infrastructure. Most importantly, social safety nets should be put in place to cushion workers, while policies like minimum wage, local content should be emphasized to protect worker's economic rights and entitlements.

¹⁹ Regional Value Chains (RVCs) chain refers to the full range of activities that economic actors in a regional entity are engaged in to bring a product to market, and involves both production, preproduction and postproduction processes. RVCs therefore offer opportunities to the countries in the region to climb up the value chains by using the region for boosting their competitiveness and producing and exporting higher value products

²⁰ UNCTAD. (2019). African Continental Free Trade Area: Challenges and opportunities of Tariff Reductions. UNCTAD Research Series, Paper No. 15.




²¹ <https://epcug.org/publication/within-the-eac-which-countries-stand-to-benefit-from-the-implementation-of-the-afcfta/?wpdmdl=11910&refresh=61f906b90c5461643710137>

²² https://unctad.org/system/files/non-official-document/aldc2018_AfCFTA_TWGRoO5_Inama3_en.pdf

²³

Free Trade Agreements (FTAs) and Labour Rights: Are they Two competing or complementing variables?

Labour Rights are any standard that addresses labour relations or minimum working terms or conditions, mechanisms for monitoring or promoting compliance, and/or a framework for cooperation. According to ILO (2019), Labour provisions in trade agreements are defined as:

-  any principle or standard or rule which addresses labour relations or minimum working conditions and terms of employment;
-  any mechanism to ensure compliance with the standards set under national law or in the trade agreement; and
-  any framework for cooperative activities, dialogue and/or monitoring of labour issues²⁴.

The ILO Decent Work Agenda is built upon four (4) pillars which include: Promoting jobs and enterprise, guaranteeing rights at work, extending social protection and promoting social dialogue²⁵. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men²⁶.

It is also key to note that decent work and the four pillars of decent work agenda became integral elements of the Sustainable Development Goals (SDGs). For example, under SDG 8, UN Member States commit to the promotion of sustained, inclusive and sustainable economic growth, full and productive employment and decent work, and will be a key area of engagement for the ILO and its constituents. Furthermore, key aspects of decent work are widely embedded in the targets of many of the other 16 goals of the UN's new development vision.

Therefore, the quest for labour rights in development policies and provisions has been of center stage in global development policy making. This trend has, over the time, been embraced in Trade Agreements negotiations.

It is key to note that global markets require mass production and supply networks which are ably provided by skilled and unskilled workers in different parts of the world. This is especially true with the dominance of value chains in today's production and marketing. Inadequate labour provisions and lack of enforcement of these labour provisions, no matter their quality, are to blame for countries failing to make progress towards Decent Work. Indeed, African countries

²⁴ https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_719226.pdf

²⁵ <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm>

²⁶ Ibid

have largely informal economies, sometimes in LDCs, on a national level. The promotion of Decent Work, as well as all other SDGs and classic development theory goals, has a long way to go.

Developed countries on the other hand have a much better level of implementation of ILO standards in law and in practice. When the first WTO Ministerial Conference in Singapore in 1996, developing countries were faced with the prospect of labour standards acquiring trade-rules power, they blocked developed countries from including labour clauses in the WTO, by arguing that the International Labour Organization (ILO) is the competent body to set and deal with labour standards²⁷. Developing countries regarded such clauses as protectionism from the developed world. They argued that economic growth and development would bring the necessary improvements in labour provisions: “.....*We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards*”²⁸. However, Labour Unions together with Civil Society Movements during the Ministerial Conference strongly backed the mainstreaming of labour provisions in trade agreements as this would lead to the protection of workers’ rights across the trade value chains²⁹.

The race to the bottom that intensified after the Singapore WTO Ministerial is well documented among others by UNCTAD’s Trade and Development reports that blame it directly on footloose capital and a decline of organized labour. As corporations and investors pit developing countries and productive sectors against each other, laborers from developing countries lose income and work in conditions prone to accidents and unprotected work. Trade’s miraculous development effect evaporates, at least for workers. Most trade benefits accrue to corporations based predominantly in western countries, and increasingly in China, that leverage their immense buying power to capture value added by labour in developing countries. Further to this, the race to the bottom affected adversely many workers in developed countries too, as the work of David Autor and others has discussed.

It is therefore fair to argue that since the WTO Doha Ministerial Conference, there have been no serious attempts to include labour provisions into multilateral trade agreements³⁰. Indeed, the WTO’s Doha Ministerial Declaration in 2001 essentially excused the WTO from further action with respect to labour, and nullified the link between trade and labour standards in the

²⁷ https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

²⁸ Ibid

²⁹ IOE Information Paper (2006). The Evolving Debate on Trade & Labour Standards. Link: https://www.wto.org/english/forums_e/ngo_e/posp63_ioe_e.pdf

³⁰ Jan Orbie, ‘Promoting Labour Standards Through Trade: Normative Power or Regulatory State Europe’ in Richard G Whitman (ed), *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave MacMillan 2011) 161.

multilateral context³¹. However, the elimination of labour provisions from the multilateral system created space for their proliferation in bilateral and plurilateral trade agreements, often referred to as Regional Trade Agreements (RTAs)³².

While the contestations on incorporation of labour rights in FTAs continue, there is a growing increase in a number of FTAs which include a labour dimension, either in the agreement itself or in a parallel agreement. Indeed, while there were only three trade agreements with labour provisions in 1995, this increased to 85 by 2019, elevating the overall share of trade agreements with labour provisions from 7.3 per cent in 1995 to 35 per cent in 2019³³. As of 2016, 136 countries had at least one trade agreement that included labour provisions³⁴. It should be emphasized that the EU and the United States, alongside Canada, have been particularly active in concluding trade agreements that incorporate labour standards in recent years³⁵. Indeed, there is also pressure in the EU and US to increase labour provisions in their FTAs/EPAs with other countries and regions. Since 2007 and 2010 respectively, all of their new FTAs include labour standards and they are obliged to do so due to resolutions in the Congress and the EU Institutions. Furthermore, the recent USA-Mexico-Canada Agreement (USMCA) provides for a new frontier for labour provisions in trade deals, for it has the strongest and most far-reaching labor provisions of any trade agreement. The agreement contains a labor chapter that prioritizes labor obligations by including them in the core of the agreement and making them fully enforceable³⁶. It is important to note that the principal debates on these provisions in trade negotiations has been over enforcement mechanisms, which have generally been too weak to result in serious improvements in labor rights. Thus, the USMCA can be leveraged upon by EAC Partner States to review and update their agreements for labour rights promotion and protection.

At Africa level, the Treaties establishing the Common Market for Eastern and Southern Africa (COMESA)-established in 1993 and the East African Community (EAC)-established in 2000 are some of the commendable treaties which have taken steps to incorporate labour rights issues in their texts. Under the COMESA Treaty (*Para 6 and Articles-15 & 143*), Labour provisions include: free movement of labour and services; establishment of a Labour Committee to monitor implementation of Labour Rights; Co-operation in Social and Cultural Affairs among Member States; and guaranteeing of labour rights as provided for under the ILO Decent Work Agenda. Under the EAC Treaty, *Articles 80 & 104* including *Chapter 17* provide for rights to employment

³¹ The 2001 Doha Ministerial Declaration (WTO, 2001) also took note of the ILO's work on the social dimension of globalization. For further discussion of the ILO's engagement in early trade discussions, see Reynaud (2018) and Tapiola (2018).

³² https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_719226.pdf

³³ https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_719226.pdf

³⁴ Ibid

³⁵ https://brill.com/view/journals/jwit/20/5/article-p705_5.xml?language=en#:~:text=While%20there%20were%20only%20three,28.8%20per%20cent%20in%202016.

³⁶ <https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca>

of local labour, free movement of labour, right to establishment and other rights provided for in the ILO Decent Work Agenda. The Labour-provision specifics of these treaties are provided for in Annex 1.

It is key to note that of the two Treaties, the COMESA provides for an explicit example of mainstreaming labour provisions in Free Trade Agreements as shown in the table above. While this is commendable, the COMESA Secretariat is yet to put in place a mechanism to monitor the enforcement of labour standards by their Member States, which continues to limit the realization of the labour rights envisaged under the COMESA.

Similarly, the USA preference regimes such as the Africa Growth and Opportunity Act (AGOA)- which came into force in 2000 with the aim of enhancing qualifying African countries' access to the US market- follow labour principles. The eligibility criteria for AGOA includes a range of political, economic and social issues, including 'protection of internationally recognized worker rights, including the right of association, the right to organise and bargain collectively, a prohibition on the use of any form of forced or compulsory labour, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health'³⁷. Moreover, qualifying countries have to demonstrate that they are making continuous progress in meeting the requirement or risk losing the preferential access. According to the ILO, Impact assessments have shown that AGOA has positively influenced productivity and quality and profitability whilst workers' rights and wellbeing have improved in a number of African Countries³⁸. There are also increased discussions between the USA and AGOA beneficiaries to ensure that AGOA qualifying Countries commit to treating workers holistically and ensuring jobs do more than just pay survival wages.

Therefore, in mainstreaming labour provisions in the AfCFTA, the COMESA Treaty provides for a more explicit and comprehensive model which the AfCFTA Secretariat can benchmark. It is key to note that Labour commitments under FTAs are largely structured in two ways:

- i. ***Commitment to uphold and ratify ILO fundamental principles and rights***: The principles are considered to be the minimum expectations of rights at work, and an obligation to observe ILO fundamental principles may be present in some form in a labour provision under an FTA, be it by explicit reference to ILO Fundamental Conventions, or by reference to the ILO fundamental principles and rights.
- ii. ***Commitment to implement, as well as not waiver or derogate from national laws implementing labour rights***: An FTA might also require a commitment to effectively enforce

³⁷ <https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/inline/LabourStandards1008.pdf>



³⁸ https://www.ilo.org/africa/media-centre/pr/WCMS_396581/lang--en/index.htm

domestic labour laws, as well as to not waiver or derogate from domestic labour laws in order to attract trade or investment. Domestic legislation might often prescribe even higher standards than the ILO fundamental conventions. For example, domestic legislation might include provisions relating to occupational health and safety or relating to labour inspectorates or inspection systems.





It should also be noted that the most commonly included provisions are: an explicit reference to the 4 core labour standards (with or without referring to the ILO), their extension to other aspects of decent work (acceptable working conditions, minimum wage, working hours, health and safety in the workplace, etc.), the existence of a procedure for settling disputes and/or imposing sanctions, and cooperation procedures³⁹.

Arguments for inclusion of Labour provisions in FTAs.

There have been calls for policy-makers to do more, including in the context of trade agreements, to protect and promote labour standards and institutionalize the involvement of stakeholders. Leveraging on this call, labour provisions in trade agreements have come to take on an increasing role and increasingly comprehensive in their scope. According to the ILO (2017) Two main trends are generalizable from trade agreements and labour rights i.e.⁴⁰

-  The most comprehensive labour mobility provisions are usually found in the more comprehensive agreements and between countries of similar income level, such as the European Union, MERCOSUR and NAFTA,
-  Limited provisions are found in bilateral agreements and between countries with wide income gaps.

As argued by the International Economic Law Clinic, there are various reasons why labour provisions are incorporated within FTAs. These provisions can be utilized for a number of reasons including⁴¹:

-  To ensure a level playing field for fair global competition;
-  To create international coherence in labour standards and to promote the protection of human rights;
-  To support protectionism where businesses in developing countries may be prevented from accessing markets when labour standards are allegedly violated;
-  To strengthen the capacity of domestic institutions in developing countries to better promote their labour standards.

³⁹ [file:///C:/Users/D%20%20S%20%20%20N/Downloads/executive%20sum%20English%20\(1\).pdf](file:///C:/Users/D%20%20S%20%20%20N/Downloads/executive%20sum%20English%20(1).pdf)

⁴⁰ ILO (2017). Handbook on assessment of labour provisions in trade and investment arrangements. Link: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_564702.pdf

⁴¹ file:///C:/Users/D%20%20S%20%20%20N/Downloads/TradeLab_IOE.pdf

It is important to take note of the arguments by the proponents who are for inclusion of labour provisions in FTAs:

- ❖ FTAs are important because they list minimum commitments for the protection of human rights at work and refer to specific international labour standards adopted by the ILO, but they also provide for conflict resolution systems as well as funds and parallel labour cooperation/consultation.
- ❖ FTA provisions enabling labour migration can have a huge impact on individual workers' lives and incomes, but also on their families back home through remittances. Among other benefits, studies have for example found a positive impact on reduction of child labour in home countries from increased international labour mobility⁴².
- ❖ The inclusion of labour provisions in FTAs further creates a scenario where a country can be held accountable for labour malpractices. Quite often, developing countries have abusive working conditions and their wages are suppressed. This can be evaded when labour provisions are enforced in FTAs.
- ❖ While Trade can create employment opportunities for large numbers of low-skilled workers in the manufacturing sector, including many entering the formal labour market for the first time (such as women, migrants, young people and members of other vulnerable groups), the fragmentation of production, which is a feature of high-volume trade in most regions of the world, can lead to increased competition for services and downward pressure on wages and working conditions. Thus, a trade agreement should foresee such challenges and set to mitigate them.
- ❖ If trade deals do not contain effective protections for workers' rights, they just make it easier for companies to locate themselves in countries where wages are lower and workers are less able to resist exploitation⁴³.

Labour provisions in trade agreements do not divert or decrease trade flows. According to ILO (2017), trade agreements with labour provisions boost trade to a similar extent, with Trade agreements with labour provisions estimated to increase the value of trade by 28 per cent on average, while those without labour provisions estimated to increase trade by 26 per cent. Thus, there is no negative impact of respect for core labour standards on trade

⁴² <https://www.unescap.org/sites/default/files/Background%20Material%20-%20Labour%20provisions%20in%20Asia-Pacific%20PTAs.pdf>

⁴³ 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>

performance.

- ❖ Advocates of trade-linked labour standards aim to halt a ‘race to the bottom’ in which national labour conditions are reduced in an attempt to lower production costs, expanding international trade and competition.

AfCFTA and Labour Rights.

Outcomes of a Free Trade Agreement (FTA) like the AfCFTA can either positively or negatively affect the livelihoods of workers along the production value chain. Such category of workers includes formal, informal and the gig-workers. The potential negative implications of AfCFTA on labour rights cannot be overstated. This is because, as argued by McMillan *et al* (2021), when workers move from low productivity to high productivity sectors – a phenomenon called structural change in the economic literature – this change is often accompanied by economic growth and better employment opportunities. However, in Africa, structural change has moved in the opposite direction: labour has shifted from higher to lower productivity employment, reducing overall growth and slowing the pace of poverty reduction⁴⁴.

To some extent, the AfCFTA should be commended 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*” as clearly pointed out under the guiding principles of the AfCFTA Protocol on Sustainable Investment. Furthermore, under the draft AfCFTA Protocol on Investment⁴⁵, the African Union makes effort both in mainstreaming labour rights issues but also in inclusion of a dedicated Labour Chapter to the Protocol

However, to a larger extent, whereas the imminent dangers of AfCFTA on labour rights are profound, a closer analysis of the current AfCFTA agreement and its related Annexes and Protocols reveals that neither does it include any labour provisions nor make any reference to the globally recognized ILO decent work Agenda. Indeed, even with the draft Investment Protocol, there are a number of gaps when it comes to Labour provisions. These include:

- Lack of a Labour Rights Enforcement Mechanism
- Weak language on Labour rights i.e. the language has been crafted to be more “best endeavour” than binding and obligatory for States to enforce.

⁴⁴ McMillan, Margaret and Dani Rodrik. 2011. “Globalization, Structural Change and Productivity Growth.” NBER Working Paper Series, Vol. w17143. Link: <http://ssrn.com/abstract=1866102>

⁴⁵ https://www.bilaterals.org/IMG/pdf/afcfta_protocol_on_investment_first_draft.pdf



While limited efforts have been undertaken to mainstream labour rights in the AfCFTA, as aforementioned, the AfCFTA could potentially negatively affect the livelihoods of workers along the production value chain in a number of ways. For example, under tariff concessions, opening up of certain agricultural products, if poorly done, might affect competitiveness of local agro-processors by subjecting them to competition from cheaper products of other well established firms, which will in the end affect the workers employed in these factories through retrenchment, low wages, and reduced workers' benefits. Furthermore, under services Liberalization, poor concessions might not only affect workers (regarding jobs losses), but may also hinder innovation and skills transfer, which are critical in enhancing human resource.

Apart from including labour standards in the AfCFTA, State Parties will have to decide for themselves how they monitor and implement their own standards in trade. In order to effectively realize this, Trade Unions should be involved in the monitoring of government's adherence to labour standards. This will also require a Pan-African template that deals with trade-related social standards in intra-African trade, as it would create a *fait-accompli* for trading with the rest of the world.

Labour rights in the AfCFTA could also create an opportunity for workers to increase on their welfare and livelihoods. A labour competition floor, agreed and observed in practice, would de facto shield income and ensure that labour captures a fair part of trade's benefits. Like in the prisoner's dilemma, developing countries would gain if they all enforced a minimum of labour standards, the ILO core labour standards.

One of the aspirations of AfCFTA is the creation of "a single market for goods, services, *facilitated by movement of persons* in order to deepen the economic integration of the African continent". Creating the possibility to move across borders to provide or receive a service leads to more economic integration, when it is not used to undermine social standards in other countries. It creates opportunities but it could also increase competitive pressure, in which case the AfCFTA will lose support by workers. In practice, there is increasing support for a trade-labour linkage, with global trends showing FTAs increasingly including provisions for labour. For example, in Africa, only two major trade agreements i.e. the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) – have labour provisions.

However, in the discourse of FTAs and labour rights, two realities have always manifested themselves:

-  Limited mainstreaming of labour rights/provisions;
-  Limited or no involvement of trade unions in the negotiations leading to FTAs.

How Labour rights have been mainstreamed in select FTAs

A clear examination of FTAs like United States-Mexico-Canada Agreement (USMCA); the USA-Hashemite Kingdom of Jordan; USA-Kingdom of Morocco FTA; USA-Rwanda Bilateral Investment Treaty (BIT); and the USA-Kenya FTA Negotiating Principles/Objectives reveals that incorporation of labour rights in FTAs has gained currency, with countries ensuring that FTAs encompass comprehensive provisions on promotion and protection of international recognized labour rights, including voluntary cooperation measures on amending labour provisions to provide for new labour rights as they emerge from ILO Agenda. Like already pointed out, the USMCA provides for a new frontier for labour provisions in trade deals, for it has the strongest and most far-reaching labor provisions of any trade agreement. The agreement contains a labor chapter that prioritizes labor obligations by including them in the core of the agreement and making them fully enforceable⁴⁶. Thus, the USMCA can be leveraged upon by EAC Partner States and AfCFTA State Parties to review and update their agreements for labour rights promotion and protection. Unlike such FTAs, the AfCFTA falls short in mentioning and mainstreaming of labour provisions in the Agreement. There has also been limited involvement and consultation of labour unions and their representatives by the AU Member States which has led to the final AfCFTA void of labour unions voice.

As discussed in the matrix below, the AfCFTA falls short of critical labour provisions including lack of a labour chapter that reaffirms the ILO Decent work Agenda and labour rights; no labour rights enforcement mechanisms; no reference to rights to i.e. freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

⁴⁶ <https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca>

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| Free Trade Agreement Sections with Labour Provisions (FTA)/Bilateral Investment Treaty (BIT) | | Proposals on how the Agreement establishing the AfCFTA should have addressed Labour issues. NB: <i>It should be noted that the Agreement establishing the AfCFTA has already been signed. Thus, it is a bit hard for State Parties to open it again for consideration of Labour issues, which it glaringly lacks. This section therefore focuses on how the Agreement should have been initially designed to address labour issues.</i> |
| United States-Mexico-Canada Agreement (USMCA) | <p>Labour Chapter (Chapter 23): <i>Among its provisions, the agreement:</i></p> <ul style="list-style-type: none"> Requires the Parties to adopt and maintain in law and practice labor rights as recognized by the International Labor Organization (ILO), to effectively enforce its labor laws, and not to waive or derogate from its labor laws. Includes new provisions that require the Parties to take measures to prohibit the importation of goods produced by forced labor, to address violence against workers exercising their labor rights, to address sex-based discrimination in the workplace, and to ensure that migrant workers are protected under labor laws. It also includes establishment of labour attaches who will monitor implementation of the USMCA labor obligations and support bilateral cooperation on labor and employment matters. | The AfCFTA labour chapter and provisions in associated Protocols e.g. Investment Protocol should contain provisions that establish new and updated provisions on the protection of worker rights and enforcement of labor commitments. Further, the AfCFTA labour provisions should prohibit imports of goods made by forced labor, and adds new commitments related to violence against workers, migrant worker protections, and workplace discrimination. |

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| | <ul style="list-style-type: none"> Includes an Annex on Worker Representation in Collective Bargaining in Mexico, under which Mexico commits to specific legislative actions to provide for the effective recognition of the right to collective bargaining. | |
| USA-Hashemite Kingdom of Jordan (<i>signed on October 24, 2000, came into force on 17 December 2001</i>) | <p>Preamble:</p> <ul style="list-style-type: none"> ➤ <i>Desiring</i> to promote higher labor standards by building on their respective international commitments and strengthening their cooperation on labor matters; ➤ <i>Wishing</i> to promote effective enforcement of their respective environmental and labor law. <p>Article 6: Labor</p> <ul style="list-style-type: none"> ➤ <i>The Parties reaffirm their obligations as members of the International Labor Organization (“ILO”) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights are recognized and protected by domestic law.</i> ➤ <i>The Parties recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each Party shall</i> | <p>The preamble of the Agreement establishing the AfCFTA should have included a section/affirmation of the desire for State Parties to promote and enforce labour rights therein the AfCFTA. Considering the fact that a treaty's preamble defines the purposes and considerations that led the parties to conclude the treaty, lack of reference to labour rights is a serious omission, and puts to question the commitment of AfCFTA State Parties to promotion of labour rights. Moreover, promotion of Labour rights is recognized under the <i>African Union declaration on Employment, Poverty Eradication, inclusive development in Africa (Doc. Assembly/AU/20(XXIV))</i>.</p> <p>Article 1 (Definitions): This should have included an explicit definition of what Labour rights are. Critical reference under this Article should have included Labour rights as defined under the ILO <i>Declaration on Fundamental Principles and Rights at Work</i>; and the 2004 <i>Ouagadougou Declaration</i></p> |

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| | <p><i>strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.</i></p> <p>➤ <i>A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.</i></p> <p>➤ <i>For purposes of this Article, “labor laws” means statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:</i></p> <ul style="list-style-type: none"> <i>• the right of association;</i> <i>• the right to organize and bargain collectively;</i> <i>• a prohibition on the use of any form of forced or compulsory labor;</i> <i>• a minimum age for the employment of children; and</i> <i>• acceptable conditions of work with respect to minimum wages, hours of work,</i> <i>• occupational safety and health.</i> | <p><i>and Plan of Action on Employment and Poverty Alleviation.</i></p> <p>Article 3 (General Objectives): This section should have included an objective on the aim of the AfCFTA to protect and promote internationally recognized labor rights. A para stating like: <i>“Desiring to achieve these objectives in a manner consistent with the protection and the promotion of internationally recognized labor rights”</i></p> <p><i>Alternatively, labour provisions could have been incorporated in Article 3b of the Agreement.</i></p> <p>Dedicated chapter on Labour: Like contemporary FTAs examined in this matrix, the AfCFTA has glaring gaps in recognition of labour rights, from lack of a mere mentioning to lack of mainstreaming principles of labour rights in its provisions. As a guiding document/mother text, this is a serious omission which should be addressed. Key Treaties like COMESA Treaty and the examined FTAs in this matrix can be benchmarked by negotiators in the future for mainstreaming an incorporation of Labour in the AfCFTA Agreement.</p> |
| | Article 8: Visa Commitments | |

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| | <p>➤ <i>Subject to its laws relating to the entry, sojourn and employment of aliens, each Party shall permit to enter and to remain in its territory nationals of the other Party solely to carry on substantial trade, including trade in services or trade in technology, principally between the Parties.</i></p> <p>➤ <i>Subject to its laws relating to the entry, sojourn and employment of aliens, each Party shall permit to enter and to remain in its territory nationals of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the other Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.</i></p> | |
| <p>USA-Kingdom of Morocco <i>(signed on June 15, 2004, entered into force on January 1, 2006.)</i></p> | <p>Preamble: <i>Desiring to strengthen the development and enforcement of labor and environmental laws and policies, promote basic workers' rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation;</i></p> <p>Chapter 16: Labor</p> <ul style="list-style-type: none"> • Art. 16.1: <i>The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on</i> | |

Fundamental Principles and Rights at Work and its Follow-up (1998) ("ILO Declaration"). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.7 are recognized and protected by its law.

- **Article 16.2: Application & Enforcement of Labor Laws:** *Each Party recognizes that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights.....as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.*
- **Article 16.3: Procedural Guarantees & Public Awareness:** **Para 5:** *Each Party shall promote public awareness of its labor laws, including by: (a) ensuring that information related to its labor laws and enforcement and compliance procedures is publicly available; and (b) encouraging education of the public regarding its labor laws.*

- **Article 16.4: Institutional Arrangements:**

- *Each Party shall designate an office within its labor ministry that shall serve as a contact point with the other Party and the public for purposes of implementing this Chapter.*
- *Each Party may convene a national labor advisory committee, comprising members of its public, including representatives of its labor and business organizations and other persons, to advise it on the implementation of this Chapter.*

- **Article 16.5: Labor Cooperation:**

The Parties may undertake cooperative activities under the Labor Cooperation Mechanism relating to labor matters of common interest, such as: promoting fundamental rights and their effective application; eliminating the worst forms of child labor; enhancing labor-management relations; improving working conditions; developing unemployment assistance programs and other social safety net programs; encouraging human-resource development and life-long learning; and utilizing labor statistics.

- **Article 16.7: Definitions**

labor laws means a Party's statutes or regulations, or provisions thereof, that are directly related 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*
- *acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.*

For greater certainty, nothing in this Agreement shall be construed to impose obligations on either Party with regard to establishing the level of minimum wages⁴⁷.

Annex 16-A: Labor Cooperation Mechanism

- Establishment of a Labor Cooperation Mechanism.
- **Cooperative Activities:** *The Parties may undertake cooperative activities through the Labor Cooperation Mechanism on any labor*

⁴⁷ In my view, it is important that AfCFTA State Parties include a provision that requires establishment of the level of Minimum Wages, given its primacy in ensuring that workers benefit from the AfCFTA.

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| | <p>matter they consider appropriate, including on:</p> <ul style="list-style-type: none"> ➤ <i>Fundamental rights and their effective application</i> ➤ <i>worst forms of child labor</i> ➤ labor relations: <i>forms of cooperation among workers, management, and governments, including the resolution of disputes</i> ➤ working conditions: <i>hours of work, minimum wages, and overtime; occupational safety and health; prevention of and compensation for work-related injuries and illness; and employment conditions;</i> ➤ <i>unemployment assistance programs and other social safety net programs</i> ➤ <i>human resource development and life-long learning.</i> | |
| <p>USA-Rwanda Bilateral Investment Treaty (BIT) (Date of signature: 19/02/2008 Date of entry into force: 01/01/2012)</p> | <p>Preamble: <i>Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights</i></p> <p>Article 13: Investment and Labor</p> <ul style="list-style-type: none"> • <i>The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or</i> | |

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| | | <p><i>otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights.....as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.</i></p> <ul style="list-style-type: none"> • For purposes of this Article, "labor laws" means each Party's statutes or regulations, 16 or provisions thereof, that are directly related to the following internationally recognized labor rights: <ul style="list-style-type: none"> ➤ <i>the right of association;</i> ➤ <i>the right to organize and bargain collectively;</i> ➤ <i>a prohibition on the use of any form of forced or compulsory labor;</i> ➤ <i>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;</i> ➤ <i>acceptable conditions of work with respect to minimum wages, hours of work, occupational safety and health.</i> | |
| USA-Kenya Negotiating Principles/Objectives (May 2020) | FTA | <ul style="list-style-type: none"> • Require Kenya to adopt and maintain in its laws and practices the internationally recognized core labor standards as recognized in the ILO Declaration, including: | |

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| | <ul style="list-style-type: none"> ➤ <i>Freedom of association and the effective recognition of the right to collective bargaining;</i> ➤ <i>Elimination of all forms of forced or compulsory labor;</i> ➤ <i>Effective abolition of child labor and a prohibition on the worst forms of child labor; and</i> ➤ <i>Elimination of discrimination in respect of employment and occupation.</i> <ul style="list-style-type: none"> • Require Kenya to have laws governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. • Establish rules that will ensure that Kenya does not waive or derogate from labor laws implementing internationally recognized core labor standards in a manner affecting trade or investment between the Parties. • Establish rules that will ensure that Kenya does not fail to effectively enforce labor laws implementing internationally recognized core labor standards and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health laws through a sustained or recurring course of action or inaction in a | |
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| | <p>manner affecting trade or investment between the Parties.</p> <ul style="list-style-type: none"> • Require Kenya to prohibit the importation of goods produced by forced labor, regardless of the source country. • Require Kenya to ensure that foreign workers are protected under labor laws. • Provide access to fair, equitable, and transparent administrative and judicial proceedings. • Ensure that these labor obligations are subject to the same dispute settlement mechanism that applies to other enforceable obligations of the Agreement. • Establish a means for stakeholder participation, including through public advisory committees, as well as a process for the public to raise concerns directly with their respective governments if they believe a 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, and include a mechanism for cooperation and coordination on labor | |
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| | issues, including opportunities for stakeholder input in identifying areas of cooperation. | |
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While the above agreements (in the matrix) provide for how Labour Provisions have been included in trade agreements, apart from the United States-Mexico-Canada Agreement (USMCA), there has not been effective enforcement mechanisms for labour commitments in these FTAs. Indeed, through emphasis on rights including: freedom of association, collective bargaining, and other provisions like bans on the import of goods made with forced labor and establishment of labour attaches by Member States to monitor the implementation of labour provisions in the Agreement; the USCMA has revolutionized mainstreaming of labour provisions in FTAs.

In the context of AfCFTA, it is worth to take note that pursuing trade agreements void of cheap or no labour provisions is disastrous for workers and development as it leads to what has been documented as the *low value-added export trap*. Entrepreneurship and workers' intellect and labour that could propel countries into development remain trapped in the activities of intensive exploitation of labour and natural resources in unsustainable ways. In fact, trade liberalization in combination with cheap labour policies undermined African manufacturing capacity, the steam engine of structural transformation and development. In 1988, manufacturing accounted for 17% of the GDP of sub-Saharan Africa. In 2020, it accounted for 11.2%.⁴⁸ Therefore, rather than excluding labour provisions, there is proof that improving labour conditions and wages, industrial policy, social protection, investment in education, health and other public services are the conditions in which trade leads to economic growth and resilience.

It is also critical to note that Trade liberalization often leads to a race to the bottom where workers will be the biggest losers. Within trade liberalization, countries become exposed to competition. In the AfCFTA context, this will be between similar developing countries but also countries much more developed than others. To become more attractive for investors, governments are forced to lower their regulations and, as a result, the cost of labour. A "race to the bottom" is created in which countries undercut each other to be the most preferred option. Achieving decent jobs with adequate social protection will thus not be possible if a standard in labour regulations is not set.

Trade liberalization like the one being pursued under AfCFTA can have a negative impact on labor in the short and medium term, especially if these sectors were protected especially given the fact that Labour mobility across sectors is limited in developing countries (Goldberg and Pavcnik (2004)). It should therefore be noted that tariff elimination under the AfCFTA might cause unemployment and lower wages in certain sectors and involve increased health care costs and costs for retraining. This may create social tensions and problems unless compensatory or 'flanking' measures, trade adjustment funds are set in place. Therefore, it goes without begging that Labour is a central part of trade and should be included in any relevant agreement.

⁴⁸ https://data.worldbank.org/indicator/NV.IND.MANF.ZS?name_desc=false&locations=ZG

Whereas the imminent dangers of AfCFTA on labour rights are profound, a closer analysis of the current AfCFTA agreement and its related Annexes reveals that it does not include any labour provisions or any reference to the globally recognized ILO decent work Agenda. Yet it is argued that improvement and growth in trade under AfCFTA would automatically lead to better working conditions for workers. Indeed, according to the Africa Trade Policy Centre (ATPC) (2016), AfCFTA will produce more jobs for Africa's bulging youth population, with the manufacturing sector Manufacturing standing to benefit the most, by creating up to 16 million new jobs⁴⁹. Whereas under African States commit to promote and mainstream Labour rights under SDG8 (*Decent Work and Economic Growth*), the omission of labour provisions in the AfCFTA and its related protocols is particularly glaring and goes against the aspirations of the SDGs.

By promoting more labor-intensive trade, it is hoped that the AfCFTA will create more jobs. Thus, the AfCFTA has the potential to stimulate intra-African trade in agriculture, manufacturing and value-added products, which employ more labour in more diversified sectors of the economy and can contribute positively to increasing employment opportunities for young people. It is also a widely shared assumption by State Parties to the AfCFTA that the promotion of trade in services under the pact will create more jobs for youth and increase entrepreneurship opportunities. Another assumption is that the Youth can also take advantage of an AfCFTA protocol on E-Commerce, which underscores the importance of the digital economy, justifying the reason why negotiations for an E-Commerce Protocol, earlier scheduled to be conducted under Phase 3 have been moved to Phase 2 of the AfCFTA Negotiations. However, the absence of labor provisions in the AfCFTA means that there is little incentive to make these "decent" jobs with stable employment, good salaries and working conditions, labor rights, and social protection. Ultimately, AfCFTA State Parties risk the perceived economic benefit of the pact going to a few actors.

Furthermore, there is no evidence both empirically and historically that improvement in trade would automatically lead to better working conditions and wages. On the contrary, as emphasized by ILO (2017)⁵⁰, there is ample evidence that improved labour conditions lead to an overall improvement in productivity and economic growth. However, as cautioned by Organisation of Trade Unions of West Africa (OTUWA), quite often, the voice of labour is regarded as an addendum and not as a critical mass in shaping the AfCFTA Negotiations, with hardly a mention, mainstreaming or reflection of key labour concerns in the entire AfCFTA⁵¹. With the AfCFTA negotiations largely exclusive to government actors and private sector, there has

⁴⁹ <https://www.intracen.org/news/New-report-AfCFTA-creates-jobs-opportunities-for-African-youth/>

⁵⁰ ILO (2017). Handbook on assessment of labour provisions in trade and investment arrangements. Link: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_564702.pdf

⁵¹ <https://ghanaonlinenews.com/%EF%BB%BFafcta-urged-to-make-labour-standards-key-in-its-operations/>

been limited consultations with Labour Unions which has hindered their pro-active involvement in shaping the negotiations. This has led to an AfCFTA (and further risks-regarding AfCFTA Protocols) that is oblivious of labour rights to the detriment of workers and general economies of State Parties.

One concern with trade liberalization is the weakening of labour protection regulation, a “race to the bottom” as a result of competitive pressures from opening up markets. Another would be the threat of “regulatory chilling”, i.e. the process of raising current domestic standards, including labour ones, coming to a halt due to investors’ and commercial partners’ disputes or threat of initiating disputes. Given the reality of cut-throat competition among the African countries that had signed up to the AfCFTA, many governments in the continent might lower labour rights regulation, including lowering the costs of labour, reject enactment of minimum wage policies (like the case of Uganda⁵²) to attract investors and business. Therefore, absence of strong labour floor in the AfCFTA would probably lead to a “race to the bottom”. An AfCFTA chapter that protects labour rights would ensure that no race to the bottom occurs among African countries.

Implications to employment

A common argument for trade liberalization, that it will stimulate domestic economies by increasing consumption and diversifying economies, there is already a reason for caution. While some might consider foreign companies having increased market access as positive, the reality is that it also increases competition and drives small companies out of market. In fact, trade liberalization has benefited bigger companies with advanced management techniques, access to capital, access to skills, market knowledge and information, and market power. The composition of the African economy should be taken into account. It is estimated that 86% of employment on the continent is within the informal economy represented by Small and Medium Enterprises (SMEs). As Autor *et al* (2014) argues, Trade theory often assumes that those who lose their jobs from new trading patterns will instantaneously transition to a new sector, but this assumption has limited real-world validity⁵³. This is especially true of small-scale operators who lack transferable skills, and who may have other obligations that do not allow for mobility and transition and as such may not be able to find alternative employment.

The effects of trade on employment vary at the country level, depending on factors such as asset distribution, on the type of trade (bilateral, multilateral or regional) as well as on the sector and

⁵² <https://www.monitor.co.ug/uganda/news/national/minimum-wage-suicidal-minister-3381522>

⁵³ Autor D, Dorn D, Gordon H. Hanson, Jae Song (2014). Trade Adjustment: Worker Level Evidence

skill-set of workers”⁵⁴. The liberalization effects of AfCFTA on SMEs is that it will subject them to competition with bigger firms and companies. The resultant effects will be a threat on jobs and welfare of workers including loss of social security. Furthermore, it has been argued that trade liberalization under AfCFTA will depend heavily on the availability of a flexible formal workforce. However, it should be noted that workers can become exposed to extensive working hours with very little protection. It is thus very important to not only look at the number of jobs created or lost but also qualitative indicators such as pay, conditions of employment and employment security.

How will AfCTA text and associated protocols impact on labour rights?

Regarding the AfCFTA text, whereas there has been no explicit integration of labour rights provisions in the AfCFTA, some key aspects of the pact will, depending on their negotiation and implementation, affect workers’ agency: Key of these include:

a) Tariff concessions under trade in goods

Tariff concessions are the most important component under the Phase 1 negotiations and are aimed at progressively reducing and eliminating customs duties and non-tariff barriers on goods. A closer look at the negotiation modalities reveals that 90 per cent of tariffs on products will be opened up (to allow for unrestricted movement of goods among State Parties) within five years for non-least developed countries (LDCs) and 10 years for LDCs; while 7 per cent will be progressively opened up with 3 per cent excluded from liberalization. It is critical that trade unions remain vigilant of the way concessions on tariff liberalization are being handled. At the onset, further integrating small economies with larger ones may benefit some industries and hurt others, negatively affect earnings and employment opportunities in certain sectors and for certain skill levels. For example, the opening up trading in certain agricultural products, if poorly done, might affect competitiveness of local agro-processors by subjecting them to competition from cheaper products of other better positioned firms. Subsequently, resulting into scarcity of locally-produced products for local consumption this could in the end affect the workers employed in these factories through retrenchment, low wages, and reduced workers’ benefits, and job losses.

b) Concessions under trade in services

⁵⁴ Gathii, J. T., Burnett, K., Changwe Nshimbi, C. and Dommen, C. 2017. The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective: United Nations Economic Commissions for Africa (ECA) and Friedrich Ebert Stiftung (FES): Geneva Office
https://www.ohchr.org/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssessment.pdf

Another critical set of concessions for liberalization being discussed under Phase 1 is trade in services, whereby African Union (AU) partner states are discussing which services to liberalize 5 services sectors i.e. financial services, transport, communication, professional services and tourism. This will be applicable to both the actual services and the suppliers of these services. Poorly designed concessions might not only affect workers (regarding jobs losses), but may also hinder innovation and skills transfer, which are critical in enhancing human resources. While there is a need for a legal right for workers to freely move for work to countries that are signatories to the AfCFTA, this should be crafted in a way that it is sufficient to spark off actual migration of workers around the region, especially through commitments to mutual recognition of certificates and skills by State Parties. Focus should be on both the right to move but also on conditions in the countries of origin and destination which in labor migration parlance are referred to as 'push' and 'pull' factors⁵⁵. Key of the Non-Tariff Barriers (NTBs) associated with trade in services is refusal of some countries to recognize academic documents and the experiences of professionals from other countries i.e. Mutual Recognition Agreements (MRAs).

c) Negotiations under Phase 2

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 the Electronic Commerce (Digital Trade) whose negotiations were initially to be conducted under Phase 3, have been pushed to be covered under Phase 2 of the AfCFTA Negotiations. The 8th meeting of the AfCFTA Council of Ministers responsible for Trade held on 29th January 2022 directed that Negotiations of the Protocols on issues under Phase 2 be concluded by September 2022 for subsequent adoption by Heads of State and Government.

It is important to note that a poor design of these protocols will have far reaching implications to Labour Rights. This is discussed below.

The AfCFTA Protocol on Sustainable Investment

Contextually and practically put, the AfCFTA Protocol on Sustainable Investment is the most relevant protocol which Labour Unions should be engaged on to ensure that the provisions therein protect, sustain and advance the rights of workers). Indeed, **objective 3(iv)** of the draft protocol aims at: *"promoting within Member States an environment conducive to the*

⁵⁵ Avenues of better employment and higher wages serve as pull factors, where as non-availability of employment opportunities in backward regions, draught and scarcity conditions are push factors.

*development of a more vibrant and dynamic private sector that facilitates job creation, promotes technology transfer, supports long-term economic growth and contributes effectively to the fight against poverty”. Furthermore, under the guiding principles, **para 6 (vii)** envisions the protocol to “.... contribute to the promotion of human rights and international labour standards, including through provisions on transparency and corporate social responsibility/responsible business conduct”.*

The draft Investment Protocol also makes an attempt at mainstreaming labour provisions and a labour chapter. These include⁵⁶:

- *Minimum Standards on the Environment, Labour and Consumer Protection (Article 22);*
- *Pursuit of Development Goals- measures to train and employ local workers; transfer technology and skills (Article 23);*
- *Human Resources Development- encourage employers to invest in training, capacity building and knowledge transfer, Enforce Mutual Recognition (qualification and experience leading to certificates and diplomas (Article 25);*
- *Relation to State Party obligations- promote and enforce laws and policies to protect human rights, labour rights and the environment (Article 27)*
- *Business Ethics, Human Rights and Labour Standards (Article 29) :- support and respect the protection of internationally recognized human rights; ensure that they are not complicit in human rights abuses; comply with the International Labour Organisation (ILO) standards, including the ILO Fundamental Principles and Rights at Work; not use child labour or forced and compulsory labour; and eliminate discrimination in respect of employment and occupation.*

The need to promote and facilitate Investments is often driven by a promise that investment liberalization will lead to increased investment, and increased investment will in turn lead to economic growth, job creation, technology transfer, and a range of other purported benefits. However, Investments in EAC have often resulted into regulation by the States in favor of investors at the expense of workers’ rights. However, if well crafted, an investment regulatory framework can lead to decent working conditions, fair wages, skills transfer among others. Therefore, it is important that Labour Unions mobilize and engage in the negotiations so as to ensure that negotiations on investments promote technology and skills transfer, create decent jobs, foster environmental protection, support the unionization of workers and strengthens the social dialogue mechanisms. This should be supported by putting in place national policies and



⁵⁶ https://www.bilaterals.org/IMG/pdf/afcfta_protocol_on_investment_first_draft.pdf

strategies that improves the working and living conditions of workers, such as a living wage⁵⁷. Curbing anti-competitive practices to protect small firms and businesses is also key.

Under the Investment Protocol this paper proposes that key issues of focus by Labour Unions should be on how the protocol addresses: access to the labour market; national treatment⁵⁸ and market access for service suppliers; commitments on visas; special market access or facilitated access for certain groups; separate chapters dealing with all temporary movement including that related to investment or to trade in goods or investment; specific reference to key personnel in relation to investment; and nondiscriminatory conditions for workers.

E-Commerce Protocol

E-Commerce can be defined as a business model in which the commerce activity is conducted over electronic networks and specifically over Internet. There are a number of types and forms under which E-Commerce may be conducted, and there have been several categories proposed:

-  Depending on the relationship between the parties involved, E-commerce can be B2C – business to customer⁵⁹, B2B – business to business⁶⁰, C2C – customer to customer⁶¹, B2A – business to administration⁶² etc.
-  Depending on the type of the business conducting the commerce activity, we can speak of pure players, selling only or primarily over Internet, selling platforms, which provide an online marketplace for external sellers, or of Omni channel players, which combine physical stores with online platforms.

The rise of E-Commerce is accompanied by many related phenomena, such as automation, digitalization, artificial intelligence, big data analysis. As UNCTAD's Information Economy Report (2017) states, *“digitalization will lead to new types of jobs and employment, change the nature and conditions of work, alter skills requirements and affect the functioning of the labour markets as well as the international division of labour”*. According to Uni Commerce Global Union (2019), the impact of e-commerce differs depending on the nature of jobs. Higher skilled workers – such as engineering, science, computer and information systems analysts and managers, commercial

⁵⁷ According to the ILO, the principle of a living wage for all workers entails a wage sufficient to maintain, in the circumstances of each country, an adequate standard of life.

⁵⁸ National treatment is a principle that says countries should treat imported goods, services and intellectual property (trademarks, copyrights and patents) the same way they treat their own. This helps create a level playing field in the marketplace by preventing domestic goods from having an unfair advantage.

⁵⁹ B2C business-to-consumer ecommerce, also called retail ecommerce, is a business model that involves sales between online businesses and consumers.

⁶⁰ B2B ecommerce, or business-to-business electronic commerce, is the sale of goods or services through online transactions between businesses

⁶¹ Customer to customer (C2C) is a business model that enables customers to trade with each other, frequently in an online environment

⁶² B2A/B2G happens when a business provides an online service for the government, generally through a website

artists, designers, writers and editors, computer systems analysts, engineers, programmers – are needed for the development of web platforms, while the increased number of fulfilment centers require a higher number of warehouse workers and drivers. On the other hand, it is expected that in the long-term the number of marketing and sales personnel, cashiers and in-store clerks, purchasing managers and agents, and wholesale buyers will decrease⁶³.

A clear analysis of the digital policies and strategies in EAC Partner States shows that job quality in digital work remains questionable. A recent report by Mohammad et al (2022) cautions that while digital work can bring some forms of freedom and flexibility into the lives of workers in the five countries, it can also contribute towards their precariousness and vulnerability⁶⁴. Therefore, E-Commerce comes with an increased risk of widening wage income and wealth inequalities, unless workers are able to adjust to new technologies and benefit from increased productivity. This will require a regulatory framework that is supportive of this inclusive transition.

Therefore, Labour Unions should ensure that E-Commerce negotiations focus on consolidating a highly skilled and technologically adaptive workforce, rather than causing the anticipated retrenchment of workers due to automation. Moreover, as the industry 4.0⁶⁵ gains currency, data which is key for the industry 4.0 needs to be regulated. Trade Unions need to ensure the regulation of this data through “**Data Unions**”⁶⁶ so as to ensure that workers have the right to protect, use, sell and regulate their data. As workers living in a “datafied” society, failure to establish “**Data Unions**” will result into exploitation of people to the enrichment of big Tech corporations.

Furthermore, as pointed out by ITUC (2019)⁶⁷, negative impacts associated with E-Commerce and Industry 4.0 include among others:

- ✓ Increase in precarious work *Ratings systems, overbearing surveillance and formal job targets disempower workers at the expense of employers and buyers, because low ratings or missed targets, even when unmerited or unattainable, can have serious consequences, including sanctions and loss of employment.*

⁶³ https://uniglobalunion.org/sites/default/files/files/news/e-commerce_report_syndex_october_2019_en.pdf

⁶⁴ Mohammad A.A & Mark. G (2020). The Digital Continent: Placing Africa in Planetary Networks of Work. Available from: <https://fdslive.oup.com/www.oup.com/academic/pdf/openaccess/9780198840800.pdf>

⁶⁵ Industry 4.0 refers to a new phase in the Industrial Revolution that focuses heavily on interconnectivity, automation, machine learning, and real-time data.

⁶⁶ A Data Union framework provides a way to bundle a user's real-time data together with others and distribute a share of the revenue when someone pays to access it.

⁶⁷ ITUC (2019). e-Commerce Free Trade Agreements, Digital Chapters and the impact on Labour A comparative analysis of treaty texts and their potential practical implications. Link: https://www.ituc-csi.org/IMG/pdf/digital_chapters_and_the_impact_on_labour_en.pdf

- ✓ Making Enforcement of Local Labour Laws more difficult: *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.*
- ✓ Eroding Workers' Rights by Necessity: *Many gig economy workers are already under heavy surveillance at work, and this is currently expanding to cover non-working hours as well.*
- ✓ Expanding Market Access Right for Digital Firms: *As public service delivery is projected to increasingly rely on digital algorithms and data, this could also mean an increased role for the private sector in core areas of public services. The additional challenge that the e-commerce rules may introduce is the limitation of government control and regulation over companies that will be delivering key public services. An additional challenge is that the digitalization of public services is also being used as a tool to increase and lock in the range of public services that could be delivered by the private sector to areas such as health care, education, local government, electricity and water distribution, by tech firms trying to expand their "market access" rights.*

Intellectual Property Rights:

So too is the protection of intellectual property. In a knowledge-based economy of the fourth Industrial Revolution the protection of workers' innovations, copyrights, and patents is paramount in stimulating growth and competitiveness, particularly in the cultural, entertainment and tech industries.

Whereas as a Free Trade Agreement, the AfCFTA aims to liberalize trade by allowing for the free flow of goods and services, this does not imply that it removes all forms of protectionism. For example, Trade Unions should mobilize to demand for no patents on critical aspects like pharmaceuticals and Health related PPEs (which are needed for public health); and seeds which are required for food security purposes. In light of this, Labour Unions have an opportunity to demand policies that will continue to protect communities and jobs as well as the creation of decent jobs.

Key Labour rights related provisions that 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 ILO fundamental rights in their 4 categories i.e. “freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. ”.*

Definition of Labour Rights/laws: A section defining labour laws should be included. Special focus should be paid to the ILO Decent Work Agenda:

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

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: *requirements to employ or source locally, transfer of technology and skills.*

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: *Labor Cooperation Mechanism;*

Institutional Arrangements; Application and Enforcement of Labor Laws. This should also entail a requirement to ensure that State Parties make progress in making their respective domestic labor laws ILO-compliant.

Enforcement mechanism: Trade Unions should ensure that provisions on enforcement guarantee: *Involvement of trade unions in trade negotiations; commitments that countries will to respect workers' rights; requirements for companies to respect workers' rights; establish an independent committee that monitors countries respect for workers' rights; establish an independent legal forum of experts in labour law (to enable Trade unions, other organizations and individuals to submit complaints to this forum when there are abuses of workers' rights, either by governments or companies); Penalties to an AfCFTA State Party that has broken its commitments on workers' rights.*

Exclusions for Public Services: *AfCFTA need to entirely exclude public services and defend them from privatization while ensuring mitigation on attacks on workers' wages and conditions.*

No special courts for foreign investors: *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 protections⁶⁸. 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.*

Establishment of Labor Attaches: *These are important in monitoring implementation of the subsequent AfCFTA (and its associated Protocols) labor obligations and support bilateral cooperation on labor and employment matters.*

⁶⁸ 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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| | <p>Binding Language: <i>The language under Labour Provisions should be made stronger and binding rather than its present form of “best endeavor”.</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 harmonized 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</i>; <i>Elimination of discrimination in respect of employment and Occupation.</i></p> |
| | <p>Establishment of a Labour Consultative Advisory body: A national, regional and continental labour consultative or advisory body which includes representatives of business organizations should be constituted at the respective levels to provide views on matters regarding the labour chapter and provisions in the Protocol.</p> |
| <p>Electronic Commerce Protocol</p> | <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> For example, <i>Algorithmic bias</i>⁶⁹ makes hiring and firing less transparent, since workers do not have an explicit right to explanation.</p> <p>The protocol should not allow for a future in which working people’s ability to hold the giants of the digital economy accountable is limited.</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. Thus the Protocol should have provisions with obligations for local presence. Alternatively, interim</p> |

⁶⁹ Algorithmic bias describes a situation in which systematic errors by an algorithm create unfair outcomes, often to the disadvantage of minority. Broadly, the use of algorithms can enable fairer employment processes, but this is not guaranteed to be the case without meaningful standards.

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| | <p>alternative to consider might be an enforcement mechanism that gives access to local resolution of labour rights violations should be sought.</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 bargain, unionize, seek leave among others.</p> <p>Data Governance/regulation of cross-border data flows: Online platforms both collect vast streams of data on people, and shape the information these people are exposed to. They should therefore be obliged to abide 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. This will require the power of trade unions to strongly advocate for regulation and enforcement.</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 from 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. • Obliging AfCFTA State Parties to ratify and establish enforcement mechanisms for Conventions: C190 (Eliminating Violence and Harassment in the World of Work) and C189 (Decent Work for domestic workers). • 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 |

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| | border management authorities on e -immigration. By Implementing Integrated Border Management will facilitate free movement of goods, services, labour and persons, and facilitate efficiency and effectiveness in immigration services among State Parties. |
| EAC AfCFTA Implementation Strategy | 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 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- <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>) |
| | 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 institutionalize participation of Labour Unions through putting 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. |

COVID-19 and the new decent work Agenda

The COVID-19 pandemic and the economic shockwaves accompanying it are placing unprecedented pressure on the world of work, and on the workers and employers whose livelihoods depend on it. The International Labour Organization (ILO) estimates that the equivalent of 400 million full-time jobs were lost because of the crisis in the second quarter of 2020 alone. Like pointed out by ILO,⁷⁰ for the millions of workers already in vulnerable situations, the COVID-19 crisis can have devastating consequences: their fundamental rights at work are under threat, pushing them and their families towards greater insecurity. Safeguarding and extending fundamental principles and rights at work will therefore be critical to the success of both immediate and longer-term responses to the crisis in the world of work. The fundamental principles and rights at work i.e. the freedom to organize and bargain collectively, and the freedom from forced labour, child labour, and discrimination in employment and occupation – is more important than ever. This is because these rights are not only at heightened risk from the crisis but also constitute the foundation for building back a better, more just world of work in its aftermath.

In order to support workers and their rights to cope up with the COVID-19 impacts, ILO suggests a number of pillars which should be emulated.

| Pillar | | Proposed Actions |
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| Pillar 1: Stimulating the economy and employment | | <ul style="list-style-type: none">• Adopt an active fiscal policy• Institute an accommodative monetary policy• Provide lending and financial support to specific sectors, including the health sector |
| Pillar 2: Supporting enterprises, jobs and incomes | | <ul style="list-style-type: none">• Extend social protection for all committed to under the SDGs and ILO Decent Work Agenda.• Implement employment retention measures• Provide financial/tax and other relief for enterprises |
| Pillar 3: Protecting workers in the workplace | | <ul style="list-style-type: none">• Strengthen occupational safety and health measures• Adapt work arrangements (e.g. teleworking)• Prevent discrimination and exclusion• Provide healthcare access for all |
| Pillar 4: Relying on social dialogue for solutions | | <ul style="list-style-type: none">• Strengthen the capacity and resilience of employers' and workers' organizations• Strengthen the capacity of governments |

⁷⁰ https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@ipec/documents/publication/wcms_757247.pdf

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| <ul style="list-style-type: none"> • Strengthen social dialogue, collective bargaining, and institutions and processes for labour relations. |
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Proposals on a way forward

Mainstreaming and enforcement of Labour Provisions in the AfCFTA: The AfCFTA and its attendant protocols and Annexes should include binding and enforceable clauses on labour, union and social rights. Furthermore, State Parties to the AfCFTA should ratify and fully implement the International Labour Organization’s fundamental conventions and other essential norms and standards. The likely abuse of workers’ rights in global and African supply chains must be brought to a halt through the agreement.”

Many AfCFTA State Parties have enacted laws that protect labor rights but have largely failed to enforce them. Thus, the AfCFTA should protect enforceable industrial relations and international labour standards that most countries have already included in their national labour laws and legislative frameworks. The pact should consider measures on how to ensure that labour provisions in the AfCFTA are actually enforced, not just mirror existing state systems. The implementation of the agreement must also be democratic and transparent unlike earlier negotiations that excluded trade unions and civil society organizations.

Implementation of Mutual Recognition Agreements (MRAs). Trade unions should ensure that 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. An inclusive approach that ensures promotion and protection of fundamental rights of migrant workers should be sought. 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.

Involvement of Labour Unions in Negotiations: Regarding ensuring transparency and inclusive negotiations, it is critical that trade unions mobilize and lobby their respective National Governments to ensure their engagement in these discussions to ensure that negotiations achieve trade union objectives. Labour Unions should be involved as they have the industrial expertise and the political support of the working class. Moreover, as per the AfCFTA negotiating mandate, the African Union is tasked to ensure stakeholders engagement at all levels, including establishment of a Consultative Dialogue Framework. Furthermore, a Trade Advisory Committee as a complementary structure under the AfCFTA Secretariat is meant to include a number of

stakeholders, including Civil Society and Trade Unions⁷¹. Trade Unions should therefore collectively mobilise and demand commitment from the African Union to create opportunities for them to participate and influence trade policies and programmes at the national level and beyond. A transformative AfCFTA can only be achieved if negotiations are inclusive and represent relevant stakeholders.

AfCFTA induced Labour market results would vary by country, and some workers would lose jobs even as others gain new job opportunities and higher wages. Governments will need to collaborate with trade unions to ensure "just transition", where governments are collaborating on supporting workers in transition, with strong universal social protection systems and portability of rights and social protection. In the same vein, Policy makers will need to carefully monitor AfCFTA's distributional impacts—across sectors and countries, on skilled and unskilled workers, and on female and male workers. Doing so will enable them to design policies to reduce the costs of job switching and provide effective safety nets where they are needed most.

Ensure mainstreaming of labour rights related provisions in the AfCFTA and its Annexes. Labour provisions should not just be an additional chapter or section within an FTA. They should rather form an essential part of agreements and should be integrated and mainstreamed in every section. This is aimed at avoiding any loopholes through which they can be bypassed. The AfCFTA negotiations are still ongoing, which presents unions with an opportunity to demand the inclusion of labour provisions throughout. If the Decent Work Agenda is to be met, the restructuring of economies across Africa should have labour as an integral component.

It should be noted that under **Article 8 (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"***. Labour Unions can leverage on this provision to demand for a dedicated Annex/Appendix on Labour Rights. Moreover, **Article 29 (Review)** provides for a review of the AfCFTA *every five (5) years after its entry into force, by State Parties*, to ensure effectiveness, achieve deeper integration, and adapt to evolving regional and international developments. This should be explored by Labour Unions through sustained lobbying to ensure that the review is undertaken to incorporate labour provisions in the AfCFTA Agreement.

Promotion of E-Immigration. Free movement of labour and persons is a key in the implementation of AfCFTA, this will be facilitated by easing cross border movements through accessible of visas, work permits and residence permits. AfCFTA State Parties should develop, update and implement legal frameworks on E-Immigration, strengthening E-Immigration

⁷¹ https://au.int/sites/default/files/documents/36085-doc-ga_cfta_en_rev15march.pdf

infrastructure, coordination and services and build the capacity of immigration officials and border management authorities on E-Immigration. Furthermore, mobility provisions should contain enforceable measures for protection of migrant workers' rights. 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. In discussing the AfCFTA and Labour rights, it should be understood that Labour mobility provisions most commonly involve highly skilled workers, such as technical personnel, investors, traders and business persons, and rarely involve low-skilled workers, despite the fact that these tend to make up the largest part of international labour migration. This should be of concern to Labour Unions in Africa, especially given the fact that the current labour issues and sectors of focus are for skilled workers.

National and Regional (EAC) AfCFTA Implementation Strategy: As earlier noted, it is critical to note that at the national level, EAC Member State are in the process of designing their respective National AfCFTA Implementation strategies. While Kenya finalized the process in 2021, other Partner States are still in the process of developing their respective national implementation policies. At the regional level, the EAC Secretariat is developing a Regional AfCFTA Implementation Strategy, with consultations being held. Labour Unions should proactively engage in this process to ensure that these strategies contain provisions of labour rights promotion and protection. On the other hand, EAC Member States should structurally build unions into the process so to strengthen social dialogue and ensure that labor union's concerns are taken into account as the AfCFTA National Implementation Strategies are being designed. It is important that labour unions are given voice in this process for an inclusive and mutually beneficial AfCFTA.

AfCFTA, Industrial Policy and Labour Rights

The quest for achieving industrialization and structural transformation is back on the agenda today and is rapidly advancing in development discourse in Africa. At the continental level, the African Union (AU) Agenda 2063 strives to transform, grow and industrialize Africa's economy through beneficiation and value addition of natural resources by implementing the African Industrial Development Action Plan (AIDA) in 2008. The AfCFTA is also hoped to promote industrial development through diversification and Regional Value Chain development. However, the question of how this will be realized depends on the way supportive protocols like E-Commerce; Sustainable Investment; Intellectual Property; including tariff liberalization and Rules of Origin provisions are designed. This is because if poorly negotiated, these protocols and related statutory instruments risk causing competition rather than cooperation among State Parties to the AfCFTA.

A clear analysis of EAC Industrialization policy (2032) and AfCFTA shows that the EAC industrialization policy is being designed and implemented as yet another sectoral approach rather than an integrated goal of overall regional strategies. Thus, EAC Partner States need a major industrial policy to design strategies to ensure that all actors especially MSMEs benefit from the transition to a scale-market economy and AfCFTA has not planned about this sufficiently. It should be noted that the potential for industrialization to raise living standards of both skilled and unskilled workers in Africa depends on indirect job creation by large firms through backward and forward linkages and increasing labor productivity in small firms. This should be the priority by EAC Partner States while engaging in AfCFTA negotiations and implementation.

Infrastructure for Trade and labour rights

One reason for the proliferation of low regional trade is poor connectivity. Hard and soft infrastructure would improve efficiency, drive down costs, and increase cross-border operations. Indeed, the poor state of infrastructure is the bane of Africans doing business within Africa. Labour-based approaches to infrastructure works have become an important element of job creation strategies in many low-wage developing countries with an oversupply of underemployed labour.

Construction of road networks, telecom and rail will dramatically open and expand markets and grow business while providing the much-needed jobs to African youth. To this effect, many parts of Africa need to upgrade their physical infrastructure to facilitate movement around the continent. This encompasses the improvements needed for cost-effective land, sea and air travel and digital connectivity.

Furthermore, physical infrastructure is useless without the soft infrastructure to build strong institutions and human capital to complement the movement of goods, services and people. Currently, inadequate knowledge of official procedures, difficulties accessing travelling documents and trading licenses, and excessive waiting times at borders often force traders to engage in informal trade. In building the human capital element of soft infrastructure, AfCFTA members must not lose sight of the need for frameworks to recognize and standardize skills and formal educational qualifications. These will enable people to work in other countries easily. The broader issue of immigration to aid mobility on the continent also needs to be addressed.

Therefore, African nations must invest in the digital and soft infrastructure needed to aid e-commerce, e-learning, remote work, e-governance and strengthen institutions. Without it, AfCFTA members may miss a crucial opportunity to become competitive destinations for trade and investment.

Conclusion

Free Trade Agreements are often criticized for paving the way for corporations in richer countries to outsource their production to countries with lower wages, weaker unions and inferior environmental standards. The AfCFTA, through the promotion of more labour-intensive trade, has the potential to produce more jobs for the estimated 30 million African youth who would be entering the jobs market each year after the year 2030⁷². However, despite the complexities associated with AfCFTA and the risks for workers and communities within such large-scale trade liberalization, the inclusion of trade unions in the process has been limited. Trade unions as representatives of workers thus urgently have an important role to play to ensure the democratic participation of workers in the AfCFTA negotiations and implementation processes. There is no doubt about the commitment of the African people to Africa's economic integration as part of the process of the structural transformation of Africa's economies for an equitable development that meets their needs and aspirations. The AfCFTA offers an opportunity to take the agenda of integration forward. However, such a transformative trade agenda cannot happen without the strategic and consistent involvement of Labour Unions. However, for this integration agenda to be realized, the terms and conditions offered must be appropriate to the imperatives of the continent's structural economic transformation and worker's agency. Otherwise, the AfCFTA would instead be a step backwards.






AfCFTA negotiations are still ongoing and Labour Unions should demand that labour is included and recognized in all sections of the AfCFTA National and Regional Implementation Strategies, in addition to a dedicated labour section with enforceable labour rights. 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.

It is easy to be misled by impressive projections of economic growth and job creation. The reality, however, tells a completely different story in which decent jobs stand to be lost, precariousness increased, and union power decreased⁷³. In order to ensure that challenges that past FTAs and regional trading arrangements have brought to the workers in Africa are not repeated in the AfCFTA, in order to ensure collective ownership of the AfCFTA, it begets involvement of trade unions in the consultations, designing of negotiation and the implementation and monitoring of the AfCFTA. Moreover, under the AfCFTA negotiating mandate, the AfCFTA Secretariat and EAC Partner States are tasked to ensure stakeholders engagement at all levels, including establishment of a Consultative Dialogue Framework that brings on board trade unions, civil society, farmers, academia, private sector among others.

⁷² <https://mo.ibrahim.foundation/news/2019/africas-job-market-challenges>

⁷³ Marie. D (2021). **Trade Unions and Trade: A Guide to the African Continental Free Trade Agreement (AfCFTA)** . Available from <https://www.lrs.org.za/wp-content/uploads/2021/12/Trade-Unions-and-Trade-A-Guide-to-the-African-Continental-Free-Trade-Agreement.pdf>

ANNEX 1. Labour Provisions in Treaties establishing COMESA and EAC.

| Treaty/Protocol | Labour Rights Provision |
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| Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) | <p> Para 6 (<i>in the field of economic and social development</i>) (e): remove obstacles to the free movement of persons, labour and services, right of establishment for investors and right of residence within the Common Market.</p> <p> Article 15 (<i>Technical Committees Composition and Functions</i>) (g)-: Establish the Committee on Labour, Human Resources and Social and Cultural Affairs.</p> <p> ARTICLE 143 (<i>Co-operation in Social and Cultural Affairs</i>) 1 (b): Member States shall promote close co-operation between themselves in the social and cultural fields, particularly with respect to: <i>employment and working conditions; labour laws; the prevention of occupational accidents and diseases; the provision of facilities for the disabled; the right of association and collective bargaining between employers and workers.</i></p> |
| Treaty establishing the East African Community (EAC) | <p> Article 80 (Strategy and Priority Areas) 1 (f): Harmonise and rationalize investment incentives including those relating to taxation of industries particularly those that use local materials and labour with a view to promoting the Community as a single investment area,</p> <p> Chapter 17: Free movement of Persons, Labour, Services, right of establishment and residence. Article 104 provides for scope of co-operation with the Partner States agreeing to conclude a Protocol on</p> |

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| | <p>the Free Movement of Persons, Labour, Services and Right of Establishment and Residence; harmonise their labour policies, programmes and legislation including those on occupational health and safety; establish a regional centre for productivity and employment promotion; and exchange information on the availability of employment; and undertake to co-operate in the enhancement of the social partnership between the governments, employers and employees so as to increase the productivity of labour through efficient production</p> |
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