AfCFTA | Insights Series

WEBBER WENTZEL
in alliance with > Linklaters

In partnership with
AFRICA LEGAL

Contents

Africa, Innovation and the AfCFTA

In an insights series (of podcasts and digital content), Webber Wentzel explores the impact the AfCFTA will have on the continent, for intra-African business relationships and for investors.

In this kick-off conversation, Christo Els, Webber Wentzel's Senior Partner, speaks to Africa Legal's Tom Pearson about his impressions of how he believes the AfCFTA will change the way Africans do business.

As global power and allegiances shift, and the impact of the pandemic starts to be understood, says Christo, so too are Africans realising how their resilience and ability to make-do can mean a new kind of future for their countries.

AfCFTA, he says, is prompting a more inward-looking approach to trade with an emphasis on focusing closer to home for business. This in turn is bringing about a new confidence and appreciation for the benefits of working together. There is also growing recognition that Africa's spirit of entrepreneurship and innovation are its greatest strengths and should be celebrated and developed.

"Covid has meant that within Africa the focus is on being more self-reliant. We should be able to 'produce' and not be so dependent on others." This shift in emphasis means there is likely to be an increase in infrastructure development, Christo said.

Already there is enormous innovation.

Telecommunications, for instance, has been an industry of remarkable growth across all 54 African countries. Whereas most countries gradually moved from terrestrial lines to mobile phones, in Africa users leapfrogged straight to mobile phones.

"Today, in Africa, the growth of the mobile phone sector has outstripped every other region in the world. And East Africa leads the globe with its developments in mobile banking."

This is where the role of advisory firms (like law firms, banks, accounting firms) becomes important as they enable start-ups to expand their innovations into multinational businesses. Webber Wentzel was committed to supporting start-ups and scale ups and helping them put in place the correct legal frameworks to thrive and expand.

It is an exciting time for a "very African practice" like Webber Wentzel, says Christo. Headquartered in South Africa and founded over 150 years ago – we are working with clients with business activities all across Africa. Our relationships with other African law firms and our alliance with global law firm, Linklaters really positions us well to provide exceptional client service.

Another area of potential growth on the continent is arbitration, says Christo. Complex disputes often involve travelling to the centres of arbitration like Paris or London but the thinking now was increasingly that this was something that could be done "at home."

"All of this reflects a continent moving towards self-reliance," says Christo.

For law firms it means following clients and it was important to see Africa "not as full of risk but full of opportunity."

What this means for Christo is, at last, the coming of age of a continent.

"At Webber Wentzel we want to be part of Africa's success, to increase connectedness and selling its potential. It is about being facilitators and overcoming challenges – to be able to do that is a real pleasure and a privilege."

---

https://www.africa-legal.com/news-detail/africa-innovation-and-the-afcfta/

Africa needs to help Africa

The biggest challenge the agreement faces is around the free movement of labour—something that won't happen without the rationalisation of existing laws, Dingley says. One way to help ease concerns about large numbers of people freely moving across borders is to initially introduce professional visas for certain businesses. That would limit mass-movement, but it would still need governments to lift visa restrictions or reform immigration policies more generally.

"This is the most difficult aspect, but at the moment you see more of a focus on trade and not so much on labour, but the two are intertwined and in order for this to take flight we need to look at the movement of people very carefully," he says.

That means identifying priority sectors where improvements are needed and where skilled labour from other member states could help build those sectors up.

Boosting intra-African trade will also mean introducing zero tariffs on goods, which is likely to happen at uneven pace across the continent as individual governments seek to protect certain domestic sectors.

"Africa needs to help Africa," says Dingley. "If we zero the tariffs among ourselves, we can start trading more and uplift countries that are closest to each other. The end result must be that we rely less on imported machines and products from overseas and we start producing these items ourselves and start diversifying as countries within the trading bloc to improve employment opportunities.

Other areas that need to be addressed include the introduction of competition laws to boost competitiveness and the dismantling of policies that constrain market development.

"Many countries in the free trade area have restrictive policies around certain sectors like communications and postal services where they have only allowed one player, so there needs to be a lot of opening up of sectors and a removal of these restrictive policies," says Dingley.

Another area that needs more focus are non-tariff barriers, such as transit fees and import payments. Exchange control rules and capital flow restrictions in certain countries mean it is challenging for companies to repatriate profits, further hindering cross-border trade. Some countries also have restrictions on foreign ownership and rules on foreign direct investment, all of which needs to be rationalised, says Dingley.

"You need to overcome those if you want to increase the manufacturing base and encourage people to invest," he says.

That investment is critical for financing the infrastructure and transport corridors needed to support intra-African trade growth.

"One of the things that needs to happen is ministers and various trade representatives in countries need to sit down and agree on priority sectors and their investment plans within their own countries," says Dingley. "They need to focus on where they have a comparative advantage that will benefit from these free trade arrangements."

---

https://www.africa-legal.com/news-detail/africa-needs-to-help-africa/

Creating the right ecosystem

In the latest Webber Wentzel AfCFTA Insights Podcast, Michael Denenga, a partner specialising in finance and investment funds, discusses this new reality with the following guests:

Dr. Nkosana Donald Moyo, PhD, former Vice President and COO of the African Development Bank (AfDB), former Managing Partner of the Africa Business of Actis Capital LLP and former Associate Director of the World Bank's International Finance Corporation (IFC) and founder of the Mandela Institute for Development Studies (MINDS) Simbah Mutasa, Regional Director of Southern Africa at DFI, Norfund and has formerly held senior roles at Citi both (Johannesburg and London) and Liberty Global. While at Citi he led the execution of transactions totalling over US$10bn across Sub-Saharan Africa.

The opportunities of the AfCFTA are staggering, with the World Bank predicting the AfCFTA may lift '30 million people out of extreme poverty and raise the incomes of 68 million others who live on less than $5.50 per day.' The potential positive gains are unmatched in modern African economic history.

Issues with the current status quo range from the sheer inefficiency and cost of importing raw materials to the cost of capital. "Africa spends about $63 billion on food imports,' says Webber Wentzel's Denenga, "Africa needs to spend less on importing raw materials."

Engineering sectoral potential

"As a young African and as someone that is perennially optimistic, I am desperate to see this continent achieve its full potential," says Mutasa.

The AfCFTA is aiming to help ensure the growth of this potential by prioritising financial services, travel, transport, communication and business services, which Mutasa refers to as "anchor sectors" that are "bedrocks."

He sees financial services as a cornerstone for driving development, providing capital into economies and helping to manage the broader costs of this capital. He suggests also focussing on manufacturing, a "multiplier industry" which adds value to industry supply chains upstream and downstream in areas such as coal, logistics wholesaling, marketing and beyond.

Creating the right ecosystem

With the great promise of the AfCFTA and the goodwill behind it, comes the high stakes responsibility of getting the fundamentals right. Dr. Moyo poses a central question here: "How do you bring it to reality and make it succeed?" He suggests a phased approach.

"The AfCFTA is a very important platform that has been conceptualised...while the concept is laudable and a lot of the anticipated numbers are big, these things are achievable only if certain implementation measures are taken care of," he says.

Moyo suggests that the way to keep up the positive momentum that has been building, is to first ensure a feeling of inclusivity amongst all participating African nations. "If participants feel left behind," he says, "or don't have skin in the game, then their commitment to making this succeed is going to be compromised."

Mutasa agrees, saying "When it comes to getting the AFCTA accurate, we have to take an ecosystem approach, and everyone has to be a stakeholder in that approach."

So where to begin? The key question according to Moyo is, "what is the structure – how do you build it so that this can happen?"

First, you need what Moyo describes as "vanguard members" or 5-10 countries with more established economies who can lead by example. These members negotiate and analyse their capacity to exchange value in a system to see where they could start in terms of exchanging goods and services.

Furthermore, these countries will create momentum and clarity about the door staying open to other countries to join when they are ready. "Don't wait for everybody from day 1 – I think that's not doable," he says. This experience would gradually allow the accrual of experience and learning how to acquire skills in order to tackle harder things and ensure you have the skills to manage risks.

This phased approach could be characterised as modular, creating a "whole system without all the pieces being in place from day one – like Lego – you can build out but put the pieces together", suggests Moyo. This clarity from inception would lead to transparency towards all who want to join.

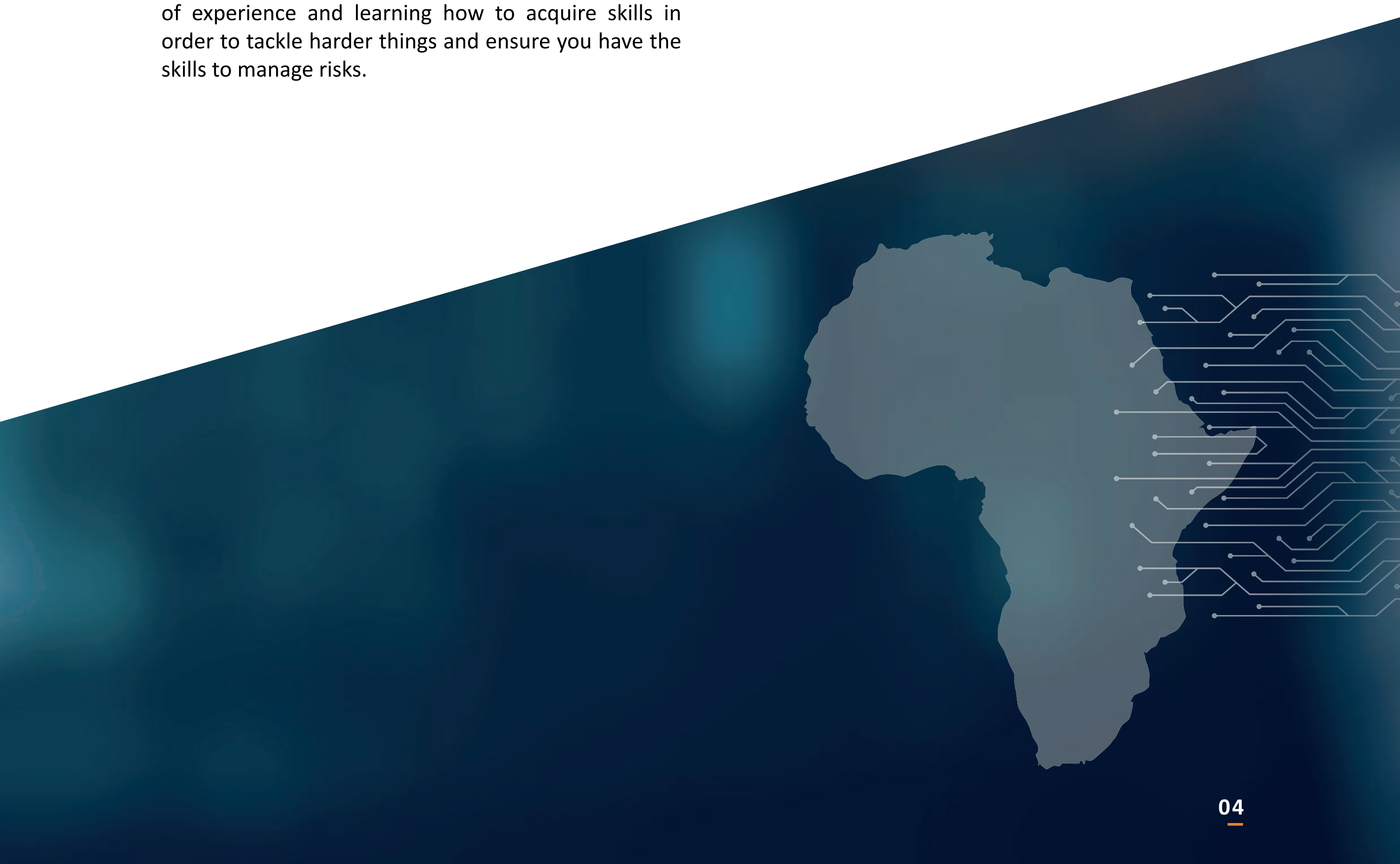
A chance to take stock

The pandemic has delayed the implementation of AfCTFA and as it continues, the effects are still being felt. Mutasa says "in the delay caused by the pandemic, people now have a chance to take stock and figure out what is going on and how it impacts thinking. It's a good opportunity to reflect on where we are ultimately and the end goal of what we are solving with the AfCTFA." He suggests that part of this thinking could be a reflection around centralisation, manufacturing or product facilities.

Denenga hopes that we can get ''the essentials in place'' in order to create a ''synergistic ecosystem '', this is an excellent opportunity that Africa cannot miss out on.''

---

https://www.africa-legal.com/news-detail/creating-the-right-ecosystem/



AfCFTA | The Big Question

We asked our @Africa Legal audiences 'Who has the biggest role to play in ensuring the success of the African Continental Free Trade Area (AfCFTA) in the medium term...?' The Results are in!

@Webber Wentzel partner, Daryl Dingley, commented on the results - ''.....although inter-governmental cooperation is key, engagement at the level of the Council of Ministers and Committee of Senior Trade Officials is even more critical. Coordination at this level will help establish timelines for the implementation of zero tariffs and the impact on specific industries affected by the tariff reductions.''

Brexit | Next steps for Africa

In this interview, we speak to Daryl Dingley, partner at Webber Wentzel to get to the heart of the opportunities and challenges for African countries brought about by new bi-lateral trade agreements with the UK in the Brexit era.

The much-lauded AfCFTA has been heralded as a milestone for African economies and a gateway to prosperity for more than a billion Africans. Yet, challenging this collective economic spirit are the trade challenges brought about by Brexit and the mosaic of forthcoming and already established trade agreements between African countries and customs unions with the UK.

“We jumped in there and got ready for January 1, post-Brexit,” says Dingley in reference to SACU or the South African Customs Union’s entry into a trade agreement with the UK. (SACU includes South Africa, Lesotho, Eswatini , Namibia and Botswana.) The new agreement aims to smooth trading between these countries and the UK by establishing a shadow agreement that directly replicates the one already in place with the EU. The benefits will be felt almost immediately for these countries, especially for agricultural products, and have the added benefit of creating another lucrative market for trade beyond the EU.

But, the gains have not been and will not be shared equally for all African countries due to their own actions and the actions of the UK.

“A lot of African countries are behind the curve” says Dingley referring to the vast majority of nations that have not yet instituted an agreement or even started negotiations.

Some countries, such as Nigeria, have waited for the UK to reach out to them which can leave them running at a slower economic speed than those that have established these agreements.

“This is the wrong approach” says Dingley, “you have to be proactive.”

To help move continental progress towards more trade agreements with the UK, the British Government is hosting a virtual conference on 20 January 2021. This conference aims to help countries understand what is required for bilateral agreements.

However, the very large elephant in the room is the AfCFTA and what differing bilateral agreements mean for the success of this agreement, he says.

“Maybe disaster is the wrong word, but the fact that you have all these bilateral trade arrangements and regional trading blocs engaging with the UK separately – not at an African Union or African Free Trade Agreement level undermines the African Union 2063 vision. What you really want is the bloc of 52 countries to be collectively, as a unit, engaging with the UK.”

Dingley offers a few suggestions to African countries and regional trading blocs that have yet to conclude agreements with the UK.

First, there needs to be a close look at the diversification of the economies in the region and the lowering of various tariffs for countries to benefit from preferential trade arrangements from the UK.

If the UK wants to uplift these economies and Africa more generally, there needs to be a discussion around the areas where they want to establish infant industries that need a level of protection.

“The UK has enough things to worry about with regards to their arrangements with the EU – this process should have been driven more by Africa.”

The African Union, for instance, could have thought about entering into a bilateral agreement with the UK that incorporated some ideas about diversification and talked about transitional mechanisms to ensure it's a smooth transition.

"Then, they should have looked at the main policy and industrial policy objectives and have identified the main investment areas that would be critical. Lastly, they should have engaged with the UK to try, for example, to encourage the UK businesses to invest in certain countries in the bloc to encourage intra-regional trade and then open up markets in a staged way."

If firms want to expedite the process, Dingley says, potential clients should seek legal advice on the trade rules and trade finance, as well as transitional advice for countries that do not yet have these agreements.

Though the era of African trade with a newly "independent" UK is just beginning, Dingley is hopeful, calling it "early days" and seeing many future opportunities for mutually beneficial economic growth both bi-laterally and through the AfCFTA.

---

https://www.africa-legal.com/news-detail/brexit-next-steps-for-africa/

Understanding Africa's Trade Web

While it is not recognised as a regional economic community (REC) in the African Continental Free Trade (AfCFTA) Area agreement, it did serve as an example for other African countries to pursue economic development through a regional bloc. Today there are eight REC's that will act as building blocks for AfCFTA, the oldest among them being the Economic Community of West African States, which was founded in 1975 and includes Nigeria, Ivory Coast and Senegal among its members. The most recent addition to the continent's RECs is the East African Community (EAC), which was re-established in 1999 and is chiefly dominated by Kenya (making up 65% of intra-EAC exports).

The largest economic community by volume of intra-REC trade is the Southern African Development Community (SADC), followed by the Community of Sahel-Saharan States (CEN-SAD) and then ECOWAS. The Economic Community of Central African States (ECCAS) accounts for the lowest amount of intra-REC trade among the eight blocs recognised by AfCFTA.

While the free trade area is designed to eventually supersede all of the RECs, in the near-term they will serve as stepping stones towards a more integrated Africa. For instance, if a policy was a success in ECOWAS, the idea would likely be replicated across the continent.

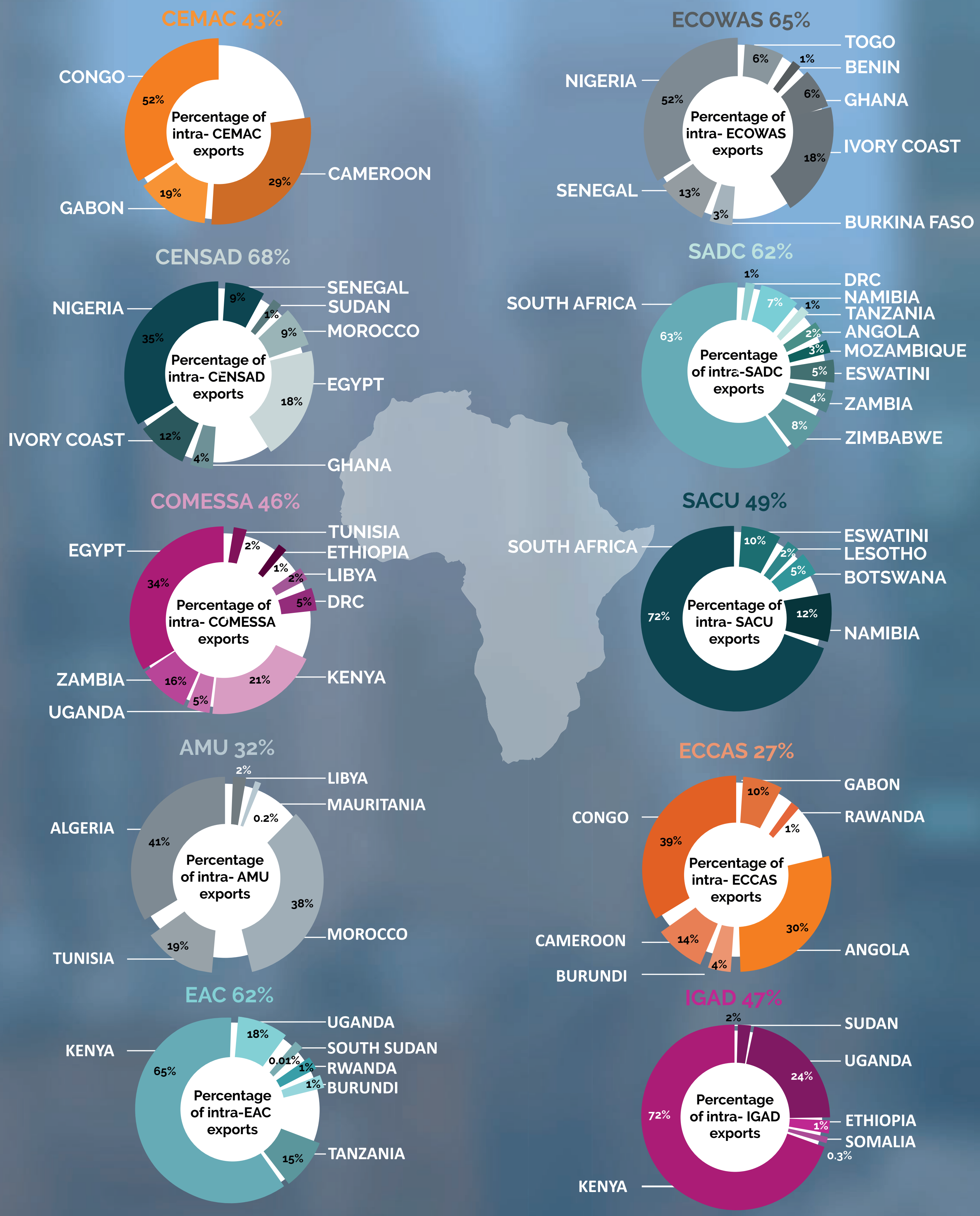
Yet while the blocs will co-exist for now, where rules in a particular REC clash with the AfCFTA agreement, the latter will generally take precedence. There are some exceptions, however. SADC, for instance, is already more deeply integrated than the continent as a whole, meaning its rules can be maintained—it doesn't have to immediately integrate to that same level with other economic communities or non-SADC members.

Integrating Africa as a whole beyond existing regional trade agreements is likely to prove challenging. Some countries might actually benefit from less integration because they are shielded from more competitive companies elsewhere, so there may be some pushback from smaller countries that have been successful in a particular REC but would now have to compete with bigger countries such as South Africa. South Africa, by contrast, with its large manufacturing base would likely stand to benefit from a more open Africa; instead it is more likely to push back on issues such as migration or other areas that will eventually be on the table.

---

https://www.africa-legal.com/news-detail/understanding-africa-s-trade-web/

EXISTING AFRICAN REGIONAL ECONOMIC COMMUNITIES



WEBBER WENTZEL
in alliance with > Linklaters

AFRICA LEGAL

(1) Overall % shown (e.g. CEMAC 43%) is the percentage of total intra-African exports made by REC members which remained exclusively within this REC.
(2) Data Source: 'The African Continental Free Trade Area - A Tralac Guide (7th Edition)' August 2020: https://www.tralac.org/documents/resources/booklets/4062-afcfta-a-tralac-guide-7th-edition-august-2020/file.html

Investment protection under the AfCFTA

Hosted by Webber Wentzel's Sarah McKenzie it features lawyers Vlad Movshovich (Webber Wentzel), Tunde Fagbohunlu (Aluko and Oyebode) and Roland Ziadé (Linklaters). In this summary, James Mayer reflects on their discussion.

The lawyers agree that, before taking the leap and investing in a foreign state, investors need to know how their investment will be treated. This question has become more relevant than ever as the investment protection regime under the AfCFTA is presently being negotiated. While many unknowns still exist, discussion continues over what this new protocol might look like.

The now well known parameters of phase one of the AfCFTA, are seeking to establish the free trade of goods and services. The less well known, but important phase two, aims to specifically address foreign direct investment (FDI) and intra-African investment through the establishment of an investment protocol.

As with so many legislative and regulatory initiatives at this time, progress cannot be spoken about without mention of the delays brought on by the pandemic. The negotiations for phase two are now on hold but expected to take place by 2022.

Vlad Movshovich, partner at Webber Wentzel, says, “The critical components of the investment protocol will include sufficient investor protections while, at the same time, putting adequate responsibilities on investors to ensure there is balance in meeting the Sustainable Development Goals (SDGs) set by the African Union 2063 Agenda.”

In 2008, the African Union mandated various committees to come up with a comprehensive code on investment which took shape over a number of years. This process has leveraged lessons, both positive and negative, from other codes globally. Some codes, such as those developed in the West, were seen by African policy-makers to be imposed on developing countries and are now seen as cautionary examples.

From these lessons, a motivation to provide balance has arisen – between substantive protections for intra-African investment and the need for states to have sufficient policy space to regulate their own social development processes.

So, how will the investment protocol interact with existing investment protection regimes on the continent?

“There are currently 190 intra-African bilateral treaties and investment agreements, though many of them have not yet entered into force. It is unclear if the investment protocol will coexist with others or if it will replace or supersede anything,” says Roland Ziadé, Global Co-Head of International Arbitration at Linklaters.

Ziadé describes a few potential options for the form of the protocol, saying “they might replace the existing African bilateral investment treaties (BIT) to streamline the framework of investment protection in the continent, but this would require significant political commitment. This could say other African BITs don’t apply and would be replaced by the protocol. We have seen this with the EU treatment with third parties – such as with Canada.”

---

https://www.africa-legal.com/news-detail/keeping-investments-safe/

Disputes: Intra-African Investment

Speculation continues to build on the content of phase two of the African Continental Free Trade Area (AfCFTA).

This will establish a pan-African investment protocol that will outline how intra-African investments are protected and how intra-African investors could start disputes and where this could happen.

While the delayed negotiations are not due to happen until 2022, the minds of investors in and outside of Africa have been musing about different potential forms the protocol may take.

Roland Ziadé, Global Co-Head of International Arbitration at Linklaters, says, “We have not even seen a draft or a provisional version of the protocol so we don’t really know what’s been done so far.”

Regardless, examining past codes, such as the Pan African Investment Code (PAIC), an instrument adopted in 2017, may offer some guidance for the near future.

Ziade says, “If the PAIC is to serve as a guideline – African states will narrow down and redefine the scope of investors protected – perhaps even linking such protection to the host states.

“We have already seen this approach in a number of agreements including the 2012 BIT and the South African Development Community (SADC).”

Other bilateral and multilateral instruments also provide clues as to elements which are likely to be included.

Tunde Fagbohunlu, head of the Litigation, Arbitration and ADR at Aluko & Oyebode says, “Typical relative protections are likely to include things such as most favoured nation, national treatment protection and absolute protections such as the right to freely transfer income abroad.”

There are some significant deviations expected, especially for expropriation and compensation.

Similarly, the open-ended concept of fair and equitable treatment is also expected to be omitted.

Fagbohunlu says, “Perhaps the negotiators can borrow a leaf from the SADC bilateral investment treaty which replaces fair and equitable treatment with fair administrative treatment so there wouldn’t be a complete abandonment of the fair treatment standard.”

Balance, especially for investor protection, is expected to be a motivating force. In short, “It must be sufficient to attract investment and preserve the regulatory space – it must be done in a way that doesn’t dissuade investment,” says Vlad Movshovich, Partner at Webber Wentzel.

Despite the fragmentation and uncertainty, Ziadé says, “I expect that the upcoming investment protocol will reflect the latest trends and ongoing debates in investment treaty protection both from a procedural and from a substantive perspective.

“We can hope that it improves the predictability, consistency and the legitimacy of the investment protection system on the continent and strikes an appropriate balance between the facilitation of cross border investment within Africa and the promotion of the sustainable development of the host states.”

Fagbohunlu adds, “The massive market that’s going to come into existence as a result of the AfCFTA will need a huge amount of investments to drive and service that market. If that market works well, African countries will benefit - if the agreement works – from sustainable development to poverty reduction to technology transfers and more. The key is going to be coming up with an arrangement that works and that it is not fitfully implemented.”

---

https://www.africa-legal.com/news-detail/disputes-intra-african-investment/

Key Contacts

Christo Els | Senior Partner

christo.els@webberwentzel.com

+27 11 530 5628

Daryl Dingley | Partner - Competition & Trade

daryl.dingley@webberwentzel.com

+27 11 530 5285

Michael Denenga | Partner - Tax & Funds

michael.denenga@webberwentzel.com

+27 11 530 5492

Sarah McKenzie | Partner - Dispute Resolution

sarah.mckenzie@webberwentzel.com

+27 11 530 5509

Vlad Movshovich | Partner - Dispute Resolution

vlad.movshovich@webberwentzel.com

+27 11530 5867

Yael Shafrir | Head: Alliances & Network

yael.shafrir@webberwentzel.com

+27 21 431 7263

Nonkululeko Jacobs | Coordinator: Alliances & Networks

nonkululeko.jacobs@webberwentzel.com

+27 11 530 5482