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THE AFRICAN CONTINENTAL FREE TRADE AREA: LOCAL CONTENT REQUIREMENTS AS A MEANS TO ADDRESSING AFRICA'S PRODUCTIVE CAPACITY CONSTRAINTS

Nchimunya D. Ndulo*

I. INTRODUCTION

The Agreement Establishing the African Continental Free Trade Area (“AfCFTA”) creates a single market for goods and services in Africa, the largest of its kind in terms of geography and population coverage since the creation of the World Trade Organization (“WTO”) in January 1995.¹ It is expected to spur significant economic growth and change.² By 2030, with the participation of all African countries, the AfCFTA is projected to create a market size of “1.7 billion people with over [\$]6.7 trillion [USD] of cumulative consumer and business spending.”³ More conservative estimates state that it is expected to create a market of approximately 1.2 billion people covering over \$4 trillion US Dollars in combined consumer and business spending⁴ and encompass a combined economic output of \$2.5 trillion USD as of 2018.⁵ The World Bank estimates that the AfCFTA has the potential to lift thirty million Africans out of extreme poverty.⁶

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1. Landry Signé, *Africa Has a New Free Trade Area. This is What You Need to Know*, WORLD ECON. F. (Apr. 3 2018) [hereinafter Signé, *Africa Has a New Free Trade Area*]; see also Landry Signé, *Africa’s Big New Free Trade Agreement, Explained*, WASH. POST (Mar. 29, 2018) [hereinafter Signé, *Africa’s Big New Free Trade Agreement*].

2. See *id.*

3. Signé, *Africa Has a New Free Trade Area*, *supra* note 1.

4. Signé, *Africa’s Big New Free Trade Agreement*, *supra* note 1.

5. BROCK R. WILLIAMS & NICOLAS COOK, CONG. RSCH. SERV., IF11423, AFRICAN CONTINENTAL FREE TRADE AGREEMENT [“AfCFTA”] 1 (2020).

6. Franck Kuwonu, *Africa’s Free Trade Area Opens for Business*, AFR. RENEWAL (Jan. 7, 2021), <https://www.un.org/africarenewal/magazine/january-2021/afcfta-africa-now-open-business>.

The AfCFTA is rooted in the Abuja Treaty of 1991, in which Member States of the former Organisation of African Unity, the predecessor of the African Union (“AU”), “agreed on a roadmap for the creation of a common African market.”⁷ In January 2012, during the 18th Ordinary Session of the Assembly of Heads of State and Government of the African Union, AU Member States⁸ adopted a decision to establish a Continental Free Trade Area.⁹ In June 2015, AU Member States launched negotiations for the establishment of the AfCFTA.¹⁰ On March 21, 2018, “44 African heads of state and government officials met in Kigali, Rwanda, to sign the framework [agreement],”¹¹ thereby setting the stage for the AfCFTA. Under article 23 of the AfCFTA, the agreement would enter into force thirty days after its ratification by at least twenty-two countries.¹² On May 30, 2019, the AfCFTA entered into force, thirty days after the twenty-second instrument of ratification was deposited with the AU Commission.¹³ On July 7, 2019, the operational phase of the AfCFTA was launched in Niamey, Niger at the Twelfth Extra-Ordinary AU Summit, at which point twenty-seven Member States had already ratified the agreement.¹⁴ This marked a diplomatic and political success in light of the short timeframe since the trade negotiations began in 2015, the ambitious liberalization goals, “and the heterogeneity and large number” of Member States.¹⁵ As of October 4, 2021, thirty-eight countries had ratified the AfCFTA.¹⁶

The agreement is being negotiated in three phases, with Phase 1 covering “trade in goods and trade services disciplines, as well as dispute

7. *African Continental Free Trade Area (AfCFTA)*, DEUTSCHE GESELLSCHAFT FÜR INTERNATIONALE ZUSAMMENARBEIT (GIZ) GMBH, <https://www.giz.de/en/worldwide/59611.html> (last visited March 9, 2021).

8. Member States refers to the states that are party to the African Union (“AU”). See Constitutive Act of the African Union art. 1, July 11, 2000, OAU Doc. CAB/LEG/23.15 (2001).

9. *CFTA - Continental Free Trade Area*, AFR. UNION, <https://au.int/en/ti/cfta/about> (last visited Mar. 9, 2021); *African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents*, TRADE L. CTR. FOR S. AFR. [“TRALAC”], <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (last visited Mar. 9, 2021).

10. LANDRY SIGNÉ & COLETTE VAN DER VEN, KEYS TO SUCCESS FOR THE AfCFTA NEGOTIATIONS 2 (Afr. Growth Initiative, Brookings Inst., 2019).

11. Signé, *Africa’s Big New Free Trade Agreement*, *supra* note 1.

12. Agreement Establishing the African Continental Free Trade Area art. 23, Mar. 21, 2018, 58 I.L.M. 1028 [hereinafter AfCFTA].

13. *Id.* arts. 23(1), 24; Kuwonu, *supra* note 6; *AfCFTA Ratification Barometer*, TRALAC (Oct. 4 2021), <https://www.tralac.org/documents/resources/infographics/2605-status-of-afcfta-ratification/file.html>.

14. Trudi Hartzenberg, *The African Continental Free Trade Area Agreement – What is Expected of LDCs in Terms of Trade Liberalisation?*, U.N. LEAST DEVELOPED COUNTRIES PORTAL, (Aug. 2019).

15. DEUTSCHE GESELLSCHAFT FÜR INTERNATIONALE ZUSAMMENARBEIT (GIZ) GMBH, *supra* note 7.

16. TRALAC, *supra* note 13

settlement.”¹⁷ With respect to services, State Parties¹⁸ have “agreed to propose liberalization through a request-and-offer approach, based on seven identified priority sectors: logistics and transport, financial services, tourism, professional services, energy services, construction, and communications.”¹⁹ Tariff concessions are yet to be fully negotiated among the State Parties. As of November 2021, State Parties were in a position to start trading on preferential terms for over eighty-eight percent of products, while negotiations on the remaining twelve percent are ongoing.²⁰ This follows the agreement on the Rules of Origin for eighty-eight percent of tariff lines.²¹ Phase 2 will address cooperation on investment, competition, and intellectual property rights.²² In February 2020, the AU approved a third phase of negotiations which will develop a Protocol on E-Commerce.²³ Trading under the AfCFTA was expected to begin on July 1, 2020,²⁴ but in light of disruptions and delays brought on by the COVID-19 pandemic, trading began on January 1, 2021.²⁵

All State Parties are expected to reach the same level of trade liberalization, although a distinction is made between least developed countries (“LDCs”) and non-LDCs in terms of the timeline afforded to achieve the process.²⁶ While all State Parties have agreed to liberalize ninety percent of tariff lines, LDCs have ten years to achieve ninety percent liberalization, whereas non-LDCs have five years.²⁷ Further distinctions are made between sensitive and non-sensitive products concerning the

17. Hartzenberg, *supra* note 14.

18. State Parties are AU Member States that have ratified or acceded to the Agreement Establishing the AfCFTA and “for which the Agreement is in force.” AfCFTA, *supra* note 12, art. 1(v).

19. LISANDRO ABREGO, MARIO DE ZAMARÓCZY, TUNC GURSOY, SALIFOU ISSOUFOU, GARTH P. NICHOLLS, HECTOR PEREZ-SAIZ & JOSE-NICOLAS ROSAS, THE AFRICAN CONTINENTAL FREE TRADE AREA: POTENTIAL ECONOMIC IMPACT AND CHALLENGES 17 (2020).

20. Phillip Xolisa, *AfCFTA: Africa Inches Closer to Target Goal on Rules of Origin*, AFR. REP. (Nov. 17, 2021) <https://www.theafricareport.com/147382/afcfta-africa-inches-closer-to-target-goal-on-rules-of-origin/>.

21. *Id.* Some sources suggest that the rules of origin for more than eighty-six percent of tariff lines have been agreed to. DDG Ellard Stresses WTO’s commitment to support AfCFTA Implementation, WORLD TRADE ORGANIZATION [“WTO”], https://www.wto.org/english/news_e/news21_e/ddgae_25nov21_e.htm (last visited Dec. 15, 2021).

22. AfCFTA, *supra* note 12, art. 7.

23. Decision on the African Continental Free Trade Area of the Thirty Third Session of the African Union Assembly, Doc. Assembly/AU/4 (XXXIII), ¶23 (Feb. 9–10, 2020).

24. Kuwonu, *supra* note 6.

25. *Id.*; TRALAC, *supra* note 13.

26. See Hartzenberg, *supra* note 14. Least developed countries, LDCs, refer to countries designated as such by the United Nations. *List of Least Developed Countries*, UNITED NATIONS, https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf (last visited Dec. 22, 2021).

27. See Hartzenberg, *supra* note 14.

liberalization of tariff lines. According to the Schedules of Tariff Concessions,²⁸

[t]he remaining 10% of tariff lines [are] divided into two categories. 7% can be designated sensitive products and 3% of tariff lines can be excluded from liberalisation entirely. LDCs have 13 years to eliminate tariffs on sensitive products and may maintain their current tariffs for the first 5 years, backloading liberalisation during the remaining 8 years. Non-LDCs have 10 years to eliminate tariffs on sensitive products and may also retain the status quo, starting liberalisation in year 6. Both LDCs and non-LDCs may exclude 3% of tariff lines, but the excluded products may not account for more than 10% of their total trade.²⁹

The list of excluded products is subject to negotiation and review every five years.³⁰ A special carve-out has been made for what are referred to as “G-6 countries,” which argue that they face specific development challenges.³¹ These countries include Ethiopia, Madagascar, Malawi, Sudan, Zambia, and Zimbabwe, which have secured a fifteen-year “phase-down” period to liberalize ninety percent of tariff lines.³² How these countries will divide the remaining ten percent of tariff lines between sensitive and excluded products is yet to be determined.³³ Applying a Special and Differential Treatment approach to timelines for tariff reductions, the AfCFTA uses a progressive and incremental approach to introducing timelines that are tailored to the priorities and capabilities of participating countries.³⁴

The AfCFTA is expected to “transform Africa from a fractured, commodity-dependent group of economies into a vibrant, integrated market of over 1.2 billion people.”³⁵ It is projected to offer substantial opportunities for industrialization and diversification, as well as employment across

28. Schedules of Tariff Concessions, Schedules of Specific Commitments, or Schedules refer to the commitments countries make under trade agreements with respect to preferential tariffs or treatment afforded for specified products or sectors. *See, e.g.*, AfCFTA, *supra* note 12, art. 8 (Protocol on Trade in Goods), art. 22 (Protocol on Trade in Services).

29. Hartzenberg, *supra* note 14; *Schedules of Tariff Concessions*, AfCFTA SECRETARIAT, <https://afcfta.au.int/en/schedules-tariff-concessions> (last visited July 15, 2021).

30. AfCFTA SECRETARIAT, *supra* note 29.

31. Hartzenberg, *supra* note 14.

32. *Id.*

33. *Id.*

34. AfCFTA, *supra* note 12, art. 6 (Protocol on Trade in Goods), art. 7 (Protocol on Trade in Services).

35. Benedict Okey Oramah, *Facilitating the Transformational AfCFTA: Tools for Eliminating Bottlenecks*, in BROOKINGS AFRICA GROWTH INITIATIVE: FORESIGHT AFRICA 2021 69, 69 (Aloysius Uche Ordu ed., 2021).

Africa as better market access produces economies of scale.³⁶ However, the onset of the AfCFTA's implementation brings to the forefront some bottlenecks that governments and the private sector, in collaboration, need to address in order to ensure that the AfCFTA achieves its full potential. These bottlenecks include non-tariff barriers such as infrastructure deficits and poor logistics performance, and most importantly, the need to increase productive capacity and produce more tradable goods.

This article argues that the use of local content requirements presents an avenue for countries to develop local products and services, which in turn could help diversify economies, develop local industries, and contribute to the growth in productive capacity. In arriving at this conclusion, this article assesses the potential impact of the AfCFTA by discussing the potential disparate and fiscal impacts of the implementation of the AfCFTA on the range of economies of the State Parties, the limitations non-tariff barriers impose on the AfCFTA's successful implementation, the extent of the AfCFTA's impact as it relates to the informal sector, and the current status of trade in Africa. Following an assessment of the current status of trade in the region, this article argues that an inhibiting factor to increased regional trade is limited productive capacity among many African countries. This article then demonstrates how the use of local content requirements, in the context of foreign direct investment ("FDI"), can facilitate the development of local skills and product inputs, create local content linkages, and act as a means to developing productive capacity. In doing so, this article analyzes the available policy space³⁷ for the use of local content requirements in the context of international trade agreements. In conclusion, this article argues that by increasing their productive capacity, State Parties will be able to participate more fruitfully and actively in intraregional trade under the AfCFTA.

II. THE AfCFTA'S POTENTIAL IMPACT

While the AfCFTA has the potential to create the largest trading block and significant economic activity across the African continent, its implementation also highlights some of the hindrances to its potential impact. Under ideal conditions, "[t]rade integration allows countries to specialize in the production of goods and services for which they have [a] comparative advantage and to exploit economies of scale, thereby

36. See Signé, *Africa Has a New Free Trade Area*, *supra* note 1; see Signé, *Africa's Big New Free Trade Agreement*, *supra* note 1.

37. The term "policy space" refers to the "'scope for domestic policies, especially in areas of trade, investment and industrial development' which might be 'framed by international disciplines, commitments and global market considerations.'" Isabelle Ramdoo, *Local Content, Trade and Investment: Is there Policy Space for Linkages Development in Resource-rich Countries* 1 (Eur. Ctr. for Dev. Pol'y, Discussion Paper No. 250, 2016).

improving productivity and growth.”³⁸ However, many bottlenecks still remain to be resolved before this can be achieved in the context of the AfCFTA. This section aims to discuss the potential impact of the AfCFTA more broadly and the bottlenecks that may inhibit its projected impact. In doing so, this section begins with assessing the potential fiscal impact of the AfCFTA by looking at how the size of a state’s economy may influence its potential gains from the AfCFTA. This section focuses on analyzing the limitations imposed by non-tariff barriers, such as poor infrastructure and logistics, on the successful implementation of the AfCFTA and concludes that removing non-tariff bottlenecks would augment the effect of tariff reductions on increased trade. This section also assesses the current state of intraregional trade and its key hindrances. It highlights poor integration with respect to regional value-chains, a by-product of limited productive capacity, as a main constraint to increasing intraregional trade. This section concludes with an analysis of how far-reaching the projected benefits from the implementation of the AfCFTA could be in relation to Africa’s predominant informal sector and demonstrates that skills development is a determining factor in allowing the informal sector to meet the demands of local and regional markets.

A. Disparate and Fiscal Impacts

The implementation of the AfCFTA raises the concern that it may stifle smaller economies, in terms of market competition between larger and smaller economies and losses in fiscal revenues due to tariff removals. In terms of market competition, the concern is that smaller economies would not be able to compete with larger economies in the production of certain goods, be it through the quality or pricing of goods. Currently, a small number of large economies dominate intra-African trade and the same economies account for nearly all value-added activity.³⁹ South Africa, for example, accounted for twenty-five percent of total intra-African trade in 2017.⁴⁰ Some argue that it is the larger African economies, such as Egypt, Kenya, and South Africa, that are likely to benefit the most from the AfCFTA due to their more developed industrial landscapes.⁴¹ These industrial landscapes position larger African economies to develop innovative products and produce goods in quantities that allow them to respond to market demand.⁴² Furthermore, with a relatively strong

38. Geremia Palomba, Russell Green, Salifou Issoufou, Thomas McGregor, Adrian Peralta-Alva, Amadou Sy, Bruno Versailles, & Jason Weiss, *Is the African Continental Free Trade Area a Game Changer for the Continent?*, in SUB-SAHARAN AFR. REG’L ECON. OUTLOOK: RECOVERY AMID ELEVATED UNCERTAINTY 39, 39 (2019).

39. See WILLIAMS & COOK, *supra* note 5, at 2.

40. *Id.*

41. Signé, *Africa Has a New Free Trade Area*, *supra* note 1; Signé, *Africa’s Big New Free Trade Agreement*, *supra* note 1.

42. Signé, *Africa Has a New Free Trade Area*, *supra* note 1.

manufacturing base already in existence, their manufactured products would gain access to a large continental market.⁴³

Differences in fiscal impact, due to tariff removals, are also expected between smaller and larger economies, thereby possibly further stifling smaller economies. Across Africa as a whole, in a scenario where all tariffs are fully eliminated, it is estimated that the fiscal losses associated with the removal of trade tariffs will amount to over \$4.1 billion USD in the short term, the equivalent of 9.1 percent of revenues as of 2019.⁴⁴ In a scenario where exemptions are given to certain sensitive products (“[a]ssuming that the sector with the highest current tariff revenue . . . would be exempted”), tariff revenue losses are estimated to amount to \$3.2 billion USD, or 7.2 percent of revenues across Africa as of 2019.⁴⁵ For the most part, the fiscal revenue losses are likely to be limited as tariffs comprise a low percentage of fiscal revenue on average; a low percentage of this revenue resulting from intraregional trade.⁴⁶ Furthermore, “revenue-to-GDP” ratios remain very low.⁴⁷ In Africa, from 2010 to 2015, “customs revenue averaged about 2.5 percent of GDP (16 percent of total tax revenue), and overall regional imports, including zero-rated imports within [Regional Economic Communities (“RECs”)], averaged about 17 percent of total imports.”⁴⁸

Amongst countries with smaller and less developed economies, the effects of the removal of tariffs present a greater concern, as tariff revenues remain an important source of government revenue and are “an important measure to reduce import competition and [to] protect domestic industry.”⁴⁹ In particular, the effects of losses in fiscal revenue due to tariff reductions may be felt to a greater extent amongst countries with growing debt sustainability concerns and experiencing widening deficits. As a result, some countries may need to adopt policies that will generate domestic revenue as they seek to mitigate the effects of revenue losses from tariff reductions. However, tariff losses may be offset in the long run by “higher tax revenue from increased consumption and income, as a result of reduced

43. *Id.*

44. Mesut Saygili, Ralf Peters & Christian Knebel, *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions* 3 (U.N. Conf. on Trade & Dev. [“UNCTAD”], Rsch. Paper No. 15, 2018).

45. *Id.*

46. Palomba et al., *supra* note 38, at 51; *see* ABREGO ET AL., *supra* note 19, at 8 (discussing how the expectation of limited fiscal losses arising from tariff eliminations under the AfCFTA is a result of a “low level of effectively applied intraregional import tariffs, the rather modest level of intraregional trade, and a small reduction in imports from the rest of the world.”).

47. Hippolyte Fofack, *Mitigating Short-term Adjustment Costs: Preparing for the AfCFTA*, BROOKINGS (Dec. 29, 2020), <https://www.brookings.edu/blog/africa-in-focus/2020/12/29/mitigating-short-term-adjustment-costs-preparing-for-the-afcfta/>.

48. Palomba et al., *supra* note 38, at 51.

49. Hartzenberg, *supra* note 14.

trade barriers . . .”⁵⁰ Also worth considering is the fact that, for some countries, the ability to substitute goods from high-tariff countries with goods from low-tariff countries as a result of the AfCFTA may have a positive fiscal effect. Therefore, the lower cost of goods may compensate, at least in part, for the loss in tariff revenue. Ultimately, the long-term solution is for a country to diversify its economy’s sources of growth—including productivity and revenue—in order to reduce its economic volatility.⁵¹

Regional development finance institutions are also seeking to play a role in ameliorating these effects. Through these institutions, initiatives have been put in place to alleviate the effects of reductions in tariff revenues that are felt by some countries as a result of the AfCFTA. One such initiative is the \$5 billion USD AfCFTA Adjustment Facility launched by the Africa Export-Import Bank (“Afrexim”),⁵² Africa’s largest trade financing bank. This initiative pledged to support countries having to adjust to sudden tariff revenue losses resulting from the implementation of the AfCFTA.⁵³ The Facility “will cover the short-term fiscal losses and support medium-to-long term adjustments of production activities in African countries to enable them to take advantage of the opportunities arising from the AfCFTA.”⁵⁴ Overall, the fiscal impact due to tariff removals may not be as significant and as widely spread across Africa; however, countries with smaller and less developed economies may be disproportionately affected by such fiscal changes. Some of the benefits arising from intraregional trade under the AfCFTA, as well as Afrexim’s AfCFTA Adjustment Facility’s instruments, may help mitigate some of the losses a country may experience.

B. *The Impact of Non-Tariff Barriers on the Successful Implementation of the AfCFTA*

The impact of non-tariff barriers on the effectiveness of the AfCFTA is a key concern surrounding its implementation. Such non-tariff barriers include logistics performance and deficits, infrastructure deficits, access to credit, border processes, and customs practices.⁵⁵ Other non-tariff barriers

50. ABREGO ET AL., *supra* note 19, at 8, 24 (discussing the four channels through which the reduction in trade barriers stemming from the AfCFTA would affect tax revenues: “First, a direct reduction in tax revenue is to be expected from the removal of tariffs on intra-continental imports. Second, trade diversion owing to lower tariffs would also reduce revenues. Third, higher GDP, owing to increased efficiency, would lead to more revenue. Fourth, higher consumption, because of increased imports and income, would also raise revenue. Importantly, the last three channels would reflect the impact not only of tariff removal but also of NTB [non-tariff barriers] removal. In sum, the net impact of the AfCFTA on tax revenues would depend on the combined effect of the four channels.”).

51. See Fofack, *supra* note 47.

52. See Oramah, *supra* note 35, at 69.

53. *Id.*

54. *Id.*

55. Palomba et al., *supra* note 38, at 46.

include restrictive regulations and procedures concerning “quotas, licenses, and complex or dissimilar rules of origin—as well as sanitary, phytosanitary, and technical barriers . . .”⁵⁶ Statistics show that African countries experience some of the highest non-tariff trade costs in the world.⁵⁷ Non-tariff barriers can hinder trade and offset expected gains from tariff reductions. Research demonstrates that “while the average applied rate of tariff protection in Africa is 8.7 [percent], other obstacles have been found to increase the cost of African trade by an estimated 283 [percent].”⁵⁸ A study conducted by the United Nations Economic Commission for Africa (“UNECA”) indicates that under the AfCFTA, “intra-African trade could increase from 10.2 [percent] in 2010 to 15.5 [percent] in 2022,” and that addressing non-tariff barriers could more than double the AfCFTA’s expected impact on trade in the same time period to 21.9 percent.⁵⁹

Studies show that in Africa, trade logistics remain “the most significant direct impediment to intraregional trade” and the development of regional value chains.⁶⁰ An International Monetary Fund (“IMF”) report states that “[i]mproving customs services, including clearance procedures and to some extent the quality of operating and brokerage services, is particularly important for [i]ntraregional trade flows in Africa.”⁶¹ Studies project that if logistics in Africa were brought to the level of the global average in terms of quality, “an improvement of about 19 percent[,]”⁶² the cost of the cross-border movement of goods would lower and intraregional trade would increase by over twelve percent.⁶³

In terms of infrastructure, African manufacturers remain constrained by unreliable and expensive power networks.⁶⁴ They are also hindered by poor transport systems that are comprised of inadequate ports, rail, and road networks,⁶⁵ many of which are remnants of colonial transport routes not

56. *Id.*

57. *Id.*

58. UNCTAD, ECONOMIC DEVELOPMENT IN AFRICA REPORT 2019: MADE IN AFRICA – RULES OF ORIGIN FOR ENHANCED INTRA-AFRICAN TRADE 31 (2019) [hereinafter UNCTAD].

59. *Id.* at 32.

60. Palomba et al., *supra* note 38, at 46.

61. *Id.* at 47.

62. *Id.* at 46.

63. *Id.* at 46–47; ABREGO ET AL., *supra* note 19, at 14. The AfCFTA Secretariat, in collaboration with UNCTAD, has developed an online tool to report, monitor, and address restrictive regulatory and procedural non-tariff barriers. *AfCFTA Support Programme to Eliminate Non-Tariff Barriers, Increase Regulatory Transparency and Promote Industrial Diversification*, UNCTAD, <https://unctad.org/project/afcfta-support-programme-eliminate-non-tariff-barriers-increase-regulatory-transparency-and> (last visited Dec. 15, 2021).

64. AFR. DEV. BANK GRP., ORG. FOR ECON. CO-OPERATION & DEV., U.N. DEV. PROGRAMME & U.N. ECONOMIC COMM’N FOR AFR., AFRICAN ECONOMIC OUTLOOK 2012: PROMOTING YOUTH EMPLOYMENT 65 (2012) [hereinafter Afr. Econ. Outlook].

65. *See id.* at 65.

structured for intraregional trade but rather for the purposes of moving raw materials from mining towns to ports for export.⁶⁶ An IMF study has shown that bringing the quality of infrastructure in Africa to that of the global average would require “(an improvement in infrastructure quality of about 40 percent) and would spur a 7 percent increase in intraregional trade flows”⁶⁷ by lowering the cost of the movement of goods across borders.⁶⁸ Amongst countries with poor infrastructure, the expected returns on increases in trade flow, if infrastructure is improved, is estimated to be even higher, with some studies suggesting that improved infrastructure could potentially double the effect of tariff reductions.⁶⁹ Many of the concerns resulting from poor infrastructure and logistics are heightened in approximately a third of Africa’s countries, where geography poses further limitations due to their landlocked nature.⁷⁰ According to the African Development Bank’s 2019 African Economic Outlook, “[l]andlocked countries in Africa, many of them low income, tend to engage more in intra-Africa trade than coastal or middle-income countries” due to their geographic constraints.⁷¹ However, “an estimated 77 percent of their export value consists of transport costs . . .”⁷² In other African countries, the share of export value attributed to transport costs ranges between thirty percent and fifty percent.⁷³ In contrast, the average for transportation costs in developing countries in other regions is estimated at seventeen percent.⁷⁴ These costs are often inflated by burdensome customs procedures, inadequate operational coordination, and weak harmonization of regulations on transit carriers.⁷⁵ Poor infrastructure hampers economic activity. As a result, raw materials are unable to get to factories, production cannot happen, and goods do not reach consumers.⁷⁶ Therefore, “trade and financial activities cannot flourish within or across borders.”⁷⁷ Plainly stated,

66. See Rémi Jedwab, Edward Kerby & Alexander Moradi, *How Colonial Railroads Defined Africa’s Economic Geography*, VOX EUR. UNION (March 2, 2017), <https://voxeu.org/article/how-colonial-railroads-defined-africa-s-economic-geography>.

67. Palomba et al., *supra* note 38, at 47.

68. *See id.* at 47–48.

69. *Id.*

70. *Id.*

71. AFR. DEV. BANK GRP., AFR. ECON. OUTLOOK 122 (2019).

72. *Id.*

73. AFR. DEV. BANK GRP., *supra* note 64, at 65.

74. *Id.*

75. *Id.*

76. AFR. UNION COMM’N, AFR. DEV. BANK GRP. & U.N. ECON. COMM’N FOR AFR., AFRICA REGIONAL INTEGRATION INDEX REPORT 2019 13 (2019) [hereinafter *Integration Index Report*].

77. *Id.*

production moving beyond national borders, including under the AfCFTA, is dependent on functioning logistics and transportation infrastructure.⁷⁸

In an illustrative study, the United Nations Conference for Trade and Development (“UNCTAD”) noted the “additional costs that poor transport and transit facilitation impose on the competitiveness of exports from Ethiopia.”⁷⁹ The study showed that the costs of labor for “making a T-shirt in Ethiopia are one third of the costs in China, yet the logistics expenses of exporting the shirt mean that, in international markets, a shirt made in Ethiopia sells for the same price as a shirt made in China.”⁸⁰ High logistics costs negatively impact trade.⁸¹ A cyclical relationship exists between investing in infrastructure and logistics and increased trade; on the one hand, investment in infrastructure and logistics can lead to increased trade, which in turn makes further investments more profitable.⁸² On the other hand, “poorly functioning [infrastructure and] logistics markets lead to a vicious circle of low trade volume and high trade costs.”⁸³

It is important for states to develop infrastructure that stimulates economic activity by not only facilitating trade but also by generating employment and bolstering supply chains.⁸⁴ It is also important for states to develop multipurpose infrastructure that can benefit multiple sectors and that could lead to the development of infrastructure-led linkages,⁸⁵ which result when infrastructure developed for a specific sector benefits other productive sectors.⁸⁶ Improved infrastructure and logistics would reduce the cost of doing business. Infrastructure and logistics bottlenecks currently undermine the potential of trade policies to promote trade and therefore threaten to reduce the potential impact of the AfCFTA.

Increased access to credit for the private sector would also play a pivotal role in enhancing intraregional trade.⁸⁷ The IMF’s 2015 Regional Economic Outlook: Sub-Saharan Africa report states that “[f]urther

78. *Id.*

79. UNCTAD, *supra* note 58, at 32.

80. *Id.*

81. Palomba et al., *supra* note 38, at 46.

82. AFR. DEV. BANK GRP., *supra* note 71, at 101.

83. *Id.*

84. Alain Ebobissé, *Improving Infrastructure in Africa: Creating Long-Term Resilience Through Investment*, in BROOKINGS AFRICA GROWTH INITIATIVE: FORESIGHT AFRICA 2021, at 71, 71 (Aloysius Uche Ordu ed., 2021).

85. See AARON COSBEY & ISABELLE RAMDOO, INTERGOVERNMENTAL FORUM GUIDANCE FOR GOVERNMENTS: LOCAL CONTENT POLICIES, at ix (2018), <https://www.iisd.org/system/files/publications/igf-guidance-for-governments-local-content.pdf> [hereinafter IGF]; see also Duncan Miriri, *African Union to Set up Infrastructure Fund for the Continent*, REUTERS (Feb. 19, 2021) (discussing the need for regional infrastructure for the AfCFTA to succeed and the AU establishing an infrastructure fund to address the infrastructure gaps needed for development and the success of the AfCFTA).

86. COSBEY et al., *supra* note 85, at ix.

87. Palomba et al., *supra* note 38, at 47.

financial deepening to the level observed elsewhere in the world would support an expansion of trade by as much as 29 percent.”⁸⁸ Developing human capital, banking networks, and financial services, as well as harmonizing regional payments systems, creating a multicurrency clearing center to reduce the costs of trading in different currencies, and addressing concerns of currency convertibility would also expect to have significant effects on increasing intraregional trade.⁸⁹ An Africa-wide digital payment system has been developed by Afrexim, in collaboration with the AU, in anticipation of the implementation of the AfCFTA.⁹⁰ Afrexim’s Pan-African Payment and Settlement System⁹¹ is expected to be a platform that will domesticate intraregional payments (allowing for payments in local currencies),⁹² which could save the continent “more than \$5 billion [USD] in payment transaction costs per annum.”⁹³ Access to credit plays a key role in allowing industries to develop and is a prerequisite for businesses to scale the production of tradable goods. This prerequisite, coupled with the ability to domesticate intraregional payments through regional payment systems and to facilitate currency convertibility, will play a significant role in easing the flow of trade within the region and will allow entities trading under the AfCFTA to maximize the value earned from intraregional trade.

C. *The Current State of Intraregional Trade in Africa*

A major concern raised in the context of the AfCFTA’s impact is the question: What will Africa trade? Essentially, will the productive capacity of State Parties allow them to actively trade under the AfCFTA? In discussing this issue, it is important to assess the current state of intraregional trade, specifically, the level of productivity and diversification. Weak productive capacities and limited economic diversification may constrict the range of intermediate and final goods that can be traded by and between countries,⁹⁴ all of which affect the development of regional value chains.⁹⁵ Furthermore, studies show a strong correlation between the availability of complex production capabilities and economic growth.⁹⁶ It is essential that governments create enabling conditions to ensure that

88. Céline Allard, Jorge Iván Canales Kriljenko, Wenjie Chen, Jesus Gonzalez-Garcia, Emmanouil Kitsios & Juan Treviño, *Global Value Chains: Where Are You? The Missing Link in Sub-Saharan Africa’s Trade Integration*, in REGIONAL ECONOMIC OUTLOOK, SUB-SAHARAN AFRICA: NAVIGATING HEADWINDS 47, 55 (Int’l Monetary Fund [“IMF”], 2015) [hereinafter IMF].

89. Palomba et al., *supra* note 38, at 47.

90. Oramah, *supra* note 35, at 69; Hartzenberg, *supra* note 14.

91. *Id.*

92. Oramah, *supra* note 35, at 69.

93. Hartzenberg, *supra* note 14.

94. See UNCTAD, *supra* note 58, at 29.

95. *Id.*

96. See *id.* at 24.

productivity rises to internationally competitive standards. Their goal must be to diversify the range and sophistication of production and services.⁹⁷ The importance of diversification is evident in that “[c]ountries that have more diversified exports [also] tend to have higher shares of intra-African exports than countries that have less diversified exports,”⁹⁸ as diversification creates more possibilities for intraregional trade.⁹⁹ In 2018, it was estimated that sixteen percent of Africa’s total exports were intraregional, considerably lower when compared with intraregional trade in most global regions including North America (thirty percent), Asia (sixty percent), and Europe (sixty-nine percent).¹⁰⁰ It is important to note that these figures do not capture informal cross-border trade, which constitutes a large percentage of trade within Africa.¹⁰¹ However, there has been a demonstrated increase in intraregional trade across Africa from seven percent to sixteen percent from 1990 to 2018, respectively.¹⁰² This has been attributed to “an increase in commodity exports, stronger macroeconomic conditions and institutions, and the establishment of regional economic arrangements [RECs].”¹⁰³ This intraregional trade occurred primarily within RECs, seventy-five percent of which occurred in five of the eight RECs in 2017,¹⁰⁴ with the Southern African Development Community alone “accounting for half of such trade flows.”¹⁰⁵

Despite RECs across Africa spurring a large expansion of intraregional trade, their performance in comparison to RECs of other regions has been lagging. This is attributed, in part, to “a lack of complementary domestic reforms to improve domestic supply responses and a low level of implementation of the arrangements, owing partly to the absence of strong institutional frameworks supporting them.”¹⁰⁶ The different trade rules applied in the different RECs, as well as the terms of bilateral agreements,

97. See *id.* at 23-24; see Fofack, *supra* note 47.

98. UNCTAD, *supra* note 58, at 23.

99. *Id.* at 23, 29, 45 (“The wider the range of intermediate goods to be sourced from within Africa, the wider the possibilities for more firms in Africa to participate as suppliers and for countries in Africa to engage in manufacturing, technological upgrading and economic and export diversification.” *Id.*).

100. WILLIAMS & COOK, *supra* note 5, at 1–2; see also UNCTAD, *supra* note 58, at 19–20 (stating that “Intra-African exports were 16.6 per cent of total exports in 2017, compared with 68.1 [percent] in Europe, 59.4 [percent] in Asia, 55.0 [percent] in America and 7.0 [percent] in Oceania. Intra-African trade . . . hovered at around 15.2 [percent] in the period 2015-2017, while comparative figures for America, Asia, Europe and Oceania were, respectively, 47.4, 61.1, 67.1 and 7.2 [percent].”).

101. See *infra* pp. 74–75.

102. WILLIAMS & COOK, *supra* note 5, at 1–2. More conservative estimates suggest growth from five percent to twelve percent from 1990 to 2017. Palomba, *supra* note 38, at 41.

103. ABREGO ET AL., *supra* note 19, at 10.

104. WILLIAMS & COOK, *supra* note 5, at 2; Palomba et al., *supra* note 38, at 43.

105. Palomba et al., *supra* note 38, at 43.

106. ABREGO ET AL., *supra* note 19, at 9.

have also contributed to the rise in the cost of trading within the continent.¹⁰⁷ Multiple and overlapping memberships in RECs have “led to complexity, lax enforcement, and uncertainty.”¹⁰⁸ Infrastructure bottlenecks and their associated high costs have also hampered the impact of RECs.¹⁰⁹ All of these factors, coupled with a “lack of complementary reforms to improve domestic supply responses and upgrade worker skills have hindered [the development of] economies of scale.”¹¹⁰

The AfCFTA has attempted to address the concerns arising from the different trade rules applied by different RECs and the possible complications resulting from State Parties being members of several RECs. The AfCFTA provides that “[i]n the event of any conflict and inconsistency between [the AfCFTA] and any regional agreement, [the AfCFTA] shall prevail to the extent of the specific inconsistency.”¹¹¹ It further provides that State Parties that are members of RECs that have attained higher levels of regional integration than they will under the AfCFTA, “shall maintain such higher levels among themselves.”¹¹² In doing so, the AfCFTA attempts to provide for legal harmonization, to the extent possible, between the rules of different RECs and the AfCFTA. However, some argue that the AfCFTA’s lack of the traditional unconditional “Most-Favoured-Nation”¹¹³ clause with respect to trade in goods, which is found in trade agreements such as the WTO’s General Agreement on Tariffs and Trade (“GATT”),¹¹⁴ but rather the AfCFTA’s requirement to accord State Parties the “Most-Favoured-Nation Treatment” on a *reciprocal basis*, still poses the risk of having a “patchwork” of different rights and obligations amongst State Parties.¹¹⁵ The AfCFTA’s approach is aimed at protecting existing RECs and preserving the *acquis*.¹¹⁶ However, for the tariff lines not subject to immediate or complete liberalization, the AfCFTA’s reciprocal requirement could result

107. Palomba et al., *supra* note 38, at 44.

108. ABREGO ET AL., *supra* note 19, at 11 (discussing how Africa is characterized by a plethora of trade regimes, regional, bilateral, and other non-regional trade regimes).

109. *Id.*

110. *Id.*

111. AfCFTA, *supra* note 12, art. 19(1).

112. *Id.* art. 19(2).

113. See *infra* p. 34 (discussing the General Agreement on Tariffs and Trade’s traditional unconditional “Most-Favoured Nation Treatment” clause).

114. General Agreement on Tariffs and Trade art 1(I), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

115. SIGNÉ & VAN DER VEN, *supra* note 10, at 4–5; see also AfCFTA, *supra* note 12, art. 4(1) (Protocol on Trade in Goods), art. 18; cf. GATT, *supra* note 114, art. I(1) (requiring Members to accord “immediately and unconditionally” the “Most-Favoured-Nation Treatment” to like products originating from or destined for Members that are contracting parties.).

116. SIGNÉ & VAN DER VEN, *supra* note 10, at 4. Notably, the AfCFTA applies the unconditional “Most-Favoured-Nation Treatment” clause with respect to trade in services. AfCFTA, *supra* note 12, art. 4(1) (Protocol on Trade in Services).

in situations where products from non-State Parties “are treated more favorably than the same products imported from African countries [by] other African countries[,]” pursuant to the application of the GATT.¹¹⁷

Africa’s intraregional exports are more diversified, less commodity-dependent, and comprised of more technological content than its exports to the rest of the world. On average, “in 2015-2017, exports of manufactures accounted for 45 [percent] of intra-African exports, but only 20 [percent] of exports from Africa to the rest of the world.”¹¹⁸ Between 2014 and 2016, “[m]ineral products (petroleum, ores, etc.) account[ed] for 33 [percent] of intra-African exports and constitute[d] 50 [percent] of total exports from Africa to the rest of the world.”¹¹⁹ For the most part, “[t]rade in Africa nevertheless remains concentrated in less processed and low-technology goods than trade in other regions of the world and shows limited signs of value-chain creation.”¹²⁰ When compared with intraregional trade in other parts of the world, intraregional trade in Africa is more focused on minerals and less on manufacturing.¹²¹ However, this form of trade is limiting, as African countries generally export minerals in their raw form and therefore do not obtain the additional trade value resulting from their processed form.¹²² Some argue that to warrant the development of processes for value addition and to build the requisite processing capacity, countries would need to consider whether there is a large enough market for processed raw materials either locally or regionally.¹²³ While others, citing how the development of diamond-processing capacities in Botswana has shifted the patterns of production and intraregional trade, argue that “developing the capacity to process primary commodities and natural resources could create a virtuous cycle of inclusive growth and expansion of intra-African trade.”¹²⁴ Nevertheless, there remains an international market for raw

117. SIGNÉ & VAN DER VEN, *supra* note 10, at 5; *see also* GATT, *supra* note 114, art. 1.

118. UNCTAD, *supra* note 58, at 23.

119. *Id.*

120. Palomba, et al., *supra* note 38, at 43.

121. *Id.*

122. *See* Jeff Geipel & Dan Hetherington, *Local Content Policy: What Works, What Doesn’t Work* 15–16 (Oct. 30, 2018) (Bus. Env’t Reform Facility: U.K. Dep’t for Int’l Dev., Working Paper) [hereinafter DFID], <http://assets.publishing.service.gov.uk/media/5c7d425aed915d4063af98df/BERF-Zimbabwe-What-Works-in-Local-Content-Policy-30Oct18.pdf>; *see* Hippolyte Fofack, *Overcoming the Colonial Development Model of Resource Extraction for Sustainable Development in Africa*, BROOKINGS (Jan. 31, 2019), <https://www.brookings.edu/blog/africa-in-focus/2019/01/31/overcoming-the-colonial-development-model-of-resource-extraction-for-sustainable-development-in-africa>.

123. *See generally* DFID, *supra* note 122, at 15. (explaining how both Sweden and Australia have the technical ability to process iron ore into steel, but they have chosen not to as “it does not make economic sense in either case because neither has a natural large market for steel.”).

124. Fofack, *supra* note 122.

materials to which many African countries contribute.¹²⁵ However, a reliance on trading raw materials makes countries and their economies vulnerable to the volatility of commodity prices.¹²⁶

Africa's intra-industry trade is lower than that of other regions, which signals less integration amongst regional value chains on the continent.¹²⁷ A recent report produced by the African Development Bank and UNECA confirms that Africa is poorly integrated on the production front.¹²⁸ The report states that "production is not geographically dispersed within the continent and countries are not reaping the benefits of variations in comparative advantage across countries."¹²⁹ This is in large part due to poor logistics, the improvement of which is necessary to operationalize regional supply chains.¹³⁰ The COVID-19 pandemic's disruption of global supply chains has highlighted the need to increase the presence of local and regional production and regional value chains. This disruption has resulted in imports being halted and production minimized, and in some instances ceased for products as critical as food supplies and as integral as materials for large-scale infrastructure projects.¹³¹ The current state of intraregional trade demonstrates that productive capacity for the production of value-added goods remains low across Africa, as trade is still very much dominated by the trade of raw materials, both globally and regionally. This limited productive capacity will hinder the extent to which State Parties can fully participate in trade under the AfCFTA.¹³²

D. *Will the Informal Sector Benefit from the AfCFTA's Increased Trade Flows?*

Another question often raised about the AfCFTA concerns how many Africans, on average, will benefit from the potential changes often promised to result from increased trade flows. Many of Africa's economies are comprised of a large informal sector, often associated with higher levels of inequality and lower-skilled labor,¹³³ and accounting for approximately

125. See Afr. Econ. Outlook, *supra* note 64, at 27, 10.

126. See Fofack, *supra* note 122; see IGF, *supra* note 85, at vi; *id.* at 10.

127. Palomba et al., *supra* note 38, at 43.

128. Integration Index Report, *supra* note 76, at 10.

129. *Id.* at 29.

130. *Id.*

131. See Astrid R.N. Haas & Victoria Delbridge, *Africa: Restrictions in Trade to Contain Covid-19 Have Been Devastating for Africa's Urban Poor*, THE CONVERSATION (Oct. 26, 2020) (discussing how as a result of disruptions in trade routes due to the impact of the COVID-19 pandemic, sub-Saharan African growth is expected to contract by 3.2 percent); see COVID-19 OPERATIONAL DISRUPTIONS IN INFRASTRUCTURE, WORLD BANK GRP. (Sept. 25, 2020), <https://ppi.worldbank.org/content/dam/PPI/documents/Operational-disruptions-due-to-COVID—September—,pdf>.

132. This conclusion is based on the author's analysis and professional experience.

133. Palomba et al., *supra* note 38, at 50–51.

eighty-five percent of economic activity in the region.¹³⁴ The informal sector is also dominated by women and youth, resulting in further social inequalities,¹³⁵ with women accounting for ninety percent of the labor force in the informal sector.¹³⁶ A considerable percentage of regional trade is also informal.¹³⁷ Regional informal trade refers to trade in goods and services across borders conducted by “vulnerable, small, unregistered[.]” and unlicensed traders within a defined threshold and frequency.¹³⁸ It “is estimated to account for up to 30 to 40 [percent] of regional trade in Africa.”¹³⁹ According to an UNCTAD report, “[i]nformal cross-border trade in Africa can contribute up to 43 [percent] of incomes in the region according to some estimates, and much of this involves women trading on a small scale . . .”¹⁴⁰ For example, “in West and Central Africa, women represent approximately 60 percent of informal traders.”¹⁴¹ In Southern Africa, “women comprise an estimated 70 percent of informal cross[-]border traders.”¹⁴²

The informal trade sector prevails because of the lack of jobs and trade-related opportunities in the formal sector, limited access to credit and financing to develop and scale businesses, as well as the prohibitive operational and compliance costs of operating in the formal trade sector.¹⁴³ Therefore, the informal sector is often concentrated in goods and services that are not tradable in formal markets due to market entry requirements.¹⁴⁴ By default, these constraints isolate “some segments of the population from the short-term effects of trade flows.”¹⁴⁵ In doing so, a large percentage of the population in African countries remains insulated from the impact of

134. WTO, *supra* note 21.

135. See Chazha Ludo Macheng, *Women Without Borders: What the AfCFTA Can Do for Botswana's Informal Cross Border Traders*, AFR. PORTAL (Jan. 13, 2021), <http://www.africaportal.org/features/women-without-borders-what-the-afcfta-can-do-for-botswanas-informal-cross-border-traders>.

136. WTO, *supra* note 21.

137. See UNCTAD, *supra* note 58, at 42.

138. Macheng, *supra* note 135 (citing, in part, the Southern African Development Community's definition of informal cross-border trade).

139. UNCTAD, *supra* note 58, at 42. Informal employment as a whole is estimated to account for more than sixty-six percent of employment in sub-Saharan Africa. Angus M. Kathage, *Understanding the Informal Economy in African Cities: Recent Evidence from Greater Kampala*, WORLD BANK BLOGS (Mar. 14, 2018), <http://blogs.worldbank.org/africacan/understanding-the-informal-economy-in-african-cities-recent-evidence-from-greater-kampala> (citing the International Labour Organization).

140. UNCTAD, *supra* note 58, at 42.

141. Macheng, *supra* note 135.

142. *Id.*

143. UNCTAD, *supra* note 58, at 42.

144. See Palomba et al., *supra* note 38, at 51.

145. *Id.* at 40.

trade.¹⁴⁶ Limited market access, coupled with the lack of consistency in the quality of the products and services offered, and limited quality control, primarily due to skills limitations, prevent informal trade from operating at the level and scale of formal trade. Spreading knowledge about market access and opportunities, as well as providing access to finance, are necessary to allow informal market participants to scale their products to the levels of formal trade markets.¹⁴⁷

These aforementioned concerns are also prevalent at the level of small and medium-sized enterprises (“SMEs”). Studies suggest “that in sub-Saharan Africa[,] the labour productivity of formal firms is four times higher than that of informal firms” because of the ability of formal firms to scale and specialize in a way that informal operations cannot.¹⁴⁸ Concerns regarding knowledge about market access and opportunities extend to SMEs. A recent survey amongst SMEs showed “that only 26.2 percent of firms in Ghana, the operational seat of the AfCFTA Secretariat, have even heard of the AfCFTA, much less are well prepared to benefit from its low-to-zero tariffs, price advantages, and other competitive gains afforded when they conduct transactions around the continent under the AfCFTA.”¹⁴⁹

In summary, non-tariff barriers, especially poor infrastructure and logistics, and the lack of digital and domesticating payment systems, stand in the way of the successful implementation and projected impact of the AfCFTA. Furthermore, access to finance, as well as investment in capacity and skills training to meet market entry requirements, are imperative to allow as many people as possible to participate in and benefit from increased trade flows. Such investments could lay the foundation for the AfCFTA to achieve its objective of “promot[ing] and attain[ing] sustainable and inclusive socio-economic development, gender equality and [the] structural transformation of [] State Parties.”¹⁵⁰ Requiring companies to invest in the development of local skills in the form of local content requirements, which are further explored in the following section, is one way to ensure that skills are available to meet the demands of industries in the local market.

146. *Id.* at 51.

147. This conclusion is based on the author’s analysis and professional experience.

148. Haas & Delbridge, *supra* note 131.

149. Wamkele Mene, *Making the AfCFTA Vision Our Reality*, in BROOKINGS AFRICA GROWTH INITIATIVE: FORESIGHT AFRICA 2021 63, 63 (Aloysius Uche Ordu ed., 2021) (discussing the AfCFTA Secretariat’s efforts to empower innovators and entrepreneurs, create and share knowledge, and facilitate connections amongst key actors, through the launch of “AfCFTA Vision, a combination of social advocacy campaigns, innovation contests, and technology strategies to unify the diverse interest groups on the continent behind the Grand Vision propelling the AfCFTA.”); Oramah, *supra* note 35, at 70 (stating that Afrexim has developed the Trade Information Portal which will improve access to trade information and predict supply chains across Africa, “helping businesses easily identify potential suppliers of inputs or distributors of their products in other parts of the continent.”).

150. AfCFTA, *supra* note 12, art. 3(e).

III. LOCAL CONTENT REQUIREMENTS: A MEANS TO ADDRESSING AFRICA'S PRODUCTIVE CAPACITY CONSTRAINTS

Limited productivity has been cited as an impediment to regional integration across the African continent, and enhancing the productive, distributive, and marketing capacities of African countries is seen as imperative to improving regional production networks and trade.¹⁵¹ The use of local content requirements could enable countries to develop and specialize in specific production activities, fostering or allowing them to participate in intra-African supply chains. Local content requirements could also stimulate the development of regional value chains in Africa and increase the participation of forward and backward linkage suppliers in African value chains. They could also contribute to diversifying the range and sophistication of products and services produced by countries, ensuring that productivity is raised to internationally competitive standards. Finally, local content requirements would also help address some of the human capital concerns surrounding the effective implementation of the AfCFTA, helping build skills that are adaptable and reflective of the market.

A. *The Role of Local Content Requirements and Policy Considerations for Structuring Them*

Local content is “the local resources a project or business utilises or develops along its value chain while investing in a host country.”¹⁵² Its use is promulgated through requirements that secure a given percentage of local inputs, thereby promoting the development of an intermediate input industry. For the purposes of this article, local content requirements are defined as provisions that require that “a given percentage of domestic value added or domestic components be embodied in a specified final product.”¹⁵³ Local content requirements can come in the form of government policies or legislation, as well as contractual obligations in agreements between companies and governments. Local content requirements are increasingly prevalent in contracts where governments are a party, especially where natural resources and strategic projects are concerned.¹⁵⁴ Governments are

151. Integration Index Report, *supra* note 76, at 12.

152. DFID, *supra* note 122, at 5 (citing OECD, Collaborative Strategies for In-Country Shared Value Creation: Framework for Extractive Projects 24 (2016) https://www.oecd.org/dev/Framework_Public-Private_Collaboration_FINAL.pdf).

153. Chilenye Nwapi, *A Survey of the Literature on Local Content Policies in the Oil and Gas Industry in East Africa*, U. CALGARY SCH. PUB. POL'Y, Apr. 2016 2 (citing Gene M. Grossman, *The Theory of Domestic Content Protection and Content Preference*, 96 Q.J. ECONOMICS 583 (1981)).

154. See, e.g., Petroleum (Local Content and Local Participation) Regulations 2013 art. 3, L.I. 2204 (Ghana) (requiring that local content is a part of contract or license holder's activities). Tanzania requires international oil companies to employ Tanzanians having appropriate qualifications. See Ramdoo, *supra* note 37, at 4. Botswana requires mineral concession holders to employ citizens of Botswana to the 'maximum extent' possible. See *id.*

increasingly using their equity participation in projects as leverage for compelling a greater use of local content.¹⁵⁵ Local content clauses are also more frequently contentious sticking points in contract negotiations as countries become more aware of the potential benefits of local content requirements.¹⁵⁶

In some cases, local content requirements can be embedded in contracts, or bidding rules as a precondition for winning contracts, “or embedded more indirectly in regulation and tax regimes through [the] provision of incentives to local industries or to other companies that support local participation.”¹⁵⁷ The implementation of local content requirements could be aimed at “raising the growth and competitiveness of large (such as manufacturing) or specific (such as the auto industry) sectors of the economy or the growth of certain key activities (such as research and development, [and] exports).”¹⁵⁸ Local content requirements could be broad or more limited to the sectors or products that a country wishes to grow. Ultimately, local content requirements “are undertaken to enable countries to maximize the gains of [FDI] through the promotion of local participation in FDI and the use of local raw materials by investors.”¹⁵⁹ The expectation is that they will result in sector and industry development and economic diversification through the use of local raw materials and services, technology transfer, training, and employment opportunities, thereby increasing local participation and allowing a country to reap the benefits of a contractual arrangement beyond the life of the resource, the project asset, or the contract. Essentially, the goal of local content requirements is to “strengthen the productive structure of a particular national economy.”¹⁶⁰ On an individual level, local content is a means to improving livelihoods through opportunities for employment and skills development, and the use of locally produced goods and services.¹⁶¹ At a national level, local content enables domestic companies to develop and compete regionally and internationally.

The use of local content requirements spans decades and continents, in both developed and developing economies, across a range of sectors, and

155. This conclusion is based on the author’s analysis and professional experience.

156. This conclusion is based on the author’s analysis and professional experience.

157. Nwapi, *supra* note 153, at 3–4.

158. Chilenye Nwapi, *The “Local” in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries*, 8 LAW & DEV. REV. 187, 190 (2015).

159. Nwapi, *supra* note 153, at 2.

160. *Id.* at 3 (citing Alberto Melo & Andrés Rodríguez-Clare, *Productive Development Policies and Supporting Institutions in Latin America and the Caribbean* 5 (Inter-Am. Dev. Bank Rsch. Dep’t, Working Paper No. C-106, 2006)).

161. A growing body of evidence demonstrates that deliberate community involvement “can and does influence the local economy and is capable of improving the quality of life for local residents.” *Id.* at 11 (citing SEAN MARKEY, JOHN T. PIERCE, KELLY VODDEN & MARK ROSELAND, *SECOND GROWTH: COMMUNITY ECONOMIC DEVELOPMENT IN RURAL BRITISH COLUMBIA*, at xiii (Vancouver: Univ. B.C. Press, 2005)).

appears to have grown in recent years with almost 100 such requirements proposed or implemented between 2008 and 2013.¹⁶² As UNCTAD has stated concerning the use of local content policies,

[n]o country has made the arduous journey from widespread rural poverty to post-industrial prosperity without employing targeted and selective government policies that seek to shift the production structure towards new types of activities and sectors with higher productivity, better paid jobs and greater technological potential.¹⁶³

Although thought of more often in the context of extractive resources, local content requirements can apply to multiple sectors and investments. Local content requirements in the extractives sector are also likely to have spillover effects to other sectors as they spur the development of products and skills applicable across a range of sectors and industries. Local inputs can take the form of labor, materials, or parts, “derived from the domestic economy and utilized in the production process for the purpose of adding value to [a] local economy.”¹⁶⁴ The objectives of local content requirements generally center on the creation of backward and forward linkages such as “the development of other (or new) economic sectors using the skills, capabilities and infrastructure developed [along] . . . industry value chain[s].”¹⁶⁵ The purpose of creating linkages is to boost nascent industries through the provision of local job opportunities and skills training, transfer of technology, and an increase in ownership control.¹⁶⁶ Through training programs, local content requirements could also ease worker mobility across industries, thereby promoting employment.¹⁶⁷ As previously stated, through such measures, local content requirements ensure that the country or community where the investment is taking place reaps the benefits of the investment beyond the life of the resource and project asset and maximizes the benefits of FDI.

Local content requirements can also help provide companies with what has been termed a “social license” to operate within the communities in which they invest.¹⁶⁸ As communities have access to training opportunities, see jobs created, and see their local products included in industry value chains, there is a demonstrated value for people as opposed to solely a value

162. Cathleen Cimino, Gary Clyde Hufbauer & Jeffrey J. Schott, *A Proposed Code to Discipline Local Content Requirements* 1 (Peterson Inst. for Int’l Econ., Pol’y Brief No. PB14-6, 2014).

163. DFID, *supra* note 122, at 4 (citing UNCTAD, *Trade and Development Report*, at XIII, UNCTAD/TDR/2016 (Sept. 22, 2016)).

164. Rabiun Ado, *Local Content Policy and the WTO Rules of Trade-Related Investment Measures (TRIMS): The Pros and Cons*, 2 INT’L. J. BUS. MGMT. STUDS. 137, 138 (2013).

165. IGF, *supra* note 85, at ix.

166. *See* Nwapi, *supra* note 153, at 3.

167. *See id.* at 15.

168. *Id.* at 11; Nwapi, *supra* note 158, at 188.

for money for projects.¹⁶⁹ This is especially important where large strategic projects and natural resources are involved, as the localities of these projects are likely to be the most affected by the activities of the project. This is also especially important for projects where locals are among the end-users of the project, and the success and viability of the project is dependent on its use-generated payments.¹⁷⁰ Through local job creation and value addition, local content could improve company-community relations.¹⁷¹ Giving consideration to the communities could also help alleviate the effects and disruptions caused by the investment and is likely to minimize the potential for conflict or obstruction which could halt a project's advancement.¹⁷² The use of local content could also allow an investor to differentiate itself from other investors that are less likely to source, mobilize, and develop local skills and inputs and who often bring their own supply firms to the countries in which they invest.¹⁷³ In doing so, an investor would also be supporting a more sustainable form of development by facilitating skills and private sector development.

Certain factors need to be considered when structuring local content requirements. These include addressing the question of what is meant by "local,"¹⁷⁴ by determining whether the requirement will compel the use of resources that are local to the area of the investment or whether it will require national participation. Another consideration is whether the requirement is intended to boost competitiveness within a country or across countries.¹⁷⁵ In terms of the substantive elements of the requirements, a government might consider what form of increased local participation the

169. See Nwapi, *supra* note 153, at 11 (citing MARKEY ET AL., *supra* note 161, at xiii) (stating that "[A] growing body of evidence . . . demonstrates that deliberate community action can and does influence the local economy and is capable of improving the quality of life for local residents.").

170. For example, the construction of toll-roads are projects where the success of the project is dependent on the local end-users. This conclusion is based on the author's analysis and professional experience.

171. This conclusion is based on the author's analysis and professional experience.

172. See Nwapi, *supra* note 153, at 11 (citing World Bank, *Human Capital for the Oil, Gas and Minerals Industries*, SCIENCE, TECHNOLOGY, AND SKILLS FOR AFRICA'S DEVELOPMENT 1, 4 (March 2014)) (stating that "[l]ocal employment is consistently the top concern of communities located near extraction projects, and often a central issue behind disputes, grievance and conflict. More local jobs result in more support for projects.").

173. See MIKE MORRIS, RAPHAEL KAPLINSKY & DAVID KAPLAN, ONE THING LEADS TO ANOTHER: PROMOTING INDUSTRIALISATION BY MAKING THE MOST OF THE COMMODITY BOOM IN SUB-SAHARAN AFRICA 197 (2012) (discussing the approach of Chinese investors in Africa of using Chinese-owned locally based suppliers and its impact on technology transfer and the development of linkages).

174. See Nwapi, *supra* note 153, at 8 (stating that "[m]ost local content laws do not define explicitly the term 'local' in local content. What local means can only be deciphered in their definitions of local content.").

175. See *id.*

requirement is intended to generate.¹⁷⁶ Is the intention to focus on skills generation and to therefore include a requirement of local training and employment? Is the intention to increase the participation of local industries, thereby requiring the local procurement of goods and services? Or is the intention to enhance broader economic diversification by promoting linkages to other sectors? Governments should define “local” in a single dimension, thereby not imposing multiple onerous requirements on businesses, which could be difficult to comply with.¹⁷⁷ There are three main policy considerations when arriving at the definition of “local”: (1) geography—the geographic delineations of the business activity;¹⁷⁸ (2) value addition—the country of origin of the value addition;¹⁷⁹ and (3) ownership—the level of participation of locals as owners of equity or as employees.¹⁸⁰ Ultimately, it is important for a government to align the requirements with a country’s industrialization policy objectives whilst assessing what is domestically feasible and what would not hamper foreign direct investment.

In defining what is meant by “local,” it is important for policymakers to strike a balance between allowing those most affected by the investment to benefit and promoting supplier diversification across the affected country. It is also important to balance providing opportunities to the most skilled for roles requiring technical and managerial expertise, especially where training is provided, with wider skills development to ensure that those opportunities do not result in the development of skills in a concentrated region of a country when the skills would benefit the greater economy. Likewise, the definition of “local” should align with policy objectives. For example, if a “government aims to increase domestic employment and foster skills improvements[,] then the focus should be on domestic value addition, not solely on business ownership.”¹⁸¹

Furthermore, the definition of “local” should align, to the extent possible, with “rules of origin”¹⁸² under regional agreements, such as the AfCFTA, to reap the benefits of the large market the AfCFTA creates. As with rules of origin, local content determines “the economic nationality as opposed to [solely] the geographic[] nationality of a given good[,]” product, or service.¹⁸³ Additionally, local content requirements, like rules of origin, “affect the range of local intermediate goods that are necessary to finalize

176. This conclusion is based on the author’s analysis and professional experience.

177. See DFID, *supra* note 122, at 7.

178. IGF, *supra* note 85, at viii.

179. *Id.*

180. *Id.*

181. DFID, *supra* note 122, at 31.

182. Rules of origin are the rules used to determine the country of origin of goods. UNCTAD, *supra* note 58, at 18.

183. See *id.* (citing World Customs Organization, Rules of Origin Handbook 6 (2012), <http://www.wcoomd.org/~media/wco/public/global/pdf/topics/origin/overview/origin-handbook/rules-of-origin-handbook.pdf> (discussing the role of rules of origin)).

the production of a given good.”¹⁸⁴ Furthermore, as with rules of origin, in developing local content policies, governments need to strike a balance between making the policies too restrictive and too broad when defining what constitutes local content. Overly restrictive policies could curb entrepreneurial and sector development as entrepreneurs struggle to meet the value-added threshold—especially in markets with very limited capacity and production—thereby negating the intended benefit.¹⁸⁵ In contrast, overly broad policies could prevent the growth of local businesses as foreign products with minimal local inputs pass as local content.¹⁸⁶ As with rules of origin, local content requirements could also look to gradually increase local input requirements as skills and market capabilities increase in a country.¹⁸⁷

In determining the substantive elements of the local content requirements, it is important to assess to what extent local skills or inputs meet industry needs, what targets are reasonable, and what gaps need to be addressed.¹⁸⁸ It is also important to assess opportunities for businesses and employment creation, and what parallel initiatives may be needed on the part of government.¹⁸⁹ In doing so, regulatory bodies need to “distinguish between capacity that is available but currently limited and that can be enhanced, and capacity that is simply not available or so limited that to insist on its use will cause significant economic loss” to the country and investors.¹⁹⁰ Where local capacity is lacking, imposing stringent conditions may not achieve the best outcome, as they may frustrate the implementation of projects and deter FDI.

One approach to address skills capacity is to focus on skills development through the required training of locals and the development of training programs complementing government efforts, an example of which is Namibia’s Petroleum Training and Education Fund, also known as Petrofund. A registered trust established in 1993, Petrofund is a statutory body of the government mandated to build capacity for the petroleum industry in Namibia.¹⁹¹ It is funded by petroleum license holders who are required by their licensing agreements to contribute an agreed-upon amount to enable the government to build and deploy the human capacity required

184. *Id.* at 45.

185. *See id.* at 46 (discussing the balance to be struck in developing rules of origin).

186. *See id.*

187. *See infra* pp. 83–84 (discussing the approach of adjusting local content requirements as market capabilities increase).

188. IGF, *supra* note 85, at vii; DFID, *supra* note 122, at 17.

189. DFID, *supra* note 122, at 17.

190. Nwapi, *supra* note 153, at 13 (citing Ike Oguine, *Nigerian Content in the Nigerian Petroleum Industry: Legal and Policy Issues*, 29 J. ENERGY & NAT’L RES. L. 409, 418 (2011)).

191. *See* Petroleum (Exploration and Production) Act (Act No. 2/1991) §§ 14(1)(b), 14(2) (Namib.); *see also* ABOUT US, PETROFUND, <http://www.petrofund.org/main/index.php/about-us/about-us> (last visited Dec. 5, 2021).

in the industry for the direct benefit of operators.¹⁹² As a result of Petrofund, scholarships are provided to Namibians for tertiary education in the fields of mathematics, science, technology, and engineering, allowing Namibians to assume professional roles in sectors where Namibia lacks adequate manpower.¹⁹³ Petrofund also promotes awareness of these professional fields and enhances the quality of teachers at secondary schools in these fields.¹⁹⁴ Overall, Petrofund's initiatives are developing skills in Namibia's priority sectors.

Another example is a \$15 million USD training center in Ghana set up in 2013 by the Jubilee Partners.¹⁹⁵ The initiative is a "public-private initiative aimed at addressing the skills gap in technical and vocational education in the oil and gas industry."¹⁹⁶ The initiative is complemented by a local content fund established by the Ghana National Petroleum Corporation¹⁹⁷ and a \$4.7 million USD fund established by the World Bank "to support training in relevant engineering fields."¹⁹⁸ Ghana's Local Content Fund, created by statute and established by the Ghana National Petroleum Corporation in 2016, aims to provide funding to local companies for training, education, and research and development in the petroleum sector.¹⁹⁹ The Fund also provides loans on a competitive basis for local small and medium-scale enterprises to support their ability to participate in the petroleum sector.²⁰⁰ Ghana's Local Content Fund is funded in part by petroleum license holders and their subcontractors.²⁰¹

Contracting parties can also consider agreeing to the incremental inclusion of local content so that as a country and its investors "continue[] to invest in [the] training of local professionals, the level of local content required of companies can be increased gradually, in proportion to a reasonably projected increase in the availability of qualified local professionals and firms to take up the opportunities."²⁰² Investors could argue that employing locals may be challenging due to available capacity and costs. The concerns about available capacity can be addressed by incremental inclusion. To address the argument concerning the potentially higher cost of hiring locals, contractual local content requirements often provide that local employees should be hired provided that they are not

192. *Id.*

193. *See* PETROFUND, *supra* note 191.

194. *Id.*

195. Nwapi, *supra* note 153, at 14.

196. *Id.*

197. Petroleum (Exploration and Production) Act, (Act No. 919/2016) § 64 (Ghana) [hereinafter Ghana Petroleum Act]; Nwapi, *supra* note 153, at 14.

198. Nwapi, *supra* note 153, at 14.

199. Ghana Petroleum Act, *supra* note 197, § 65(2)(a); PETROFUND, *supra* note 191.

200. Ghana Petroleum Act, *supra* note 197, § 65(2)(b).

201. *Id.* § 66(1).

202. Nwapi, *supra* note 153, at 14.

more costly than equally competitive non-local candidates, typically determined by an agreed upon ceiling.²⁰³ Some local content requirements applicable to investor contracts, pursuant to a country's regulations or model contracts, may also impose more suggestive than prescriptive employment requirements. Such requirements could address capacity and cost concerns and facilitate an incremental inclusion of local employees. For example, in Botswana, investors holding mineral concessions are required to employ citizens of Botswana to the "maximum extent" possible, and to provide training to the local labor force.²⁰⁴ Another example is the case of Tanzania, where international oil companies "are required to employ Tanzanian citizens having appropriate qualifications to the maximum extent possible."²⁰⁵ The use of the term "maximum extent" by both Botswana and Tanzania, and "appropriate qualifications" by Tanzania, is more suggestive and thereby allows for considerations for capacity availability and feasibility while still promoting local employment and skills development. Regardless of the approach taken, it is important that the requirements are known and transparent, allowing investors to calculate potential costs into their investments.

To address the procurement capacity concerns, countries can develop industry-certified databases of local businesses, thereby making it easier for companies to search for local companies for local inputs.²⁰⁶ Such a database would reduce the transaction costs for investors seeking local suppliers. A certification process or pre-qualification process could also help assure investors that the companies meet a certain standard of practice, thereby augmenting the effect of having such a database and further reducing transaction costs.²⁰⁷ A database would not only help facilitate connections but also help ensure that potential business opportunities are seized.²⁰⁸ For example, Ghana has set up a "Common Qualification System" in the petroleum sector.²⁰⁹ The objective of the Common Qualification System is "to serve as the sole system for the registration and pre-qualification of local content in the petroleum industry[.]"²¹⁰ verifying contractor's capacities, capabilities, and local content strength, as well as tracking and monitoring their performance.²¹¹

203. This conclusion is based on the author's analysis and professional experience.

204. Mines and Minerals Act (1999) Cap. (66:01), art. 12(2)(3) (Bots.).

205. Ramdoo, *supra* note 37, at 4; Tanzania Model Production Sharing Agreement (2013), art. 21(a) (Tanz.).

206. DFID, *supra* note 122, at 12.

207. *Id.*

208. *Id.* at 13.

209. See Petroleum (Local Content and Local Participation) Regulations 2013, L.I. 2204, art. 38(1) (Ghana) [hereinafter Ghana Local Content Regulations].

210. *Id.* art. 38(1).

211. *Id.* art. 38(2).

To mitigate concerns about the availability of inputs to meet procurement needs, parties can consider incremental approaches to promoting local content as suggested as an approach to address skills capacity concerns. Contracting parties can generally outline the stages of projects as they tend to be consistent within sectors.²¹² Furthermore, investors in many sectors are often required to provide work plans, which include procurement plans.²¹³ By doing so, parties can determine what goods and services are required at different stages and develop procurement plans accordingly. The development of procurement plans could then allow the host country to have foresight as to what services and goods it has to provide, which it could in turn use to determine what sectors to invest in to ensure that the requisite local goods and services are developed in time. Such actions can be even more effective in sectors typified by extensive supply chain networks and would contribute to the diversification of production and services provided in the host economy, while helping guarantee the market access required for local entrepreneurs to develop their businesses.²¹⁴

For example, in Ghana, the government requires “mining companies to submit five year local procurement plans with targets and detailed support for suppliers, and plans must be revised each year based on results.”²¹⁵ Australia has achieved success using similar methods in the mining sector and “uses the information provided to identify supplying opportunities and steer policy and support.”²¹⁶ Such plans are, of course, more effective when governments and other actors make a concerted effort to monitor and direct efforts based on the plans.²¹⁷

A potential concern with procurement requirements involves the concept of elite capture. Elite capture refers to the partnership between foreign firms and local firms, where the local firm will bid under the guise of local content to obtain a local contract while the production work will be substantially performed by a foreign company.²¹⁸ Ultimately, in such cases, the foreign companies will obtain the primary benefit.²¹⁹ Alternatively, local elites may partner with domestic economic entrepreneurs involved in local content markets, extracting profits from entrepreneurs in support of elite interests.²²⁰ One way to combat both of these issues is to require and conduct

212. This analysis is based on the author’s analysis and professional experience.

213. See, e.g., Ghana Petroleum Act, *supra* note 197, § 27 (describing the development and operation plan that petroleum license holders in Ghana are required to produce).

214. This analysis is based on the author’s analysis and professional experience.

215. DFID, *supra* note 122, at 11.

216. *Id.*

217. See IGF, *supra* note 85, at x.

218. See Nwapi, *supra* note 153, at 21–22.

219. *Id.*

220. See *id.*

due diligence on company ownership and shareholding structures.²²¹ It is also important to establish “adequate systems of information sharing and transparency around local content.”²²²

B. Local Content Requirements, the Development of Linkages and Industries, and the Rise of Diversification

Local content policies targeting the development of skills, goods, and services can spur the development of linkages.²²³ Linkages generally come in three forms: (1) those resulting in employment and skills development and the transfer of technology, also referred to as horizontal linkages;²²⁴ (2) those creating demand for inputs from local suppliers, local sourcing, and procurements, also referred to as backward linkages;²²⁵ and (3) those increasing the supply of inputs to local producers and value addition, referred to as forward linkages.²²⁶ All forms of linkages are intertwined. Demand-side policies “focus on creating a demand for local procurement of goods and services.”²²⁷ In contrast, “[o]n the supply side, the focus is on building the capacity of local suppliers to bring them up to global standards on price, quality, and reliability. Both types of policies are typically needed; supplier development helps to ensure that demand-side policies do not require more than local firms are able to supply[,]”²²⁸ while skills development is the foundation for all forms of local content measures.²²⁹

With respect to employment, linkages occur through training and experience gained by local employees, which could ultimately benefit local firms if employees subsequently join local firms.²³⁰ The skills developed could also be used to serve the needs of other sectors. However, as investors generally invest in training specific to their investment’s training needs, linkages through employment could be limited.²³¹ Linkages can be effectively developed through policies promoting the use of inputs from local suppliers, thereby promoting economic diversification and resulting in local companies improving production standards and practices in their efforts to meet the demands and standards of foreign companies.²³² Such activity could also help improve efficiency, provide exposure to new

221. See *id.* at 22.

222. DFID, *supra* note 122, at 19.

223. See *supra* p. 18 (discussing the definition of linkages).

224. See DFID, *supra* note 122, at 5–6, 10; see Nwapi, *supra* note 153, at 15.

225. *Id.*

226. *Id.*

227. IGF, *supra* note 85, at viii.

228. *Id.*

229. See *id.*

230. Nwapi, *supra* note 153, at 15.

231. *Id.*

232. *Id.*

technologies, and result in the development of new products and services, which could help spur innovation and the production of more sophisticated products. Some argue that “the largest single determinant of [gross domestic product (“GDP”)] growth in both developed and developing economies is innovation.”²³³ Increased complexity in production, driven by innovation, is typically tied to higher value addition.²³⁴

As countries seek to promote linkages as part of their industrialization policies, they must be strategic and ensure alignment between their policies, the nature of the conditions they impose, and the firms they wish to attract. Policymakers should develop policies that not only attract FDI, but also allow knowledge and skills to develop and stay in the host country. Like many policy objectives, local content requirements cannot operate effectively in isolation. Countries should define their focus based on priorities, needs, availability, and circumstances, and they should complement their local content objectives with the requisite support measures and mechanisms.²³⁵

In the case of Europe, Norway presents a classic example of the significant impact of applying local content requirements on the development of linkages in its petroleum sector. In 1972, “Norway passed the Royal Decree, requiring all operations to source from Norwegian companies unless the Norwegian suppliers were not competitive in terms of quality, service[,] and price.”²³⁶ Subsequently, the 1985 Petroleum Act required the use of local content provisions when allocating licenses in the North Sea.²³⁷ As a result of these measures, “Norway provided preferential treatment to Norwegian companies in all bidding rounds between 1974 and 1994. The licenses also included provisions requiring the transfer of skills and technologies to Norway’s infant petroleum industry.”²³⁸ Norway also employed policies that required multinational corporations to integrate domestic firms in large projects and fostered joint ventures and cooperation agreements between domestic and foreign firms.²³⁹

When Norway first discovered offshore oil in 1969, it did not have the capacity to supply offshore rigs.²⁴⁰ However, within a span of approximately thirty years, during which it introduced local content requirements, it had

233. Hippolyte Fofack, *A Competitive Africa: Economic Integration Could Make the Continent a Global Player*, INT’L MONETARY FUND: FIN. & DEV., Dec. 2018, at 50; see also UNCTAD, *supra* note 58, at 23–24.

234. See UNCTAD, *supra* note 58, at 23–24.

235. See Nwapi, *supra* note 158, at 198.

236. LISE JOHNSON, SPACE FOR LOCAL CONTENT POLICIES AND STRATEGIES: A CRUCIAL TIME TO REVISIT AN OLD DEBATE 9 (2016), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1015&context=sustainable_investment_staffpubs.

237. *Id.*

238. *Id.*

239. *Id.* at 10.

240. *Id.* at 9.

developed the industries required to supply the petroleum sector.²⁴¹ After just thirty years, “companies were sourcing more than 50% of capital inputs and more than 80% of operations and maintenance inputs from Norwegian firms.”²⁴² Furthermore, the expertise acquired “enabled Norwegian firms to expand into export markets, with exports comprising nearly half of their sales by the early 2000s.”²⁴³ Norway stopped imposing local content requirements when it joined the European Economic Area in 1994, which as a condition of membership did not allow the application of preferential treatment policies.²⁴⁴ However, Norway’s backward linkages had already been developed by then.²⁴⁵

Local content measures can also be initiated by the private sector. A notable example of local content initiatives and the development of linkages on the part of the private sector is Anglo American Corporation’s Zimele Enterprise Program in South Africa. The Program is comprised of a fund, Anglo Zimele, which focuses on supporting entrepreneurs from historically disadvantaged communities and those most impacted by mining activities.²⁴⁶ The fund was developed “to provide financial and hands-on technical support to entrepreneurs in mining-impacted communities and labour-sending areas in South Africa[,]”²⁴⁷ with the aim of developing the ability of SMEs “to meet Anglo American’s procurement or processing requirements.”²⁴⁸

From its inception, Anglo Zimele has focused on providing opportunities and resources to support entrepreneurs who, due to the absence of the required collateral, limited market access, and other viability concerns, have limited access to traditional start-up capital.²⁴⁹ Anglo American invests in the companies with an eye toward making them financially sustainable.²⁵⁰ The fund provides entrepreneurs with start-up capital as well as guaranteed market access.²⁵¹ In doing so, it has helped develop local businesses, generate employment, and drive social and economic development in economically marginalized communities.²⁵² In

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 10.

245. *Id.*

246. AFR. NAT’L RES. CTR., AFR. DEV. BANK, ANGLO AMERICAN CORPORATION’S ZIMELE ENTERPRISE PROGRAM: A CASE STUDY 9 (2016), http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/Anglo_american_corporations_Zimele_enterprise_program.pdf.

247. *Id.*

248. *Id.*

249. *See id.*

250. *See id.* at 12.

251. *See id.*

252. *See id.* at 9–12.

turn, this has helped diversify Anglo American's supplier base and drive competitiveness amongst suppliers.²⁵³ Since its inception, Anglo Zimele has concluded over "2,750 transactions and invested over ZAR1.4 billion [South African rand] in businesses in South Africa that have a combined turnover of over ZAR6 billion [South African rand]" as of 2016.²⁵⁴ In addition, "businesses supported by Zimele have also contributed to the creation of 38,000 jobs in mining-affected communities and labour-supply areas across South Africa" as of 2016.²⁵⁵

Local content proponents assert "that countries—particularly developing countries—should be able to implement [local content requirements] to protect and strengthen infant industries,"²⁵⁶ whose firms would otherwise have to compete with foreign firms and may not yet be able to compete on the global market.²⁵⁷ The creation of linkages, whether through the development of skills to produce certain products or conduct certain services, or through the development of local products through requirements for the use of local inputs, gives rise to systems of supply chains where value to goods and services can be added at the local level and then subsequently exported.

Local content requirements also allow countries to develop expertise at providing certain services and producing certain goods that are integral to their local industries and domestic economies and, in doing so, develop a comparative advantage.²⁵⁸ Furthermore, competitive pressures provide incentives to innovate and stimulate the growth of entrepreneurial activity. Countries could develop specializations that become part of production or service chains through their value addition, which may be easier to attain than producing all parts of a product or a full range of services, especially in a globally competitive environment where global value chains are very much established.²⁵⁹ But to do so, "certain preconditions such as sufficient levels of capacity, quality, and efficiency are required."²⁶⁰ Requiring and investing in local content can help develop these capacities and address these gaps. Value chains could be developed at the regional level, resulting in "lower transit costs and shorter supply chains[.]" as sourcing or manufacturing would be conducted closer to the target regional export markets.²⁶¹

253. See *id.* at 12.

254. *Id.* at 11.

255. *Id.*

256. JOHNSON, *supra* note 236, at 7.

257. *Id.*

258. This conclusion is based on the author's analysis and professional experience.

259. This conclusion is based on the author's analysis and professional experience.

260. IMF, *supra* note 88, at 56.

261. Fofack, *supra* note 233, at 51.

Such activity could also eventually result in increased integration into global value chains. Whether through deepening ties into global value chains or through developing value chains at the regional level, local content requirements may “help foster structural transformation, export diversification, and the possibility to absorb technology and skills.”²⁶² Using local content requirements to spur the development of the production of goods and services is an effective way to leverage FDI to address supply-side constraints.²⁶³ It would also result in the creation of job opportunities, and more sustainable and inclusive growth. Such actions would support the development of regional trade flows, which in turn would “better shelter the region from exogenous external shocks”²⁶⁴ and could act as a form of insurance from disruptions of global trade,²⁶⁵ or a form of insulation, the necessity of which became apparent during the COVID-19 pandemic and the resulting trade and supply-chain disruptions.

The growth of many Asian economies provide recent examples of how local content policies can play a significant role in developing local industries and regional value chains and, in turn, foster increased trade within a region. The Asian success stories, such as those of Singapore, South Korea, and Taiwan, are attributed to industrial policies that focused on creating backward linkages from foreign investors to domestic suppliers. These backward linkages placed an emphasis on local content and the transfer of technology—often through joint ventures.²⁶⁶ They also developed production engineering skills to use imported technologies efficiently, absorbing new production technologies that they successfully plugged into global production networks formed by multinational corporations as well as local suppliers.²⁶⁷ Such industrial policy tools and objectives were coupled with a variety of tax incentives and investment subsidies.²⁶⁸ These actions

262. IMF, *supra* note 88, at 59.

263. This conclusion is based on the author’s analysis and professional experience.

264. IMF, *supra* note 88, at 62.

265. Fofack, *supra* note 233, at 49.

266. See generally Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends, Prospects, and Challenges* 3 (Asian Dev. Bank Econ., Working Paper No. 226, 2010) (discussing how the use of advanced technologies in conjunction with local suppliers provided an environment for Asian firms to be able to compete internationally); Jostein Hauge, *Should the African Lion Learn from the Asian Tigers? A Comparative-Historical Study of FDI-Oriented Industrial Policy in Ethiopia, South Korea and Taiwan*, 40 *THIRD WORLD Q.* 2071, 2073–76, 2080–83 (2019) (highlighting how industrial policies carefully designed to create backward linkages increase local content and move technology from foreign firms to the domestic economy).

267. Kawai & Wignaraja, *supra* note 266, at 3.

268. See Ha-Joon Chang & Kiryl Zach, *Industrial Development in Asia: Trends in Industrialization and Industrial Policy Experiences of Developing Asia* 12–15 (U.N. Univ. World Inst. for Dev. Econ. Rsch., Working Paper No. 2018/120, 2018).

were accompanied by investment in infrastructure, logistics, and human capital to attract FDI, which in turn also facilitated trade.²⁶⁹

As innovation took place, there was a shift from labor-intensive to more technology-intensive exports.²⁷⁰ A “long period of market-driven expansion of trade and FDI followed, during which Asia increasingly became a global production center with deep and diverse technological capabilities.”²⁷¹ As a result of such measures, “three of the world’s richest economies—in terms of per capita income—are now in Asia: Japan, the Republic of Korea, and Singapore.”²⁷² Furthermore, “[f]alling regional trade barriers and logistics costs, technological progress, and rising factor costs at core production locations spurred the decentralization of production networks to the most cost-effective locations.”²⁷³ This resulted in the development of regional value chains. As a result, trade within Asia grew from thirty-seven percent in 1980 to fifty-six percent in 2008.²⁷⁴ Similar policies have been applied in other Southeast Asian countries besides Singapore.²⁷⁵ As a result, from the inception of the Association of Southeast Asian Nations (“ASEAN”) Free Trade Area in 1993 (a predecessor to the ASEAN Economic Community established in 2015), intra-ASEAN trade grew from \$82 billion USD to \$598 billion USD in 2011.²⁷⁶ Indonesia, Malaysia, Singapore, and Thailand account for the bulk of this trade, “with Singapore alone accounting for 34.4 [percent].”²⁷⁷

In conclusion, “for the AfCFTA to have a transformative effect on member countries, it would need to spur the development of the nascent supply chain[s] on the continent.”²⁷⁸ One way to do so is through the application of local content requirements by State Parties within their countries in the context of FDI. By applying local content requirements and taking advantage of the opportunity presented by the AfCFTA, African economies could transition “from low productivity and labour[-]intensive activities to higher productivity and skills[-]intensive industrial and service

269. See Kawai & Wignaraja, *supra* note 266, at 3.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. See *id.* at 3, 6; see generally Chang & Zach, *supra* note 268, at 12–15 (discussing industrial policy measures in Korea, Malaysia, and China that contributed to industrialization in these countries, China and Korea being non-ASEAN countries but within the Asia region).

276. Siow Yue Chia, *The ASEAN Economic Community: Progress, Challenges, and Prospects* 25 (Asian Dev. Bank Inst., Working Paper No. 440, 2013); see also Wolfgang Lehmacher, *The ASEAN Economic Community: What You Need to Know*, WORLD ECON. F., (May 31, 2016), <https://www.weforum.org/agenda/2016/05/asean-economic-community-what-you-need-to-know/> (stating that less conservative estimates place the growth in trade among ASEAN countries between 2007 and 2014 at a value of nearly \$1 trillion USD).

277. Chia, *supra* note 276, at 24–25.

278. ABREGO, ET AL., *supra* note 19, at 11.

activities – which in turn will produce better paid jobs and make an impact on poverty.”²⁷⁹ Such developments would align with the objectives of the AfCFTA, which include the promotion of “industrial development through diversification and regional value chain development”²⁸⁰ and enhancing “the competitiveness of the economies of State Parties within the continent and the global market.”²⁸¹ Local content requirements could also produce an added value for the communities that businesses engage in through training, job creation, and increased production activities. In turn, showing a value for the people and the communities through the use of local content is likely to contribute to the creation of a successful investment climate.

IV. AN ARGUMENT FOR A REGIONAL APPROACH TO LOCAL CONTENT REQUIREMENTS

Does the AfCFTA present an opportunity to develop a regional approach to local content requirements? Could such a strategy be more effective to achieve the intended goals of local content requirements? With different levels of capacity and technology, and a range of productivity levels and outputs, what implementation structures would be the most effective? A regional approach to local content requirements could provide a stronger bargaining position for AfCFTA State Parties when negotiating local content requirements with non-regional investors. The rationale behind a regional approach is that “the comparative advantages that each country enjoys can be strategically mobilized to meet the supply needs”²⁸² of sectors in the region and thereby further develop those sectors. Regional local content approaches could help develop complementarity in production structures, including in the form of regional value chains, as countries could participate in different steps of the value chain of products or services in accordance with their specializations and comparative advantage. Essentially, “an Africa[]-wide framework can serve as a continental coordinating mechanism to support sub-regional frameworks by linking the sub-regions together and creating opportunities for cross-pollination of resources.”²⁸³

A key consideration for a regional approach to local content requirements would be relevance, allowing countries to draw on skills that are relevant to their industrial policy priorities.²⁸⁴ Other key considerations include accessibility, referring to the bureaucratic and structural bottlenecks, both in terms of infrastructure and policies, that may make the movement of

279. Signé, *Africa Has a New Free Trade Area*, *supra* note 1.

280. AfCFTA, *supra* note 12, art. 3(g).

281. *Id.* art. 3(f).

282. Nwapi, *supra* note 153, at 19.

283. *Id.* at 19–20.

284. *See id.* at 20.

workers and goods difficult.²⁸⁵ Equity considerations would guard against the effects of the possible domination of weaker countries by stronger countries.²⁸⁶ All of these issues are consistent with considerations concerning the efficacy of the AfCFTA and, if addressed, could help develop an effective regional approach to local content requirements and thereby promote the economic diversification needed for countries to fully participate at the level of intraregional trade envisioned by the AfCFTA. A regional approach to local content requirements could also enable “neighboring countries facing similar challenges to pull their institutional resources together to enhance the local capacity of each country.”²⁸⁷

V. LOCAL CONTENT REQUIREMENTS AND INTERNATIONAL TRADE LAW CONSIDERATIONS

The regulation of the use of local content requirements stems from international and bilateral agreements. Therefore, in developing local content requirements, it is important for policymakers to consider the international obligations arising from such agreements. Policymakers must assess which local content tools conflict with international legal obligations, namely WTO agreements, regional agreements, and bilateral agreements. This section focuses on the implications of the WTO agreements on local content requirements in the context of FDI as the agreements apply more broadly to the WTO’s Members.²⁸⁸ Furthermore, almost all of the WTO’s African Members have ratified the AfCFTA, thirty-four out of the forty-four African WTO Members, with ratification or parliamentary approval for ratification pending in the remaining ten countries.²⁸⁹ Additionally, “all nine African countries seeking to accede to the WTO are signatories [to] the AfCFTA.”²⁹⁰ Therefore, AfCFTA State Parties are significantly impacted by the restrictions imposed on local content requirements by the WTO agreements. The WTO agreements specifically at issue are the GATT, the General Agreement on Trade in Services (“GATS”), the Agreement on Subsidies and Countervailing Measures (“ASCM”), and the Agreement on Trade-Related Investment Measures (“TRIMs Agreement”).²⁹¹ These agreements uphold the principle of “National Treatment,” which requires WTO Members to grant one another the same treatment as they accord their

285. See *id.*

286. *Id.*

287. *Id.* at 21.

288. A Member refers to a state that is a party to the WTO agreements. See Marrakesh Agreement Establishing the World Trade Organization art. II, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]; GATT, *supra* note 114, Annex 1A.

289. See *Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited July 18, 2021); TRALAC, *supra* note 13.

290. WTO, *supra* note 21.

291. See Nwapi, *supra* note 158, at 193–94.

nationals.²⁹² This section will provide an overview of how the AfCFTA relates to the WTO framework and its agreements. Although briefly discussing the restrictions bilateral investment treaties (“BITs”) impose on local content requirements, this section focuses on the aforementioned key WTO agreements that impact the use of local content requirements, assessing how they regulate local content requirements. Following an overview of the restrictions WTO agreements impose on the use of local content requirements, this section assesses the available policy space for local content requirements in the context of the WTO agreements. This section concludes by demonstrating the potential impact that local content requirements can have on a country’s course of development and questions whether it may be time to revisit the local content restrictions imposed by WTO agreements.

A. *The AfCFTA in the Context of the WTO Agreements*

From its inception, the GATT recognized the contributions that regional integration, through regional trade agreements, could make to facilitating trade in different regions and the expansion of trade globally.²⁹³ Therefore, article XXIV of the GATT allows WTO Members to form customs unions or free-trade areas provided that

the duties and other regulations of commerce maintained in each [of] the constituent territories and applicable at the formation of such [a] free-trade area . . . to the trade of [Members] not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area.²⁹⁴

The purpose of such free-trade areas should be to facilitate trade between their members and not raise trade barriers with other WTO

292. See GATT, *supra* note 114, art. III; General Agreement on Trade in Services art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1994) [hereinafter GATS]; Agreement on Trade-Related Investment Measures art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement].

293. See *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, WTO, https://www.wto.org/english/docs_e/legal_e/10-24_e.htm (last visited Nov. 14, 2021).

294. GATT, *supra* note 114, art. XXIV(5)(b). With respect to customs unions, the WTO Members agree that the same language concerning “the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union” requires an assessment of “weighted tariff rates and customs duties collected.” The duties and charges to be taken into account should be applied rates of duty, and for incidences where quantification and aggregation are difficult, “the examination of individual measures, regulations, products covered and trade flows affected may be required.” WTO, *supra* note 293.

Members.²⁹⁵ Under article XXIV, the GATT defines a free-trade area as “a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories.”²⁹⁶ WTO panels and appellate bodies have recognized that WTO Members have not reached an agreement on the meaning of “substantially all the trade” but have inferred that although “substantially” does not refer to “all” trade, it means something considerably more than “some.”²⁹⁷ This recognition is accompanied by an understanding that article XXIV 8(a)(i) of the GATT allows for a degree of flexibility with respect to trade liberalization within customs unions and free-trade areas.²⁹⁸

The AfCFTA aims to facilitate trade amongst its State Parties, the majority of which are also Members of the WTO. Through its provisions and as a result of its constituent negotiations, the AfCFTA requires its State Parties to liberalize ninety percent of their tariff lines within the first ten or five years for LDCs and non-LDCs, respectively.²⁹⁹ The AfCFTA further requires its State Parties to liberalize seven percent of the remaining tariff lines, designated sensitive products, within thirteen years or ten years for LDCs and non-LDCs, respectively.³⁰⁰ Therefore, it is evident that the AfCFTA intends to eliminate duties and other restrictions on substantially all trade between its State Parties. Furthermore, the AfCFTA’s Protocol on Trade in Goods provides assurances that the agreement will not create barriers for trade in goods with other WTO Members through article 5 of the Protocol, which requires State Parties to apply the principle of National Treatment to imported goods.³⁰¹ Furthermore, the Protocol’s “Most-Favoured-Nation” provision does not prevent State Parties from concluding or maintaining preferential trade arrangements with third parties, provided that the arrangement does not impede or frustrate the objectives of the Protocol and that any advantage arising from such a preferential arrangement is extended to other State Parties on a reciprocal basis.³⁰²

Article V of the GATS also allows for regional agreements in a manner similar to that of the GATT, provided that they facilitate trade between the parties to the agreement and do not raise trade barriers for WTO Members who are not parties to the agreement.³⁰³ The GATS requires that regional

295. GATT *supra* note 114, art. XXIV(4).

296. *Id.* art. XXIV(8)(b).

297. Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 48, WTO Doc. WT/DS34/AB/R (adopted Oct. 22, 1999) [hereinafter *Turkey-Textile*].

298. *Id.*

299. Hartzenberg, *supra* note 14.

300. *Id.*

301. AfCFTA, *supra* note 12, art. 5 (Protocol on Trade in Goods).

302. *Id.* art. 4 (Protocol on Trade in Goods).

303. See GATS, *supra* note 292, art. V(1)(4).

agreements have substantial sectoral coverage and provide for the absence or elimination of substantially all existing discriminatory measures and the prohibition of new or more discriminatory measures.³⁰⁴ In assessing a regional agreement's discriminatory measures, consideration is given to the agreement's impact on economic integration or trade liberalization among the countries concerned.³⁰⁵ The GATS also provides flexibility for developing countries with respect to its conditions for regional agreements "in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors."³⁰⁶ As previously stated, the AfCFTA aims to liberalize much of the service sectors in key agreed-upon priority sectors.³⁰⁷ In terms of the requirements for eliminating discrimination for regional agreements under the GATS, the AfCFTA's Protocol on Trade in Services' "Most-Favoured-Nation Treatment" clause addresses those issues. It does so by requiring that the "Most-Favoured-Nation Treatment" is unconditionally extended to State Parties.³⁰⁸ In terms of not creating trade barriers with non-State Parties, the Protocol allows for State Parties to agree to preferential arrangements with non-State Parties in accordance with article V of the GATS provided that such an arrangement does not impede or frustrate the objectives of the Protocol and the preferential arrangement is "extended to all State Parties on a reciprocal and non-discriminatory basis."³⁰⁹ In summary, with respect to its regulations on trade in both goods and services, the AfCFTA strives to facilitate and liberalize trade, as well as promote economic integration within the region. It does so without inhibiting trade with non-State Parties, consistent with the WTO agreements. The WTO agreements allow for the development of regional trade agreements for specified purposes, but Members still remain bound to their obligations under the WTO agreements, including the local content restrictions.³¹⁰

304. *Id.* art. V(1).

305. *Id.* art. V(2).

306. *Id.* art. V(3).

307. *See supra* p. 2.

308. AfCFTA, *supra* note 12, art. 4(1) (Protocol on Trade in Services). Notably, the AfCFTA applies the "Most-Favoured-Nation Treatment" principle reciprocally with respect to trade in goods. *Id.* art. 4(1) (Protocol on Trade in Goods), art. 18.

309. *Id.* art. 4(2) (Protocol on Trade in Services).

310. *See, e.g.,* Turkey-Textile, *supra* note 297, ¶¶ 57–58 (a WTO Appellate Body held, with respect to customs unions but concerning language identical to language used to define regional trade agreements and their purpose under the GATT, that regional agreements could not require obligations inconsistent with certain provisions under the GATT, unless the party claiming this defense demonstrates "that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV" and "the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.").

B. *Local Content Requirements and the Restrictions
Imposed by WTO Agreements*

1. General Agreement on Tariffs and Trade

The requirement to treat all trading partners and all those engaged in trade-related activities similarly resonates in different forms throughout the provisions of the WTO agreements. Article I of GATT provides for the requirement of the “Most-Favoured-Nation Treatment,” stating that

with respect to all matters referred to in paragraphs 2 and 4 of [a]rticle III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.³¹¹

Under article II of the GATT, Members are required to provide Schedules of Concessions, binding commitments that guarantee tariff concessions to Members, essentially providing a ceiling on customs tariffs.³¹² Article II states that each Member “shall accord to the commerce of the other [Members] treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule . . .”³¹³

Article III(2) of the GATT prohibits the imposition of internal charges or taxes on imported products in excess of those applied to domestic products.³¹⁴ Article III(4), which is more applicable to the discussion of the local content requirements discussed in this article, requires that the treatment accorded to national products be afforded to like products of foreign origin under “all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”³¹⁵ This article is at the root of most cases brought before WTO panels concerning local content requirements, primarily because of its incorporation into the TRIMS Agreement.³¹⁶ It codifies the National Treatment requirement, the principle that “domestic laws, regulations, and restrictions affecting the sale and use of products should not afford protection to domestic production.”³¹⁷

WTO panels have held that the National Treatment obligation under article III(4) of the GATT pertains to “whether a measure modifies the

311. GATT, *supra* note 114, art. I.

312. *See id.* art. II.

313. *Id.* art. II(1)(a).

314. *Id.* art. III(2).

315. *Id.* art. III(4).

316. *See infra* pp. 101-02, 110-11.

317. Cimino et al., *supra* note 162, at 4.

conditions of competition in the relevant market to the detriment of imported products”³¹⁸ such that “the term ‘treatment no less favourable’ in article III:4 requires effective equality of opportunities for imported products to compete with like domestic products.”³¹⁹ In *India – Certain Measures Relating to Solar Cells and Solar Modules (India-Solar Cells)*, the WTO panel found that neither a threshold degree of detrimental impact nor a continued market dominance and the provision of other competitive or market opportunities could preclude a finding of less favorable treatment under article III(4) of the GATT.³²⁰ Therefore, requiring the use of local inputs as part of a local content requirement could be found to modify the conditions of competition to the detriment of imported inputs and constitute a violation of the National Treatment obligation.

National Treatment under the GATT does not apply if the requirement being challenged relates to a government’s procurement of products for governmental purposes, as article III(8)(a) of the GATT excludes such government procurements from the National Treatment obligation.³²¹ Exceptions to the exclusion of government procurements exist for countries that are signatories to the WTO’s plurilateral³²² Government Procurement Agreement (“GPA”).³²³ The GPA “establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement,” to the extent of the commitments provided in the Schedules of parties to the agreement.³²⁴ However, no African countries are signatories to the agreement and only two African countries serve as observers to the agreement.³²⁵

Through article III(5), the GATT also prohibits regulations that require the “mixture, processing or use of [domestic] products in specified amounts

318. Panel Report, *India–Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 7.92, WTO Doc. WT/DS456/R (adopted Oct. 14, 2016) [hereinafter *India-Solar Cells*] (citing Appellate Body Report, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 137, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001)).

319. *Id.* (citing Appellate Body Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.101, WTO Doc. WT/DS400/AB/R (adopted June 18, 2014)).

320. *India-Solar Cells*, *supra* note 318, ¶ 7.97.

321. GATT, *supra* note 114, art. III(8)(a). In order to be exempted under article III(8)(a), the foreign product being discriminated against must be a competing alternative to the product purchased by way of the government procurement and cannot be purchased for the purpose of commercial resale or with the purpose of using the product in the production of goods for commercial sale. *Id.*

322. A plurilateral agreement, in the context of the WTO, is an agreement to which not all WTO Members are party. *Agreement on Government Procurement*, WTO, https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Dec. 5, 2021).

323. *Id.*

324. *Id.*

325. *Agreement on Government Procurement: Parties, Observers and Accessions*, WTO, https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited Dec. 5, 2021).

or proportions” in the production of another product. Thereby, restricting the use of regulations that require that local inputs must be used to produce final products.³²⁶

2. General Agreement on Trade in Services

The GATS extends the principle of the “Most-Favoured-Nation Treatment” to trade in services.³²⁷ It extends the principle of National Treatment to sectors that Members include in their Schedules of Specific Commitments.³²⁸ The GATS also provides an exclusion for government procurements under article XIII with respect to National Treatment, the Most-Favoured-Nation Treatment, and market access restrictions.³²⁹ A key characteristic of the GATS is its restrictions on the imposition of requirements that limit market access in trade in services.³³⁰ These restrictions include requirements limiting the number of natural persons that a service supplier may employ,³³¹ It also restricts requirements that impose limitations on the number of service suppliers,³³² the number of service operations,³³³ the quantity of service output,³³⁴ the specific types of legal entities through which a foreign service supplier may supply a service,³³⁵ and limits on foreign capital participation.³³⁶ The agreement further clarifies that treatment should be considered to be less favorable if “it modifies the conditions of competition in favour of services or service suppliers of [a] Member compared to like services or service suppliers of any other Member.”³³⁷ The GATS’ restrictions essentially prevent governments from imposing local content requirements, with respect to service industries, on foreign investors seeking to gain market access, thereby preventing “governments from using various supportive measures to increase the competitiveness of domestic service firms and their ability to integrate and upgrade in domestic and global value chains.”³³⁸

However, the GATS restrictions only apply to those service sectors that a country chooses to include in its Schedule of Specific Commitments.³³⁹

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- 326. GATT, *supra* note 114, art. III(5).
 - 327. GATS, *supra* note 292, art. II(1).
 - 328. *Id.* art. XVII.
 - 329. *Id.* art. XIII.
 - 330. *See id.* art. XVI.
 - 331. *Id.* art. XVI(2)(d).
 - 332. *Id.* art. XVI(2)(a).
 - 333. *Id.* art. XVI(2)(c).
 - 334. *Id.*
 - 335. *Id.* art. XVI(2)(e).
 - 336. *Id.* art. XVI(2)(f).
 - 337. *Id.* art. XVII(3).
 - 338. JOHNSON, *supra* note 236, at 17.
 - 339. *See* GATS, *supra* note 292, art. XX.

Members may modify their Schedules after three years have elapsed from the date on which the commitment entered into force.³⁴⁰ With respect to the sectors in which such commitments are undertaken, each Schedule may provide specifications which set the parameters of the commitments.³⁴¹ These specifications include: “(a) terms, limitations and conditions on market access; (b) conditions and qualifications on [N]ational [T]reatment; (c) undertakings relating to additional commitments; (d) where appropriate[,] the time-frame for implementation of such commitments; and (e) the date of entry into force of such commitments.”³⁴² These specifications limit the extent to which the market access commitments apply and, in turn, the extent to which the market access restrictions apply. Overall, countries retain the ability to impose local content requirements that contravene the market access and National Treatment rules in service sectors that they have not specifically included in their Schedule of Specific Commitments.³⁴³

In terms of the AfCFTA, the Protocol on Trade in Services requires State Parties to apply the “Most-Favoured-Nation Treatment” principle to other State Parties with respect to measures affecting trade in services.³⁴⁴ It also applies restrictions on market access requirements identical to that of the GATS³⁴⁵ and requires State Parties to apply “treatment no less favourable than it accords its own like services and service suppliers,” National Treatment, subject to their Schedule of Specific Commitments.³⁴⁶ The Protocol also provides that State Parties may provide specifications and parameters identical to those identified in the GATS for sectors in which commitments are undertaken.³⁴⁷ The Schedule of Specific Commitments allows for flexibility by only applying market access restrictions and the principle of National Treatment with respect to sectors in which such commitments are undertaken.³⁴⁸ The Protocol allows State Parties to implement subsidies pertaining to trade in services that are in line with their

340. See GATS, *supra* note 292, art. XXI(1)(a). The AfCFTA also provides for procedures to modify Schedules of Specific Commitments three years after their entry into force. AfCFTA, *supra* note 12, art. 23(1) (Protocol on Trade in Services).

341. See GATS, *supra* note 292, art. XX.

342. *Id.* art. XX(1).

343. JOHNSON, *supra* note 236, at 17.

344. AfCFTA, *supra* note 12, art. 4(1) (Protocol on Trade in Services).

345. See *id.* art. 19 (Protocol on Trade in Services); GATS, *supra* note 292, art. XVI.

346. AfCFTA, *supra* note 12, art. 20 (Protocol on Trade in Services); see also AfCFTA, *supra* note 12, art. 21 (Protocol on Trade in Services) (stating that “State Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles 19 [(Market Access article)] or 20 [(National Treatment article)].”).

347. See *id.* art. 22(2) (Protocol on Trade in Services); see also GATS, *supra* note 292, art. XX(1).

348. See AfCFTA, *supra* note 12, art. 22 (Protocol on Trade in Services) (discussing the specifications required for Schedules of Specific Commitments).

development objectives.³⁴⁹ Similarly, the GATS recognizes that in certain circumstances, developing countries may need to provide subsidies to support development programs.³⁵⁰

3. Agreement on Subsidies and Countervailing Measures

The ASCM concerns the provision of subsidies and “prohibits the use of subsidies to confer undue advantages to domestic companies over foreign companies.”³⁵¹ Article 1 of the ASCM provides that a subsidy is deemed a subsidy if “there is a financial contribution by a government or any public body within the territory of a Member,”³⁵² or “any form of income or price support in the sense of [a]rticle XVI of GATT 1994”³⁵³ that is granted by a government and confers a benefit to domestic firms that is unavailable to foreign firms.³⁵⁴ The ASCM explicitly prohibits two types of subsidies: “subsidies that are contingent on export performance (i.e., export subsidies) and subsidies that are contingent on the use of domestic goods over imports (i.e. [local content requirements] and other important substitution subsidies).”³⁵⁵ Furthermore, article 2 of the ASCM requires that a subsidy, as prohibited under the ASCM, is “specific to an enterprise or industry or group of enterprises or industries.”³⁵⁶ Under the ASCM, the provision of “grants, loans, equity infusions, fiscal incentives, and other measures provided by [a] government and designed to support [the] development and growth of local industries may be restricted.”³⁵⁷

A further requirement, which has in recent times complicated the application of the ASCM’s restrictions on subsidies, is that article 5 of the ASCM requires the challenging country to demonstrate evidence of “adverse effects,” as described in article 5 of the ASCM, placing the burden of proving adverse effects on the challenging party.³⁵⁸ In essence, “subsidies breach WTO obligations only when they cause adverse effects to the

349. See *id.* art. 17 (Protocol on Trade in Services).

350. GATS, *supra* note 292, art. XV.

351. Nwapi, *supra* note 158, at 194.

352. Agreement on Subsidies and Countervailing Measures art. 1.1(a)(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter ASCM] (stating circumstances under which a financial contribution conferred is prohibited under the ASCM).

353. *Id.* art. 1.1(a)(2); see also GATT, *supra* note 114, art. XVI (discussing implications of government subsidies).

354. See ASCM, *supra* note 352, art. 1.1.

355. Cimino et al., *supra* note 162, at 5–6; ASCM, *supra* note 352, art. 3.

356. ASCM, *supra* note 352, art. 2.1 (providing principles used to determine whether a subsidy is specific to an enterprise or industry or group of enterprises).

357. JOHNSON, *supra* note 236, at 16.

358. See ASCM, *supra* note 352, art. 5 (discussing what constitutes “adverse effects” under the ASCM).

commerce of another WTO [M]ember,”³⁵⁹ a threshold, which in practice is rarely met.³⁶⁰

Subsidies are tools that can be used to develop local content and local industries for the purpose of trade and for which some policy space exists for developing countries. However, developing countries often lack the financial resources needed to provide substantive subsidies that could significantly impact the growth trajectory of nascent industries.³⁶¹ In such instances, “the challenge is not policy space, but financial space.”³⁶² As previously stated, the AfCFTA allows for the use of subsidies, with respect to trade in services, to the extent that they align with a State Party’s development priorities, perhaps signaling a recognition of the role they can play in industry development. Subsidies are not part of the local content tools addressed by this article in the subsequent discussion on the available policy space for local content requirements in light of the definition of local content used in this article.³⁶³

4. Agreement on Trade-Related Investment Measures

The WTO Agreement most at issue when it comes to local content requirements is the TRIMs Agreement. The TRIMs Agreement has been interpreted by WTO panels as prohibiting any advantage conditioned on the use of local content in the form of performance and procurement relating to foreign investment.³⁶⁴ Article 1 of the TRIMs Agreement provides that the Agreement “applies to investment measures related to trade in goods only.”³⁶⁵ Furthermore, article 2 provides that “no Member shall apply any TRIM [trade-related investment measure] that is inconsistent with the provisions of [a]rticle III or [a]rticle XI of GATT 1994.”³⁶⁶ Article III of the GATT, as previously discussed, refers to the National Treatment requirement in conducting trade.³⁶⁷ Article XI of the GATT refers to the elimination of quantitative restrictions on trade.³⁶⁸ Article 2(2) of the TRIMs Agreement states that the annex to the Agreement provides “[a]n illustrative list of TRIMs that are inconsistent with the obligation of [N]ational

359. Cimino et al., *supra* note 162, at 3.

360. *Id.*

361. Ramdoo, *supra* note 37, at x.

362. *Id.*

363. *See supra* p. 17.

364. *See, e.g.,* India-Solar Cells, *supra* note 318, ¶ 7.73; Panel Report, *Indonesia - Certain Measures Affecting the Automotive Industry*, ¶ 14.91, WTO Doc. WT/DS54R (adopted July 23, 1998) [hereinafter *Indonesia-Autos*].

365. TRIMs Agreement, *supra* note 292, art. 1.

366. *Id.* art. 2.

367. GATT, *supra* note 114, art. III.

368. *Id.* art. XI.

[T]reatment provided for in paragraph 4 of [a]rticle III of GATT 1994.”³⁶⁹ The Illustrative List in the annex states that TRIMs include measures that are “mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage.”³⁷⁰ In addition, they are measures which require “the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.”³⁷¹ TRIMs also include measures that require “that an enterprise’s purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.”³⁷² A WTO panel held that the exception for government procurements, as provided for under article III(8)(a) of the GATT, applies to local content requirements prohibited under the TRIMs Agreement’s Illustrative List.³⁷³ Essentially, certain government procurements aside, the TRIMs Agreement prohibits the use of local content requirements in the form of preferential treatment and quantitative restrictions in the trade of goods.³⁷⁴

The assessment of whether a local content requirement violates article 2 of the TRIMs Agreement consists of a determination of whether the requirement at issue constitutes an investment measure, whether the requirement concerns trade-related activities, whether the products to which differential treatment is applied are “like products,” and whether an advantage is conferred contrary to article III(4) of the GATT.³⁷⁵ WTO panels have determined that a measure is an investment measure by assessing whether it has investment features or objectives.³⁷⁶ In *Indonesia—Certain Measures Affecting the Automotive Industry (Indonesia-Autos)*, the panel found that measures seeking to develop local manufacturing were investment measures and that they need not be explicitly adopted as investment regulations.³⁷⁷ In *India-Solar Cells*, the panel found that measures looking to promote and develop specific industries constituted investment measures.³⁷⁸ Furthermore, in *Indonesia-Autos*, the panel

369. TRIMs Agreement, *supra* note 292, art. 2(2).

370. *Id.* Annex § 1.

371. *Id.* Annex § 1(a).

372. *Id.* Annex § 1(b).

373. Appellate Body Report, *Canada - Certain Measures Affecting the Renewable Energy Generation Sector, Canada-Measures Relating to the Feed-in Tariff Program*, ¶¶ 5.19–.33, WTO Doc. WT/DS412/AB/R (adopted May 24, 2013).

374. See TRIMs Agreement, *supra* note 292, Annex §§ 1–2.

375. See, e.g., *Indonesia-Autos*, *supra* note 364, ¶¶ 14.80–.92.

376. *Id.* ¶ 14.80.

377. *Id.* ¶¶ 14.80–81.

378. *India-Solar Cells*, *supra* note 318, ¶ 7.60 (discussing the finding that “investment measures” in *Indonesia-Autos* looking to promote and develop specific industries constituted investment measures).

considered local content requirements consistent with the measures prohibited under the TRIMs Agreement's annex to be trade-related because they "always favour the use of domestic products over imported products, and therefore affect trade."³⁷⁹ In *Brazil–Certain Measures Concerning Taxation and Charges (Brazil-Taxation)*, a WTO panel held that article III of the GATT, which is incorporated into article 2 of the TRIMs Agreement, is applicable to "pre-market" measures directed at producers, including research and development, and not just final products.³⁸⁰ Therefore, local content requirements that affect pre-market activities and production are prohibited in the same manner as market activities under the TRIMs Agreement.

In determining what constitutes "like products," a WTO panel in *India-Solar Cells* reiterated that previous panels have found products to be "like products" in the context of article III(4) of the GATT (and therefore by incorporation, under article 2 of the TRIMs Agreement) when the only distinguishing factor is origin.³⁸¹ At the crux of the panels' decisions when addressing claims alleging violations of article 2 of the TRIMs Agreement has been the element that the requirement at issue would need to provide an advantage and that compliance with the requirement is necessary to obtain the advantage.³⁸² Panels have also held that, not only requirements to which an enterprise is legally bound, but also requirements that an entity voluntarily accepts to obtain an advantage from a government, fall under article 2 of the TRIMs Agreement.³⁸³

Although the GATT principles are woven throughout the AfCFTA's Protocol on Trade in Goods, it stops short of the TRIMs Agreement by applying only to trade in goods³⁸⁴ and not applying to *trade-related investment measures*—the key characteristic that brings local content requirements under the regulation of the TRIMs Agreement.³⁸⁵ Thus, the Protocol does not impose restrictions on the use of local content requirements. The Protocol requires State Parties to accord the "Most-Favoured-Nation Treatment" to other State Parties in accordance with article 18 of the AfCFTA, which requires such treatment to be provided on a

379. *Id.* ¶ 7.63 (quoting *Indonesia-Autos*, *supra* note 364, ¶ 14.82).

380. Panel Report, *Brazil – Certain Measures Concerning Taxation and Charges*, ¶ 7.70, WTO Doc. WT/DS472/R (adopted Jan. 11, 2019) [hereinafter *Brazil-Taxation*].

381. *India-Solar Cells*, *supra* note 318, ¶¶ 7.83–84.

382. *Indonesia-Autos*, *supra* note 364, ¶¶ 14.8–92; *see also* *India-Solar Cells*, *supra* note 318, ¶¶ 7.72–73.

383. *See, e.g.,* *Indonesia-Autos*, *supra* note 364, n.685; *see also* *Brazil-Taxation*, *supra* note 380, ¶ 7.65 (stating that government actions that "merely create [] incentives or disincentives for otherwise voluntary action by private persons" are encompassed under laws, regulations, or requirements in the context of the GATT, arts. III(2), III(4).); *India-Solar Cells*, *supra* note 318, ¶ 7.87.

384. AfCFTA, *supra* note 12, art. 3(1) (Protocol on Trade in Goods).

385. *See supra* pp. 101–102.

reciprocal basis with respect to trade in goods.³⁸⁶ The reciprocal basis on which such treatment is provided, as previously stated, preserves the *acquis* of RECs.³⁸⁷ With respect to tariff barriers, like the GATT, the Protocol requires State Parties to provide and apply a Schedule of Tariff Concessions in accordance with the adopted tariff modalities.³⁸⁸ Furthermore, it requires State Parties to apply National Treatment to products imported from other State Parties, a “treatment no less favourable than that accorded to like domestic products of national origin, after the imported products have been cleared by customs.”³⁸⁹ The Protocol also prohibits State Parties from imposing quantitative restrictions on imports from or exports to other State Parties, unless provided for in the Protocol’s annexes and article XI of the GATT.³⁹⁰ However, the Protocol allows for flexibility for State Parties at “different levels of economic development or that have individual specificities as recognised by other State Parties.”³⁹¹ The AfCFTA’s Protocol on Trade in Goods’s exclusion of WTO language that restricts local content requirements which require the use or purchase of local products, whilst incorporating other WTO clauses concerning trade in goods, signals a recognition by State Parties of the importance of local content requirements in developing local industries.³⁹² This is consistent with the proposals made by many African Members of the WTO before the Organization.³⁹³ However, as WTO Members, many AfCFTA State Parties will still remain restricted from imposing local content requirements as signatories to the TRIMs Agreement.

5. Special Considerations for Developing and Least Developed Countries

It is important to note that the WTO agreements create exceptions for developing countries and LDCs, many of which are AfCFTA State Parties. For example, GATT provides a few exceptions. Through the “Decision on Waiver” adopted by the WTO on June 15, 1999,³⁹⁴ the WTO waived the provision of the GATT’s “Most-Favoured Nation Treatment” clause for developing countries until June 30, 2009.³⁹⁵ The waiver was granted “to the

386. AfCFTA, *supra* note 12, art. 4(1), (Protocol on Trade in Goods).

387. *See supra* p. 12.

388. *See* AfCFTA, *supra* note 12, art. 8(1), (Protocol on Trade in Goods).

389. *Id.* art. 5, (Protocol on Trade in Goods).

390. *Id.* art. 9 (Protocol on Trade in Goods); *see also* GATT, *supra* note 114, art. XI (requiring the elimination of quantitative restrictions and providing exceptions thereto).

391. AfCFTA, *supra* note 12, art. 6 (Protocol on Trade in Goods).

392. This conclusion is based on the author’s analysis and professional experience.

393. *See discussion infra* p.46-47.

394. World Trade Org., *Preferential Tariff Treatment for Least Developed Countries, Decision on Waiver*, WTO Doc. WT/L/204 (adopted on June 15, 1999).

395. *Id.* at 1–2.

extent necessary to allow developing country Members to provide preferential tariff treatment to products of least developed countries, designated as such by the United Nations, without being required to extend the same tariff rates to like products of any other Member.”³⁹⁶ The waiver was extended on May 27, 2009 until June 30, 2019,³⁹⁷ and subsequently on October 16, 2019 until June 30, 2029.³⁹⁸

As a result of the “Decision of 28 November 1979,”³⁹⁹ WTO Members “may accord differential and more favorable treatment to developing countries,” without according such treatment to other Members, with respect to the GATT’s non-tariff measures,⁴⁰⁰ and may provide preferential treatment to products originating in developing countries in accordance with the Generalized System of Preferences.⁴⁰¹ Such differential treatment is non-reciprocal and is expected “to be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.”⁴⁰² The differential treatment shall also be compliant with the following criteria: it “(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties”;⁴⁰³ and “(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a [M]ost-[F]avoured-[N]ation basis.”⁴⁰⁴ The Decision also provides that less developed Members may enter into regional or global arrangements that provide a mutual reduction or elimination of tariffs,⁴⁰⁵ which set the stage for regional agreements such as the AfCFTA. Additionally, the Decision specified that Members could provide “special treatment [to] the least[ly]developed among the developing countries in the

396. *Id.*

397. World Trade Org., *Tariff Treatment for Least Developed Countries, Decision on Extension of Waiver*, WTO Doc. WT/L/759 (adopted on May 27, 2009).

398. World Trade Org., *Preferential Tariff Treatment for Least Developed Countries, Decision of Waiver*, WTO Doc. WT/L/93 (adopted Oct. 16, 2019).

399. World Trade Org., *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision*, WTO Doc. L/4903 (Nov. 28, 1979) [hereinafter *Differential and More Favourable Treatment*].

400. *Id.* ¶ 1, 2(b).

401. *Id.* ¶ 2(a); see *Generalized System of Preferences*, UNCTAD, <https://unctad.org/topic/trade-agreements/generalized-system-of-preferences> (last visited Mar. 12, 2021) (stating that the Generalized System of Preferences (“GSP”) refers to a system of nonreciprocal preferences instituted in 1971 by UNCTAD, through which countries agree to provide GSP preferences, duty-free and quota-free access, to exports from least developed countries).

402. *Differential and More Favourable Treatment*, *supra* note 399, ¶ 3(c).

403. *Id.* ¶ 3(a).

404. *Id.* ¶ 3(b).

405. *Id.* ¶ 2(c).

context of any general or specific measures in favour of developing countries.”⁴⁰⁶

The WTO’s Hong Kong Ministerial Declaration of 2005 (the “Hong Kong Declaration”) stipulated that developed and developing countries would provide duty-free and quota-free market access under the GATT on a lasting basis for products originating from LDCs, and that they were to do so by 2008 “or no later than the start of the implementation period in a manner that ensures stability, security, and predictability.”⁴⁰⁷ It further provided that Members that faced difficulties in providing such concessions would have to provide them to at least ninety-seven percent of products originating from LDCs by the above-referenced deadline, and that they would have to take steps to achieve compliance with the obligations “taking into account the impact on other developing countries at similar levels of development.”⁴⁰⁸ Under the Hong Kong Declaration, developing country Members were permitted to “phase in their commitments and [were to] enjoy appropriate flexibility in coverage.”⁴⁰⁹

Under articles XVIII and XII of the GATT, Members may control imports by “restricting the quantity or value of merchandise permitted to be imported”⁴¹⁰ to “safeguard [their] external financial position and to ensure a level of reserves adequate for the implementation of [their] program[] of economic development . . .”⁴¹¹ However, the restrictions instituted “shall not exceed those necessary: (a) to forestall the threat of, or to stop, a serious decline in [a Member’s] monetary reserves, or (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.”⁴¹² Both articles require Members “to progressively relax the restrictions as conditions improve and eliminate them when conditions no longer justify their maintenance.”⁴¹³ The 1979

406. *Id.* ¶ 2(d). The clause emanating from the Decision is also referred to as the “Enabling Clause.” Trade and Dev. Comm., *Special and Differential Treatment Provisions*, WTO, https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited March 9, 2021).

407. World Trade Org., *Ministerial Declaration of 18 December 2005*, WT/MIN(05)/DEC, Annex F, ¶ 36(a)(i) (Dec. 18, 2005) [hereinafter Hong Kong Declaration].

408. *Id.* ¶ 36(a)(ii).

409. *Id.* ¶ 36(a)(iii).

410. GATT, *supra* note 114, arts. XVIII(B)(9), XII(1).

411. GATT, *supra* note 114, art. XVIII(B)(9); *see also id.* art. XII(1).

412. GATT, *supra* note 114, art. XVIII(B)(9); *see also id.* art. XII(2).

413. *Technical Information on Balance of Payments*, WTO., https://www.wto.org/english/tratop_e/bop_e/bop_info_e.htm (last visited March 9, 2021) (stating further that article XII of the GATT can be invoked by all WTO Members while article XVIII(B) of the GATT can only be invoked by developing country Members (including LDCs), and that article XVIII(B) contains less stringent criteria than article XII for applying the balance-of-payments exception.) For example, art. XII requires that measures undertaken do not exceed those necessary “to forestall the imminent threat of, or to stop a serious decline” in monetary reserves or that measures undertaken should not exceed those necessary for a Member “with

Declaration on Trade Measures Taken for Balance-of-Payments Purposes (the "1979 Declaration") added three more conditions for the application of the balance-of-payments measures,

- (i) that preference shall be given to the measure which has "the least disruptive effect on trade" while abiding by disciplines provided for in the GATT; (ii) that the simultaneous application of more than one trade measure for balance-of-payments purposes shall be avoided; and (iii) that "whenever practicable, contracting parties shall publicly announce a time schedule for the removal of the measures."⁴¹⁴

Furthermore, the 1979 Declaration explicitly provided that measures taken to correct the balance-of-payments shall not be taken "for the purpose of protecting a particular industry or sector."⁴¹⁵

Article XVIII of the GATT provides for adjustments to tariff schedules to promote the establishment of a particular industry for development purposes.⁴¹⁶ However, article XVIII also requires that in order for these deviations to be permitted, the requesting Member must consult, and in most instances, must negotiate the adjustments requested with affected Members.⁴¹⁷ If agreed upon, the affected Members may require compensation to the extent that they are affected by the tariff adjustment.⁴¹⁸ The arduous process of requiring developing countries or LDCs to conduct consultations or negotiations with affected Members in order for them to agree to the requested tariff adjustments, and then the possibility of having to make compensatory payments, could deter a developing country Member or LDC Member from seeking such tariff adjustments, even if for development purposes.

With respect to the GATS, a similar deviation to correct balance-of-payments as permitted under the GATT is permitted under article XII of the GATS.⁴¹⁹ The GATS allows for the imposition of restrictions in the event of "serious balance-of-payments and external financial difficulties or threat

very low monetary reserves, to achieve a reasonable rate of increase in its reserves." GATT, *supra* note 114, art. XII(2). In contrast, article XVIII(B)(9) does not require the same imminent nature for the threat of a serious decline in monetary reserves. *See* GATT, *supra* note 114, art. XVIII(B)(9)(a). Article XVIII(B)(9) also requires a showing of "inadequate" monetary reserves as opposed to "very low monetary reserves" with respect to a Member seeking to achieve a reasonable rate of increase in its reserves. *Id.* art. XVIII(B)(9)(b); *cf.* GATT, *supra* note 114, art. XII(2).

414. *Id.* (discussing the elements of the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes).

415. *Id.*

416. GATT, *supra* note 114, art. XVIII(A)(C).

417. *Id.*

418. *Id.*

419. *See* GATS, *supra* note 292, art. XII.

thereof.”⁴²⁰ It is important to note that the GATS includes that the balance-of-payments must be *serious*, an additional requirement that is not present under the GATT balance-of-payments exception.⁴²¹ It further provides that the restrictions should not “discriminate among Members”;⁴²² shall “be consistent with the Articles of Agreement of the International Monetary Fund”;⁴²³ shall “avoid unnecessary damage to the commercial, economic and financial interests of any other Member”;⁴²⁴ “shall not exceed those necessary to deal with the circumstances described in paragraph 1”;⁴²⁵ and “shall be temporary and [] phased out progressively as the situation [] improves.”⁴²⁶ Article XII further provides that “[i]n determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development [programs]. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.”⁴²⁷

Article IV of the GATS also provides for the increasing level of participation of developing countries through negotiated specific commitments which shall consider

- (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and information networks; and (c) the liberalization of market access in sectors and modes of supply of export interest to them.⁴²⁸

The ASCM also provides for some degree of special and differential treatment for developing country and LDC Members.⁴²⁹ Under article 27 of the ASCM, export subsidies do not apply to developing country Members referred to in annex VII of the ASCM, which include LDCs and countries with a Gross National Product per capita of less than \$1000 per annum.⁴³⁰ Other developing country Members had a period of eight years from the date of the entry into force of the WTO Agreement in January 1995 to phase out their export subsidies, subject to limited extensions following

420. *Id.* ¶ 1.

421. *Compare* GATS, *supra* note 292, art. XII(1), *with* GATT, *supra* note 114, arts. XVIII (B)(9), XII(1).

422. GATS, *supra* note 292, art. XII(2)(a).

423. *Id.* ¶ 2(b).

424. *Id.* ¶ 2(c).

425. *Id.* ¶ 2(d) (referring to GATS art. XII(1), the balance of payments exception).

426. *Id.* ¶ 2(e).

427. *Id.* ¶ 3.

428. GATS, *supra* note 292, art. IV(1).

429. *See* ASCM, *supra* note 352, art. 27.

430. *Id.*, art. 27, Annex VII.

consultations.⁴³¹ This transition period expired on January 1, 2003.⁴³² With respect to the local content subsidies, article 27 of the ASCM provides that the prohibition of their use “shall not apply to developing country Members for a period of five years” and a period of eight years for LDCs, “from the date of [the] entry into force of the WTO Agreement.”⁴³³ The transition period expired on January 1, 2000 for developing country Members and on January 1, 2003 for LDCs.⁴³⁴ The transition arrangements for eliminating local content subsidies were notably more restrictive when compared to the transition arrangements for export subsidies.

With respect to the TRIMs Agreement, a deviation to correct balance-of-payments is afforded to developing country Members (including LDCs).⁴³⁵ Article 4 of the TRIMs Agreement allows developing country Members to temporarily deviate from the provision of article 2, the obligation of National Treatment with respect to trade-related investment measures, including with respect to local content as per the annex to the TRIMs Agreement.⁴³⁶ It permits this deviation to the extent to which the GATT’s balance-of-payment provision permits Members to deviate from article III and article XI of the GATT.⁴³⁷ Article III and article XI of the GATT concern National Treatment on internal taxation and regulation and the general elimination of quantitative restrictions on imports, respectively.⁴³⁸

The TRIMs Agreement also previously applied exceptions which impacted the use of local content requirements by developing and least developed countries, including many AfCFTA State Parties. At its inception, the TRIMs Agreement applied transitional arrangements for Members.⁴³⁹ The arrangements allowed Members to maintain TRIMs in place prior to the WTO’s entry into force, for which notice was provided “within 90 days of the date of entry into force of the WTO Agreement” to the Council for Trade in Goods, for all TRIMs not in conformity with the Agreement.⁴⁴⁰ The arrangements provided were for a specified limited time following the entry into force of the WTO in January 1995.⁴⁴¹ The specified limited time was two years for developed country Members, five years for

431. *Id.*, art. 27(3)(4).

432. Ramdoo, *supra* note 37, at 36.

433. ASCM, *supra* note 352, art. 27(3).

434. Ramdoo, *supra* note 37, at 36.

435. TRIMs Agreement, *supra* note 292, art. 4.

436. *Id.*

437. *Id.*

438. GATT, *supra* note 114, arts. III, XI.

439. See TRIMs Agreement, *supra* note 292, art. 5.

440. *Id.* ¶ 1.

441. *Id.* ¶ 2.

developing country Members, and seven years for LDC Members.⁴⁴² The Council for Trade in Goods could grant an extension of the transition periods for developing and least developed Members following a showing of particular difficulties in implementing the provisions of the TRIMs Agreement.⁴⁴³ In considering requests for extensions, the Council was to take into account “the individual development, financial and trade needs of the Member in question.”⁴⁴⁴

Subsequently, the Hong Kong Declaration provided LDCs with an additional transitional period of seven years for existing TRIMs, provided that the Members notified the Council for Trade in Goods of the measures within two years of the Hong Kong Declaration, starting from thirty days after the date of the Declaration.⁴⁴⁵ The additional transitional period could be extended by the Council for Trade in Goods, taking into account the Member in question’s “financial, trade, and development needs.”⁴⁴⁶ The Hong Kong Declaration also allowed Members to introduce new measures that deviated from obligations arising from the TRIMs Agreement for a period of five years.⁴⁴⁷ Any measures adopted under the Hong Kong Declaration and incompatible with the TRIMs Agreement would need to be phased out by 2020.⁴⁴⁸ No notifications of extensions or measures were received since the adoption of the Hong Kong Declaration.⁴⁴⁹ The availability of these transitional arrangements has now expired.

The transitional arrangements did not provide developing countries with much more of a transition period than they provided developed countries, nor did they do so for LDCs—many of which are AfCFTA countries.⁴⁵⁰ This was the case despite the developed countries already having highly developed industries—the growth of some of which benefited from local content requirements prior to the establishment of the WTO, measures currently prohibited by the TRIMs Agreement. This meant that AfCFTA countries, unlike many developed countries, did not have a significant period of time to apply local content requirements as part of their industrial

442. *Id.*

443. *Id.* ¶ 3.

444. *Id.*

445. Hong Kong Declaration, *supra* note 407, Annex F, ¶84.

446. *Id.*

447. *Id.*

448. *Id.*

449. *LDCs in the Agreement on Trade-Related Investment Measures (TRIMs) and Related Decisions*, U.N. LEAST DEVELOPED COUNTRIES PORTAL, <https://www.un.org/ldcportal/ldcs-in-the-agreement-on-trade-related-investment-measures-trims-and-related-decisions/> (last visited Mar. 18, 2021).

450. The Council for Trade in Goods issued extensions of the transition arrangements for eight Members pursuant to article 5.3 of the TRIMs Agreement. *Trade and Investment: Technical Information, Agreement on Trade Related Investment Measures*, WTO, https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm (last visited Mar. 14, 2021).

development policies. Even with the additional transition period provided to LDCs by the Hong Kong Declaration, the time period afforded to them, and to developing countries, to continue to employ TRIMs did not amount to a period sufficient enough to develop sustainable sectors and industries that would be able to compete and take part in global trade.⁴⁵¹

The disparate impact of restrictions on local content requirements and the different perspectives concerning the relevance of local content requirements between developed and developing countries (including LDCs) is evidenced by the issues raised in the dispute settlement proceedings brought before the WTO. By 2015, forty-one dispute settlement proceedings, which included a claim under the TRIMs Agreement, had been brought before the WTO, twenty-seven of which were brought against developing countries.⁴⁵² Out of these twenty-seven proceedings, twenty-five (ninety-three percent) concerned allegations of local content violations on the part of developing countries.⁴⁵³ These proceedings show that several developing countries, many of which include AfCFTA countries, still require the flexibility to use local content requirements prohibited under the TRIMs Agreement “to promote upstream and downstream linkages with the local economy and achieve industrialization and economic transformation.”⁴⁵⁴ As a result, the G90—comprised of African, Caribbean, Pacific, and least developed Members⁴⁵⁵—have submitted proposals which include exempting LDCs from the TRIMs Agreement until they graduate to developing status and cease to be LDCs.⁴⁵⁶ It is also worth considering allowing LDCs and developing countries to preserve or introduce new TRIMs aligned with a specified policy objective, tied to their development and industrial policy objectives and priorities for a specified period.⁴⁵⁷ These TRIMs would allow for nascent industries and linkages to develop.

451. This conclusion is based on the author’s analysis and professional experience.

452. World Trade Organization, *Ministerial Conference of 10-13 December 2017*, WTO Doc. WT/MIN(17)/60 4 (Dec. 10–13, 2017) [hereinafter Ministerial Conference 2017].

453. *Id.*

454. *Id.*

455. The G90 is comprised of the Organisation of African, Caribbean and Pacific States, the African Group and the WTO’s group of least developed countries. See *WTO Members to Discuss Proposals to Enhance Special Treatment for Developing Countries*, WTO, https://www.wto.org/english/news_e/news20_e/devel_21sep20_e.htm (last visited Mar. 19, 2021).

456. Ministerial Conference 2017, *supra* note 452, at 2–3.

457. For example, with respect to trade in goods, the AfCFTA allows State Parties to impose measures to protect infant industries having national strategic importance for a specified period of time, provided that the measures are applied in a non-discriminatory manner and the State Party applying them has “taken reasonable steps to overcome the difficulties related to such infant industry.” AfCFTA, *supra* note 12, art. 24 (Protocol on Trade in Goods).

6. Bilateral Investment Treaties

Countries seeking to impose local content requirements are further limited by restrictions imposed by BITs. Currently, there are 2,258 BITs in force globally.⁴⁵⁸ According to an UNCTAD report, “as of [the] end [of] 2013, 793 BITs had been concluded by African countries, representing 27 [percent] of the total number of BITs worldwide at the time,⁴⁵⁹ with more negotiated since and currently under negotiation.⁴⁶⁰ Although not a focus of this article, due to the country variations, this section will provide an overview of some of the clauses found in BITs that have an impact on the use of local content requirements, with a focus on BITs to which Mozambique, Kenya, and Rwanda are signatories.⁴⁶¹ BITs often include restrictions on local content requirements through non-discrimination provisions, such as National Treatment and “Most-Favoured-Nation Treatment” clauses, and provisions which require “fair and equitable treatment” and provide absolute standards of protection.⁴⁶² BITs require that neither contracting party shall subject investments from the other contracting party to treatment less favorable than it accords to investments from its own nationals or companies, requiring contracting parties to apply the National Treatment principle.⁴⁶³ The BIT between Kenya and Japan provides a unique exception to the National Treatment requirement. It stipulates that National Treatment shall not apply to measures adopted or maintained “with respect to incentives only for the purpose of promoting small and medium[-]sized enterprises in its [a]rea,⁴⁶⁴ to the extent that such measures do not materially affect the investments or investment activities of [] investors [from] the other [c]ontracting [p]arty.”⁴⁶⁵ This unique exception

458. *International Investment Agreements Navigator Investment Policy Hub*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited Dec. 4, 2021).

459. Ramdoo, *supra* note 37, at 26.

460. See UNCTAD, *supra* note 58.

461. Kenya and Rwanda have ratified the AfCFTA, and Mozambique’s ratification of the AfCFTA is pending. TRALAC, *supra* note 13.

462. JOHNSON, *supra* note 236, at 19; *see infra* p. 48.

463. See, e.g., Agreement for the Promotion and Protection of Investments, U.K.-Kenya, art. 3, Sept. 13, 1999, GR. BRIT. TS NO. 8 (2000) (Cd. 4597); *see, e.g.*, Agreement for the Promotion and Protection of Investments, U.K.-Mozam., art. 3, Feb. 27, 2007, GR. BRIT. TS NO. 15 (2007) (Cd. 7150); *see, e.g.*, Agreement for the Promotion and Protection of Investments, U.K.-Uganda, art. 3, Apr. 24, 1998, GR. BRIT. TS NO. 33 (1998) (Cd. 4037); *see, e.g.*, Investment Treaty with Mozambique, U.S.-Mozam., art. II(1), Dec. 1, 1998, S. TREATY DOC. NO. 106-31 (1998) [hereinafter U.S.-Mozam. BIT]; *see, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, art. 3, Feb. 19, 2008, S. EXEC. REP. NO. 111-8 (2010) [hereinafter U.S.-Rwanda BIT]; *see, e.g.*, Agreement for the Promotion of Protection of Investment, Kenya-Japan, art. 3, Aug. 28, 2016 [hereinafter Kenya-Japan BIT].

464. Kenya-Japan BIT, *supra* note 463, art. 3(3).

465. *Id.*

to the National Treatment requirement demonstrates a recognition for the need to provide preferences to nascent industries to allow them to develop, including through local content measures.

BITs also require that both contracting parties apply the “Most-Favoured-Nation Treatment” to investments from the other contracting party.⁴⁶⁶ The BIT between the United States and Mozambique further requires that either contracting party applies the most favorable of the two treatments between the National Treatment or the “Most-Favoured-Nation Treatment.”⁴⁶⁷ Some BITs specify that preferences obtained as a result of regional agreements will not extend to investments from either contracting party as a result of a “Most-Favoured-Nation Treatment” clause.⁴⁶⁸ BITs also require that a minimum standard of “fair and equitable treatment and full protection and security in accordance with customary international law” applies to investments from either contracting party.⁴⁶⁹

BITs may also explicitly prohibit the use of local content requirements. For example, the BIT between the United States and Mozambique and the BIT between the United States and Rwanda explicitly prohibit requirements for specific levels or percentages of local content.⁴⁷⁰ These BITs also bar quantitative restrictions on imports and exports of goods.⁴⁷¹ Furthermore, these BITs explicitly prohibit either party from requiring the use of or giving preference to local products or services,⁴⁷² thereby prohibiting local content requirements concerning the procurement of local goods and services. BITs can also restrict the use of local content requirements “through express restrictions on ‘performance requirements.’”⁴⁷³ These performance requirements may also impose restrictions on technology transfer.⁴⁷⁴ For example, the BIT between the United States and Mozambique and the BIT between the United States and Rwanda explicitly

466. See, e.g., *id.* at art. 4; U.S.-Rwanda BIT, *supra* note 463, art. 4. The United States allows for exceptions by either party to the application of the “Most-Favoured-Nation Treatment” and National Treatment principles. US-Mozam. BIT, *supra* note 463, art. II(2)(a).

467. US-Mozam. BIT, *supra* note 463, art. II(1). Note that the 2012 Model U.S. BIT just requires the application of both the “National Treatment” and “Most-Favoured-Nation Treatment” principles without the additional requirement of applying the most favorable of the two. See U.S. MODEL BILATERAL INVESTMENT TREATY arts. 3, 4, (U.S. TRADE. REP. 2012) [hereinafter U.S. Model BIT].

468. See, e.g., Kenya-Japan BIT, *supra* note 463, art. 4(5)(a).

469. See, e.g., *id.* art. 5(1); see also US-Mozam. BIT, *supra* note 463, art. II(3)(a); see also US-Rwanda BIT, *supra* note 465, art. 5; see also U.S. Model BIT, *supra* note 467, art. 5.

470. U.S.-Mozam. BIT, *supra* note 463, art. VI(a); U.S.-Rwanda BIT, *supra* note 463, arts. 8(1)(b), 8(2)(a)(b); see also U.S. Model BIT, *supra* note 467, art. 8(1)(b)(c).

471. U.S.-Mozam. BIT, *supra* note 463, art. VI(b)(c); U.S.-Rwanda BIT, *supra* note 463, art. 8(1)(a)(d).).

472. US-Mozam. BIT, *supra* note 463, art. VI(a); US-Rwanda BIT, *supra* note 463, arts. 8(1)(c), 8(2)(b).

473. JOHNSON, *supra* note 236, at 19.

474. IGF, *supra* note 85, at 84; see, e.g., U.S. Model BIT, *supra* note 46, art. 8(1)(f).

state that neither party can mandate or enforce, as a condition to an investment, a requirement to “transfer a particular technology, a production process or other proprietary knowledge.”⁴⁷⁵ Interestingly, the BIT between the United States and Rwanda provides a caveat clarifying that this requirement should not be construed to prevent any party from enforcing a requirement to employ or train workers in its territory, provided that such employment or training does not result in the “transfer of a particular technology, a production process, or other proprietary knowledge to a person in its territory.”⁴⁷⁶ This clarification allows for the use of employment, as well as skills and capacity building as local content tools. BITs can also further restrict market access requirements concerning the formation of entities by restricting requirements on the nationality of board members and senior management in entities.⁴⁷⁷ Notably, the 2012 U.S. Model BIT allows for a party to require that the majority of the board of directors of a covered investment “be of a particular nationality, or resident in the territory of [a] Party [to the agreement], provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.”⁴⁷⁸ This approach could allow for more local representation in projects. The obligations arising from BITs must be read in concert with the obligations arising from international trade agreements in framing the parameters of possible local content requirements.

*C. The Available Policy Space for Local Content Requirements
Within the Context of the WTO Agreements*

Currently, forty-four of Africa’s fifty-four countries are Members of the WTO,⁴⁷⁹ of which thirty-four have ratified the AfCFTA,⁴⁸⁰ nine have signed the agreement and have ratification pending, one has parliamentary approval for ratification pending,⁴⁸¹ and the nine African countries currently seeking to accede to the WTO are signatories to the AfCFTA.⁴⁸² Essentially, all of the WTO’s African Members currently are or will be AfCFTA State Parties. As a result of the WTO agreements, WTO Members and all AfCFTA State Parties are left with limited options when devising local content requirements. When considering and developing local content requirements outside of the realm of providing subsidies, which would be effective in spurring both productivity and diversification whilst remaining compliant

475. U.S.-Rwanda BIT, *supra* note 463, art. 8(1)(f); *see* U.S.-Mozam. BIT, *supra* note 463, art. VI(e).

476. U.S.-Rwanda BIT, *supra* note 463, art. 8(1)(f) n.13.

477. *See, e.g., id.* art. 9(1).

478. U.S. Model BIT, *supra* note 467, art. 9(2).

479. WTO, *supra* note 289.

480. TRALAC, *supra* note 13.

481. *Id.*

482. WTO, *supra* note 21.

with the WTO agreements, it is important to focus on whether the requirements would modify the conditions of competition or provide an advantage, and whether compliance with the requirement is necessary to obtain the advantage. Policymakers should consider such factors as they develop local content policies as WTO panel decisions have already held that local content measures constitute investment and trade-related measures even when they are not constructed to affect trade-like activities. The panels' decisions hinge on this analysis.

The AfCFTA's State Parties are left with limited options when devising local content requirements. The local content tool with the widest possibilities in the context of international trade agreements is the requirement of skills training, as it is not restricted by such agreements. Skills development allows for greater participation in projects and economies as a whole; it can result in an increased pool of potential local employees as well as professional progression amongst local employees. Furthermore, capacity building can "improve the absorptive capacities for (targeted) local content measures,"⁴⁸³ thereby having a spillover effect that results in the creation of linkages such as the development of local suppliers as employees develop different trades and production skills.⁴⁸⁴ Skills development can also be achieved by requiring investors to contribute to government funds focused on training locals in the sectors relevant to the investor's and the country's industrial policy, such as in the case of Ghana's Local Content Fund and Namibia's Petrofund.⁴⁸⁵ Some countries may also have domestic economic policies that prevent their government's engagement and investment with respect to national resources or strategic projects that would result in a loss of jobs to locals. Such a policy would be part of a government's considerations for engagements in some projects and would also indirectly have an impact on further developing skills and capacity by encouraging the incorporation of skills development in projects that may require government participation.

The impact of skills development can also be achieved and enhanced through technology transfer requirements (if not prohibited by a BIT) as locals are exposed to and trained to use new technology. However, "technology transfer [also] requires adequate absorptive capacity in the host country, and government support for education and training is fundamental for developing that capacity."⁴⁸⁶ Notably, requiring local equity participation, the use of joint-ventures, and certain activities to be conducted in host countries (if not prohibited by a BIT), to the extent that they concern trade in goods, are also potential tools to develop skills and build capacity.⁴⁸⁷

483. JOHNSON, *supra* note 236, at 10.

484. *See id.* at 10–11.

485. *See supra* pp. 82–83.

486. JOHNSON, *supra* note 236, at 11.

487. *Id.* at 16.

Skills development and the transfer of technology are likely to result in an increase in economic productivity, innovation, and diversification in production outputs, all of which would result in increased productive capacity, allowing countries to become integrated into regional and global value chains, and increase regional trade flows within the AfCFTA.

Such requirements would also help countries make progress in achieving the Sustainable Development Goals (“SDGs”), especially SDG 8, which aims to “Promote Sustained, Inclusive and Sustainable Economic Growth, Full and Productive Employment and Decent Work for All.”⁴⁸⁸ More specifically, local content requirements aimed at skills development and the transfer of technology would help countries achieve SDG 8.2, which aims to “achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high-value added and labour[-]intensive sectors.”⁴⁸⁹ Such requirements would also put countries in a better position to achieve, at least in part, SDG 8.3, as they strive to “promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services.”⁴⁹⁰ They would also help countries “promote inclusive and sustainable industrialization and foster innovation” in accordance with SDG 9.⁴⁹¹

In terms of market entry requirements, in sectors which a country has included in its Schedule of Commitments under GATS, there is limited room for countries to employ local content tools. However, countries could be suggestive rather than prescriptive with their requirements, suggesting that investors maximize their capacity to employ locals, use local services, or partner with locals in forming legal entities, to the extent that they meet requisite standards and requirements, and doing so is economically feasible.⁴⁹² Schedules of Commitments, and more significantly, the ability of countries to make specific commitments in certain sectors and not others, allows for a more flexible application of local content requirements with respect to trade in services.

488. *Sustainable Development Goal 8: Promote Sustained, Inclusive and Sustainable Economic Growth, Full and Productive Employment and Decent Work for All*, U.N. DEP’T ECON. & SOC. AFFS., <https://sdgs.un.org/goals/goal8> (last visited March 9, 2021).

489. *Id.*

490. *Id.* This article notes that these forms of local content requirements would not address the part of Sustainable Development Goal 8.3 that concerns access to financial services.

491. *Sustainable Development Goal 9: Build Resilient Infrastructure, Promote Inclusive and Sustainable Industrialization and Foster Innovation*, U.N. DEP’T ECON. & SOC. AFFS., <https://sdgs.un.org/goals/goal9> (last visited March 19, 2021).

492. *See supra* p. 83–84 (discussing Botswana and Tanzania’s application of suggestive requirements for local employment in the natural resources sector).

Even in cases where countries are otherwise restricted, such as by their Schedule of Commitments, local industries can be supported through government procurements conducted in accordance with the exceptions for government procurements under the GATT, the GATS, and the TRIMs Agreement.⁴⁹³ An example of a government's policy on procurements supporting local industries is Australia's Indigenous Procurement Policy. Australia introduced this policy in 2015, which mandates preferences and support for indigenous-owned enterprises for government procurements with the aim of stimulating indigenous entrepreneurship and economic participation.⁴⁹⁴

In terms of local content requirements targeting procurement activities involving the private sector, the restrictions under the TRIMs Agreement concern measures that: 1) require firms to use local goods;⁴⁹⁵ 2) "impose quantitative restrictions on imports or exports of goods";⁴⁹⁶ and 3) "bar[] firms from exporting unprocessed raw materials."⁴⁹⁷ Therefore, countries have to look to other local content tools that would increase local participation in procurements, in terms of the use of local products, and that would support the development and competitiveness of local goods and local production.⁴⁹⁸ Such tools would also contribute to the achievement of the aforementioned SDGs.

Some countries have required foreign investors to provide some form of an industry participation or local content plan.⁴⁹⁹ Plans describe how an investor intends to incorporate and provide fair opportunities for local participation.⁵⁰⁰ Such plans allow companies to describe how they intend to account for local participation in projects through procurement, as well as through employment or skills training, thereby addressing two local content objectives.⁵⁰¹ A plan could also include a description of how an investor intends to support the integration of local industries into the supply chains of the project and into global supply chains generally.⁵⁰² The requirement to provide a plan does not need to be prescriptive in terms of its required

493. See *supra* pp. 97–98, 102.

494. *Indigenous Procurement Policy December 2020*, NAT'L INDIGENOUS AUSTRAL. AGENCY 8, <https://www.niaa.gov.au/sites/default/files/publications/ipp-guide.pdf>.

495. TRIMs Agreement, *supra* note 292, Annex ¶ 1(a); JOHNSON, *supra* note 236, at 16.

496. JOHNSON, *supra* note 236, at 16; TRIMs Agreement, *supra* note 292, Annex ¶ 1(b).

497. JOHNSON, *supra* note 236, at 16.

498. See *id.* at 16, 18.

499. See, e.g., Ghana Local Content Regulations, *supra* note 209, art. 7; see, e.g., *Australian Jobs Act 2013* (Cth) s 17 (Austl.).

500. See, e.g., Ghana Local Content Regulations, *supra* note 209, arts. 9, 4(7); see, e.g., *Australian Jobs Act*, *supra* note 501, ss 34–35.

501. See, e.g., Ghana Local Content Regulations, *supra* note 209, art. 9.

502. See, e.g., *Australian Jobs Act*, *supra* note 499 s 36(1)(f); see also Ghana Local Content Regulations, *supra* note 209, art. 9.

content, such as setting local content targets in the form of mandatory or numerical targets, and should not be the basis of the selection of an investor. For example, a requirement could be that a plan be submitted within a specified number of days before a project's trigger date followed by its approval by the relevant authorities.⁵⁰³ Prescriptive terms and selection criteria could encroach on violations of international trade agreements. Many countries take the requirement of plans a step further, requiring their publication and the submission of regular, perhaps annual, reports detailing progress made on the industrial and local content plans.⁵⁰⁴ The requirement of the publication of plans encourages accountability and provides awareness with respect to available opportunities amongst local participants. The need to consistently report on progress and the publication of plans may also put pressure on companies to comply with them, thus incentivizing companies to use more local goods, services, and employees.

Typically, in large scale projects, in particular those in the extractives sector, investors are required to provide procurement plans for the duration of the project, identifying procurements required at each stage of the project.⁵⁰⁵ Plans can include information about employment and training specifications of skills needed and local skills shortages, as well as goods and services needed and local shortages. Procurement plans allow governments to foreshadow investment needs at different stages of projects and therefore invest in advance in the development of skills to produce specific goods and services, and in the development of relevant sectors generally, through support initiatives provided to local participants.

Additionally, some countries require investors to ensure the fair participation of local participants in procurements, thus ensuring that they are provided the same opportunity as global suppliers to compete on an equal and transparent basis.⁵⁰⁶ These countries require that notices of procurements are made accessible to local suppliers and require investors to ensure that local suppliers are provided a reasonable time to tender.⁵⁰⁷ Investors are expected to ensure that tenders are free from non-market burdens that might rule out local participants and that they are structured in such a way as to allow participation.⁵⁰⁸

In some jurisdictions, such as in Australia, investors in major projects (defined as projects with a capital expenditure equal to or greater than \$500 million Australian dollars)⁵⁰⁹ are required to conduct awareness programs

503. See, e.g., *Australian Jobs Act*, *supra* note 499, ss 17, 18.

504. See, e.g., *id.* s 25.

505. See, e.g., *Ghana Petroleum Act*, *supra* note 197, § 27.

506. See, e.g., *Australian Jobs Act*, *supra* note 499, s 35.

507. See, e.g., *id.*

508. See, e.g., *id.*

509. *Id.* s. 8(1)(2).

and publicize opportunities to supply goods and services.⁵¹⁰ Investors are expected to ensure that local entities are able to compete by publishing required procurement standards and expectations in relation to the key goods or services required for the project.⁵¹¹ The Australian Jobs Act also requires investors to provide feedback to unsuccessful local bidders, which must include recommendations for relevant training, and “relevant skills capability and capacity development.”⁵¹² Investors could also be required to form business development task forces, as has been the case in some Australian states.⁵¹³ These task forces would serve the purpose of informing locals of contracting opportunities and consider opportunities more suited for local contracting.⁵¹⁴ They could also develop business support initiatives and incubation services to develop local industries.⁵¹⁵ The use of procurement plans and their publication, and requirements ensuring local businesses are able to compete and are aware of procurement opportunities along project value chains, as well as requirements that promote skills and capacity development, present opportunities for local content requirements to develop the productive capacity needed for State Parties to fully participate in intraregional trade under the AfCFTA.

D. *The Development Impact of Local Content Requirements: Is It Time to Revisit the WTO Agreements’ Local Content Restrictions?*

Although some policy space remains under WTO agreements for countries to adopt local content requirements, their actions are limited in terms of what local content tools remain permissible. Despite restrictions, “[l]ocal content policies have been and continue to be used by countries of all income levels, in different sectors, and with varying levels of success in achieving their policy aims of maximizing the benefits that foreign direct investment can, but does not necessarily, bring.”⁵¹⁶ This is in part due to the enforcement mechanisms of WTO agreements, which are only triggered when countries bring claims against one another before WTO panels, alleging a violation of an agreement.⁵¹⁷ In addition, the preferred approach

510. *Id.* s 36.

511. *Id.* ss 35–36.

512. *Id.* s 35(g).

513. *See, e.g., Native Title Report 2006: Chapter 5: The Argyle Participation Agreement*, AUSTL. HUM. RTS. COMM’N, <https://humanrights.gov.au/our-work/native-title-report-2006-chapter-5-argyle-participation-agreement#endnote26> (last visited March 8, 2021) (discussing the terms of the Argyle Diamond Mine Participation Agreement, “a registered Indigenous Land Use Agreement (ILUA) between Traditional Owners of the East Kimberley region of Western Australia, the Kimberley Land Council and Argyle Diamond Mine.”).

514. *See, e.g., id.*

515. *See, e.g., id.*

516. JOHNSON, *supra* note 236, at 7.

517. *See* Understanding on Rules and Procedures Governing the Settlement of Dispute art. 3(7), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization,

under the WTO is for countries concerned to consult and attempt to settle the disputes amongst themselves before resorting to the Dispute Settlement Body, which is responsible for ultimately forming panels to resolve disputes.⁵¹⁸ Furthermore, diplomatic, political, and economic interests, as well as the costs associated with filing claims, often act as a deterrent to bringing forward such claims.⁵¹⁹

However, in many cases, international agreements remain a deterrent for countries to develop and implement local content requirements.⁵²⁰ The limitations imposed on the policy space with respect to the development of local content requirements, in contrast with the development that the use of local content can stimulate and the substantial progress it can help countries make toward achieving the Sustainable Development Goals (SDGs) raises questions. Specifically, it “raises questions about whether and to what extent [these] treaties are consistent with the policies and policy space needed in this new era of sustainable development.”⁵²¹ Local content requirements can help countries develop industries, diversify their economies, develop and participate in value chains, and in turn spur sustainable development. According to a United Nations Industrial Development Organization (“UNIDO”) Report, “Africa’s Manufactured Value Added (MVA) accounted for just 1.6 [percent] of the global total in 2014.”⁵²² While studies have shown that “a country’s growth in terms of its participation in [global value chains] is correlated with higher rates of economic growth in general,”⁵²³ this is especially true where the use of local inputs in exports are concerned.⁵²⁴ The cases of the Asian success stories and Norway, as

Annex 2, 1869 U.N.T.S. 401. Note that disputes concerning local content restrictions between countries and investors arising from BIT provisions are settled in accordance with the dispute resolution clauses of the BITs, which generally require arbitration proceedings. *See, e.g.* U.S. Model BIT, *supra* note 467, art. 34.

518. *Understanding the WTO: Settling Disputes, A Unique Contribution*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited March 12, 2021). Consultation and mediation remain an option even when a case has advanced to different stages. *Id.*

519. *See generally* JOHNSON, *supra* note 236, at 16 (discussing enforcement under the TRIMs Agreement).

520. *See supra* p. 110–11 (discussing the number of claims brought before the WTO alleging local content violations on the part of developing countries).

521. JOHNSON, *supra* note 236, at 15.

522. Ministerial Conference 2017, *supra* note 452, at 2.

523. JOHNSON, *supra* note 236, at 14 (citing UNCTAD, WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT 151 (2013) https://unctad.org/system/files/official-document/wir2013_en.pdf).

524. *Id.* at 14 n.34 (stating that “[o]ne study found that backward participation (that is, the extent to which domestic firms use foreign inputs in exports) is not correlated with income level while ‘countries with higher per capita GDP tend to have higher forward participation ratios’ capturing the extent to which a country’s exports are used as inputs in products exported by other countries.”).

previously discussed, are striking examples of this.⁵²⁵ In the extractives sector, data on spending by the companies British Petroleum and Anglo American showed that they spent “an estimated 87% and 64%, respectively, of total value created on suppliers in 2014.”⁵²⁶ In contrast, they spent two percent and eleven percent, respectively, of total value created on tax and royalty payments.⁵²⁷ This data demonstrates the potential value of developing production linkages and value chains through local content requirements, and their potential to contribute to sustainable economic development.

The Marrakesh Agreement Establishing the World Trade Organization cites attaining sustainable development as one of its key objectives and recognizes the

need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.⁵²⁸

However, the divergent directions of some international trade requirements, namely those which concern restrictions on local content requirements which were used by many developed countries⁵²⁹ prior to the adoption of WTO agreements, and the policies that are needed to support development, raise a crucial question: Do “trade and investment treaties leave [] governments adequate policy space to achieve agreed upon development objectives,”⁵³⁰ and in many cases, development objectives agreed upon at the global level? It may be time for international trade regimes to be revisited to ensure that they support an enabling international economic environment for sustainable development.

The time-barred waiver of the “Most-Favoured-Nation Treatment” clause under the GATT, the tariff and quota concessions, the allowances afforded by the balance-of-payments provisions—which can solely be used to attain an economic equilibrium and explicitly can’t be tied to sector or industry development, the non-obligatory nature of the concessions developed countries can provide developing countries, and the expired transitional periods for the implementation of the TRIMs Agreement leave little space for countries to develop policies that are likely to promote sustainable economic growth. These waivers and concessions are unlikely to result in the development of local skills, increased local participation, and enhanced local productive capacity, all of which are necessary requirements

525. See *supra* pp. 86–87, 90–91.

526. JOHNSON, *supra* note 236, at 9.

527. *Id.*

528. WTO Agreement, *supra* note 288, pmbl.

529. JOHNSON, *supra* note 236, at 9, 15.

530. *Id.* at 15.

for a country to attain long-term sustainable development. These requirements are also necessary to spur the innovation, industry development, diversification, value chain creation, and integration that is needed for many African states with low levels of productivity and nascent industries to successfully trade under the AfCFTA.

VI. WILL THE AfCFTA DISPLACE FOREIGN PARTNERSHIPS?

At the outset, it may seem as though Africa's long-standing traditional trading partners might be displaced by increased intra-African trade, but this is unlikely, as increased intraregional trade will result in several developments which would be attractive to foreign investment. For example, greater productive capacity and larger markets could spur demand for non-regional goods, services, and product inputs as regional supply chains develop.⁵³¹ It is estimated that the increase in the domestic production of consumer and capital goods in Africa could have significant multiplier effects on G20 economies, amounting to almost \$315 billion USD in value resulting from investment and the consumption of goods.⁵³² It is also estimated that this would result in the generation of 7.5 million jobs in G20 economies.⁵³³ In addition, reduced production costs across Africa due to economies of scale, the result of a larger continental market, could be attractive to foreign investors, especially those interested in shifting toward the production of industrial and manufactured goods, which would provide a further boost to intraregional trade.

Such investments could have an even greater impact on development across African countries if conducted in partnership with local businesses, contributing to the growth of local capacity and local production. There are opportunities for joint investment, either through intracontinental private sector partners or through public-private partnerships, the impact of which is felt and seen beyond the financial investment. Partnerships could also result in spillover effects, which "occur when the ownership of investment projects is shared between domestic and foreign firms, for in such cases[,] foreign firms are more likely to source their suppliers locally and so would be more willing to share their technology since this can improve the performance of their suppliers, whereas wholly owned affiliates would tend to import their inputs."⁵³⁴ Such spillover effects would contribute even further to the growth of local businesses and industries, which could enhance trade participation under the AfCFTA.

Furthermore, as infrastructure remains a major bottleneck in the successful implementation of the AfCFTA, foreign investment in this sector

531. WILLIAMS & COOK, *supra* note 5, at 2.

532. AFR. DEV. BANK GRP, AFR. ECON. OUTLOOK 89 (2018).

533. *Id.*

534. Nwapi, *supra* note 153, at 16–17.

will be needed and encouraged to address this obstacle. Moreover, the effective implementation of the AfCFTA could help “reduce[] uncertainty over trading rules and market access” within and among African countries, thereby improving the African business environment.⁵³⁵ In doing so, making the AfCFTA “an essential ingredient to unlocking private sector decisions to expand existing and start new businesses to take advantage of the agreement.”⁵³⁶

Development finance institutions and partner countries could also provide support in private sector development, for example in developing and scaling manufacturing. This support would help countries to develop sectors and industries, diversify their industries and production, and contribute to regional and global value chains, thereby contributing to the effectiveness of the AfCFTA. Additionally, by requiring large projects to use local content, whether through the recruitment of local employees, training of local employees, or the transfer of technology, development partners could not only support skills development, but also support private sector development and the development of tradable goods and services. Local content requirements, especially as they concern local skills development through the employment of locals, are unlikely to contravene with partner countries’ possible policy prohibitions on promoting sectors that would result in job losses at home.

Both national and multilateral development agencies could also provide technical assistance and support capacity building with respect to trade facilitation and other trade-related matters, which would help with the implementation of the AfCFTA.⁵³⁷ Furthermore, development agencies that push for reforms intended to produce sustainable economic growth could also consider advocating for some of the policy reforms necessary to produce a favorable trading and business environment in the African countries with which they engage. Such reforms would not only support the implementation of the AfCFTA but would also support private sector development and FDI in the region. Overall, showing an interest in and finding ways to support the AfCFTA could improve relations between partner countries which would go a long way in promoting FDI and global SDGs.

535. ABREGO ET AL., *supra* note 19, at 27.

536. *Id.*

537. See AfCFTA, *supra* note 12, art. 29 (Protocol on Trade in Goods), art. 27 (Protocol on Trade in Services) (discussing how the Secretariat and State Parties will work with each other, RECs, and development partners to provide technical assistance and capacity building with respect to trade facilitation and other trade-related matters); see, e.g., DEUTSCHE GESELLSCHAFT FÜR INTERNATIONALE ZUSAMMENARBEIT (GIZ) GMBH, *supra* note 7 (discussing GIZ’s cooperation with the International Trade Centre’s SheTrades Initiative which “aims to embed a gender sensitive approach into the negotiating process.”).

VII. CONCLUSION

While the implementation of the AfCFTA does not guarantee intraregional trade, it does provide an incentive for governments to make trade with State Parties under the Agreement more attractive and accessible.⁵³⁸ However, there are existing bottlenecks which stand in the way of the AfCFTA achieving its full potential. One such bottleneck is the limited availability of tradable goods resulting from limited productive capacity. Although international trade agreements impose limitations on the extent of their use, local content requirements present an avenue for sectors and industries to develop by strengthening productive capacity to produce more local goods and services for export. As sectors and industries develop, local content requirements could also contribute to the integration of African economies into global value chains and, perhaps more importantly, they could contribute to the development of regional value chains in the long term, thereby spurring sustainable economic development. The potential impact of local content requirements on economic development raises questions as to whether international trade restrictions on their use should be revisited. Local content requirements are a long-term solution, and while they are not the only solution, they present a sustainable solution which must be coupled with complementary and supportive measures. They present an avenue to capitalize on investments in order to develop additional and sustainable growth beyond the life of the asset, project, and the resource. As African governments look to seize the benefits presented by the AfCFTA for their countries, they should use this opportunity to address many of the bottlenecks that could impact the overall effectiveness of the AfCFTA, thereby pushing their countries forward and allowing their countries to reap the full benefits of their participation in intraregional trade.

538. Hartzenberg, *supra* note 14.