



Implications of the African Continental Free Trade Area for Trade and Biodiversity: Policy and Regulatory Recommendations



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For further information on UNCTAD's BioTrade Initiative, please visit <https://unctad.org/biotrade> or contact the BioTrade team at biotrade@unctad.org.

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Acronyms and abbreviations

AfCFTA	African Continental Free Trade Area
AFRAC	African Accreditation Cooperation
ARIPO	African Regional Intellectual Property Organization
ARSO	African Organization for Standardization
BIAT	Boosting Intra-Africa Trade
BIT	bilateral investment treaty
CAC	Codex Alimentarius Commission
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
EAC	East African Community
ECOWAS	Economic Community of West African States
FDI	foreign direct investment
FTA	free trade area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GISA	Continental Strategy for Geographical Indications in Africa 2018–2023
HS	Harmonized Commodity Description and Coding System
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO)
IIA	international investment agreement
ILO	International Labour Organization
IPPC	International Plant Protection Convention
IPRs	intellectual property rights
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
LDC	least developed country
NTB	non-tariff barrier
NTM	non-tariff measure
OAPI	African Intellectual Property Organization
OAU	Organization of African Unity
OIE	International Office of Epizootics
PAIC	Pan-African Investment Code
PAIPO	Pan-African Intellectual Property Organization
P&C	Principles and Criteria (of BioTrade)
PPM	processes and production methods
PVP	plant variety protection
RTA	regional trade agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SDG	Sustainable Development Goal
SPS	sanitary and phytosanitary
TBT	technical barriers to trade
TFA	Trade Facilitation Agreement
TRIPS	trade-related aspects of intellectual property rights
UEBT	Union for Ethical BioTrade
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Executive Summary

On 5 December 2020, the African Union Heads of States and Government decided to launch trade¹ in goods under the African Continental Free Trade Area (AfCFTA) on 1 January 2021. On the basis of the reciprocal offers already extended and the State Party's "customs-readiness" during phase I negotiations, this interim arrangement will continue while Rules of Origin (RoO) and tariff concessions negotiations are expected to be concluded in Q2 2021; phase II negotiations to adopt protocols on competition policy, investment and intellectual property rights (IPRs) are currently underway (Tralac, 2021).

This study investigates the nexus between trade in biodiversity, specifically on the legal and sustainable trade of biodiversity-based goods and services (including BioTrade), and the existing commitments under the framework of the AfCFTA. It seeks to identify potential entry points to enable legal and sustainable trade in biodiversity/BioTrade to support AfCFTA through future commitments, including in market access, services, investment, intellectual property rights (IPR), and competition policy. While sustainable socioeconomic development is one of the general objectives of the AfCFTA, the link between trade and environment was not fully developed under commitments negotiated up to December 2020. In particular, the content needed to address sustainability had not yet been fully achieved. The AfCFTA Agreement would benefit from the inclusion of sustainable development considerations into the protocols being negotiated in phase II,² as well as from the introduction of a specific protocol on trade and environment, with BioTrade as one of its components. This study presents short- and longer-term recommendations with a view to transform the AfCFTA Agreement into an enabler of legal and sustainable trade in biodiversity/BioTrade as a key driver for development in Africa.

BioTrade is understood as activities related to the collection, production, transformation and commercialization of goods and services derived from biodiversity (genetic resources, species and ecosystems) under environmental, social and economic sustainability criteria known as the BioTrade Principles and Criteria (P&C) (UNCTAD, 2020a). BioTrade activities have been implemented in over 25 countries in Africa by partners and practitioners in the personal care and food industries, who produce and trade products as diverse as argan oil, baobab pulp, honey, marula oil and shea butter.

The COVID-19 pandemic and the ensuing economic crisis are undermining prospects for global growth and damaging fast-growing African economies. In this context, sustained actions are needed to help African countries 'build forward better' by establishing a green development pathway (UNECA, 2020, p.4).

The pandemic has had negative impacts on the economic use of nature-based products and services. Many biodiversity-based sectors, such as ecotourism in coastal and protected areas, have been greatly affected. Policymakers see an opportunity to decouple growth from environmental degradation and invest in green industries as part of sustainable recovery strategies. Such investments can build on and embed shifts in human behavior already under way. Fast-track green policies could include natural capital spending through afforestation, expanding parkland, and enhancing rural ecosystems (UNCTAD, 2020b, p.96).

The most difficult aspect of a green economic recovery will be orchestrating a just transition for those impacted by a shift away from unsustainable practices or industries. As African countries move towards economic recovery, they can identify where the activities and jobs of the future may be, and focus on these opportunities, including in biodiversity-based solutions like BioTrade (UNCTAD, 2020b, p.104). The latter is particularly relevant as many African countries have a comparative advantage in biological resources, and a majority of the African population depends directly on biodiversity and ecosystem services for their livelihoods. Africa has the opportunity to use the historic AfCFTA Agreement to achieve a continental-wide economic recovery and create more sustainable, resilient and inclusive societies, thus contributing to achieving the goals of the African Union's Agenda 2063 – the Africa We Want. As an immediate step, parties to the Agreement Establishing the AfCFTA can start the implementation phase in 2021 with a focus on adhering to existing commitments in an environment-friendly way, so that Africa can produce more sustainably, engage in trade-related activities that promote both economic recovery and environmental sustainability, and chart a clear path towards a greener transition (Thomson Reuters Foundation News, 2020).

Trade in goods

The AfCFTA Protocol on Trade in Goods aims to boost intra-African merchandise trade through several means. The first is the progressive elimination of tariffs and non-tariff barriers (NTBs). To realize the benefits of this first aim, the protocol seeks enhanced efficiency of customs procedures, trade facilitation and transit. It also aims to enhance cooperation on technical barriers to trade and sanitary and phytosanitary measures. The intended result is the development and promotion of regional and continental value chains, and enhanced socioeconomic development, diversification and industrialisation across Africa. Special efforts are needed to liberalize trade in environmental goods to spearhead efforts on improving environmental conservation and sustainable use practices.

Although the Protocol on Trade in Goods is in place, the completion of phase I negotiations on tariff commitments and rules of origin is urgently needed (UNECA et al., 2019, p.xii). In developing their tariff proposals, AfCFTA members should reflect on how to enable legal and sustainable trade in biodiversity/BioTrade and support the creation of regional and continental biodiversity-based value chains through targeted tariff reductions. The work of the United Nations Conference on Trade and Development (UNCTAD) on BioTrade-relevant codes of the Harmonized Commodity Description and Coding System (HS)³ could contribute to the identification of tariff lines for this purpose. In addition, cooperation on developing standards appropriate to the African context can be pursued through African institutions, including the African Accreditation Cooperation (AFRAC) or the African Organization for Standardization (ARSO), to simplify sanitary and phytosanitary requirements, and reduce technical barriers to trade.

With appropriate tariff reductions and cooperation towards the elimination of NTBs, the implementation of trade facilitation measures – like an NTB reporting mechanism or a simplified trade regime for small traders and capacity-building can be used to their full extent to increase intra-African flows of biodiversity/BioTrade goods and create sustainable regional and continental value chains (UNECA et al., 2019, p.xiii), thereby supporting enhanced socioeconomic development, diversification and industrialization across Africa.

Trade in services

Continental integration of markets for services can contribute significantly to economic activity, as services make a sizable contribution to gross domestic product (GDP) growth in Africa (UNECA et al., 2019, p.xiii). Liberalizing trade in environmental services of relevance to BioTrade, such as business and finance services, would facilitate the creation of BioTrade businesses, further enable the emergence of service providers and related projects. Given the emphasis placed in the Agenda 2063 on growing tourism and ecotourism, and the focus on reversing the loss of forests, biodiversity and natural habitats loss, governments should ensure that specific attention is devoted to facilitating the provision, regulation and delivery of services that enable the development of services, such as ecotourism and REDD+ projects. The AfCFTA Protocol on Trade in Services provides a sound basis for capacity development activities for the cross-border provision of services, which should be pursued to maximize the benefits resulting from the specific commitments negotiated on trade in services.

Intellectual property rights (IPRs)

An intellectual property protocol will provide an opportunity to advance a continental approach to intellectual property that responds to the United Nations' 2030 Agenda for Sustainable Development and the African Union's Agenda 2063. Noting that regional preferential agreements are not exempt from the terms of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO),⁴ a viable AfCFTA protocol could provide clarity on a series of issues relevant to BioTrade. First, it could provide guiding principles for national intellectual property laws and policies, and engagement in relevant international treaties. Second, a protocol could provide minimum requirements on the protection of traditional knowledge, genetic resources, and cultural expressions, while allowing for flexibility to adapt domestic laws and policies in relation to developments and outcomes of negotiations within the World Intellectual Property Organization (WIPO). Third, a protocol could establish norms for the protection of geographical indications through either a *sui generis* system, or through certification and collective marks. Fourth, a protocol could establish minimum standards for plant variety protection, including on its availability, scope, exceptions, and especially the protection

of traditional and new farmers' varieties. Fifth, a protocol could address matters related to intangible cultural heritage. Negotiations over IPRs will be highly controversial and, in consequence, should be open, transparent and inclusive. This could include broad public consultations and debates, as well as iterative capacity-building for key stakeholders (UNECA et al., 2019).

Investment

The AfCFTA offers an important opportunity to increase investment in areas relevant to legal and sustainable trade in biodiversity/BioTrade, such as those supporting the development of new and value-added biodiversity-based goods and services under BioTrade P&C, as well as targeting activities such as nature-based tourism (e.g., ecotourism) and forestry-based carbon credit (e.g., REDD+) activities. Moving forward, the Pan-African Investment Code (PAIC) and other instruments discussed in this study establish a sound basis for the development of an investment protocol that strikes a better balance between investor protection and the rights of governments to regulate in the public interest for sustainable development.

Competition policy

Competition policy will be an important driver of growth of competitive markets in Africa by working to address prevalent cross-border anti-competitive practices (UNECA et al., 2019, p.xv). The competition protocol to be agreed as part of the second phase of the AfCFTA negotiation process should cover the main substantive competition areas, embrace consumer protection in a dedicated chapter, and develop enforcement arrangements – whether a supranational competition authority, a competition cooperation framework, or a sequential approach in which a supranational authority follows the cooperation framework. The relationship between the AfCFTA investment and competition protocols will need to be considered, which could be based on the PAIC's call for member States to promote, maintain and encourage competition, prohibit anti-competitive investment conduct, and adopt clear and transparent competition rules (UNECA et al., 2019).

Ensuring competition is particularly important for BioTrade due to the vital role played by micro, small and medium-sized enterprises (MSME) in biodiversity-based sectors.

Way forward

The table below summarizes key opportunities and challenges for BioTrade and the trade of biodiversity-based products and services, in the context of the AfCFTA Agreement.

Key recommendation

- Specific trade and environment considerations and recommendations, including on the legal and

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