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WRITE-UP

INTERNATIONAL TRADE RELATIONS AFTER THE COVID-19 PANDEMIC: AFRICA RISING?

By

ALEX ANSONG

Senior Lecturer & Acting Dean, GIMPA Faculty of Law.

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Alex Ansong

I. INTRODUCTION

The outbreak of the COVID-19 pandemic has had a chilling effect on international trade flows. The World Trade Organization for example estimates that global trade will plunge by between 13% to 32% in 2020.[1] Recovery in the global economy is uncertain as the lifting of some state-imposed restrictions on economic activities will most likely hinge on the discovery of a vaccine or medicine to tackle the spread and effect of COVID-19. Even as states ease restrictions on social gatherings and economic activities, the general public will most likely self-impose restrictions on their social and economic engagements. Such self-imposed restrictions on social and economic engagements that the general public may deem non-essential will almost invariably have economic implications for some sectors of the economies of states. Notable among such sectors is the leisure and its allied industries. As things stood, in 2020, almost all regions of the world experienced a double-digit decline in trade volumes with Asia and the Americas being the hardest hit regions.[2]

The World Bank's Africa Pulse Report found that the economic impact of COVID- 19 will likely result in the first recession in Sub-Saharan Africa in the past 25 years.[3] Economic growth will diminish into the negatives. If these bleak economic predictions materialize fully, it will plunge millions into dire poverty.[4] Thus, while comparatively and relatively Africa has so far been largely spared the ravages of the health impacts of the pandemic, the economic impact will be very serious. Trading under the African Continental Free Trade Area Agreement (AfCFTA) was set to commence in July 2020. However, due to the outbreak of the COVID-19 pandemic, the commencement of trading has been postponed to January 2021. In the post- COVID era, an ambitious engagement in trading globally and more specifically in the AfCFTA potentially hold enormous advantages for Africa's economic recovery. It is hoped that the long trumpeted clarion call for Africa's rising will materialize under the AfCFTA in the post-COVID-19 era and bear tangible economic fruits for the peoples of Africa.

II. THE GLOBAL REGULATORY FRAMEWORK IN INTERNATIONAL TRADE

While the coming into effect of the AfCFTA, holds positive prospects for Africa's contribution

1 https://www.wto.org/english/news_e/pres20_e/pr855_e.htm.
2 Ibid
3 https://www.worldbank.org/en/news/video/2020/04/13/africas-pulse-the-economic-impact-of- COVID-19-coronavirus-in-africa.
4 Ibid.

to international trade, an overwhelming majority of African countries[5] are already members of the most global regulatory framework in international trade which comes under the competence of the World Trade Organization (WTO). The WTO's regulatory reach in international trade covers three main substantive areas – trade in goods,[6] trade in services,[7] and trade-related aspects of intellectual property rights.[8]

The WTO regime on trade in goods is the most developed in the international trade system. It covers 13 treaties or multilateral trade agreements dealing with subjects like subsidies,[9] anti-dumping measures,[10] agriculture,[11] technical barriers to trade,[12] and trade facilitation.[13] Of the 13 treaties or multilateral trade agreements dealing with goods, 12 focus on specific subject matters on goods. These 12 subject-specific treaties or multilateral trade agreements can thus be referred to as lex specialis regimes as they do not regulate the broad subject matter of trade in goods, but rather specific issues under goods, like subsidies or dumping. The General Agreement on Tariff and Trade 1994 (GATT 1994) is the only multilateral trade agreement that broadly regulates the subject matter of goods. Due to its general regulation of trade in goods, it can be termed as a lex generalis regime. In addition to the 13 treaties or multilateral trade agreements on goods, the General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) form the three-pillar structure upon which the WTO's regulation of international trade is based – i.e. goods, services and intellectual property rights. The Dispute Settlement Understanding and the Trade Policy Review Mechanism are the other two multilateral trade agreements in the WTO that do not specifically regulate the actual conduct of trade. The stated agreements that regulate both substantive and non-substantive matters in international trade are classified as multilateral trade agreements because they are binding on all WTO members.[14]

While the WTO regulatory regime is composed of many Multilateral Trade Agreements, the two most fundamental principles that weave through the entire fabric of this legal system are the non-discrimination and market access rules. Under the rule on non-discrimination, the most favoured nation (MFN) principle obliges WTO members to grant to other members the most

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5 44 African countries.
6 There are 13 treaties or, to use WTO law parlance, Multilateral Trade Agreements (MTAs), that regulate the sub ject matter of trade in goods. These MTAs have been annexed to the WTO Agreement under Annex 1A. Thus all the Annex 1A MTAs regulate trade in good.
7 The General Agreement on Trade in Services (GATS) is the Multilateral Trade Agreements that regulates trade in services. The GATS has been annexed to the WTO Agreement under Annex 1B.
8 The Agreement on Trade Related Aspects of Intellectual Property Rights has been annexed to the WTO Agreement under Annex 1C.
9 i.e. Agreement on Subsidies and Countervailing Measures.
10 i.e. Anti-Dumping Agreement.
11 Agreement on Agriculture.
12 Agreement on Technical Barriers to Trade.
13 Agreement on Trade Facilitation.
14 Article II:2 of the WTO Agreement.

favourable treatment they accord to like goods, from any state.[15] The MFN principle addresses discrimination between WTO members exporting like products to the same WTO member state. All like products from WTO member states must be treated alike either at the border of entry or on the domestic market after the products satisfy all the border requirements.[16] The national treatment obligation is the complementary non-discrimination rule to the MFN. It requires that once goods from WTO members enter the territory of a WTO member, the importing member is obliged to treat the imported goods the same way it treats like domestic ones.[17] The national treatment principle ensures that a WTO member state does not discriminate between imported and like domestic products to the detriment of the imported ones.

The market access provisions in the General Agreement on Tariff and Trade 1994 (GATT 1994) address tariff and non-tariff barriers to trade in goods. For example, Article II of the GATT 1994 forbids WTO members from charging tariffs above their agreed (or bound) tariff ceilings and Article XI prohibits WTO members from adopting quantitative restrictions to trade. Similar treaty provisions mandating non- discrimination and market access in the services sector are enunciated in Articles II and XVI respectively of the General Agreement of Trade in Services (GATS). The rules on non-discrimination and market access are supposed to provide a level playing field for all WTO members to maximize their benefits from international trade.

WTO members can, however, legally deviate from the stated rules on non- discrimination and market access based on a number of exceptions provided for in Article XX of the GATT 1994 and Article XIV of the GATS. Of significance for the discussion on the impact of COVID-19 on international trade flows, especially from an African perspective, is that Article XX(b) of the GATT 1994 and Article XIV(b) of the GATS allow WTO members to legally deviate from their obligations if this is necessary to protect human, animal, or plant life or health. In essence, this is a public health exception to non-discrimination and market access, among other obligations. For example, domestic regulations[18] leading to the closure of ports of entry into Ghana for road, sea and air transport services have been undertaken in consonance with Ghana's obligations under the WTO system and the exceptions available to it in Articles XX and XIV of the GATT 1994 and GATS respectively. Other WTO members adopting similar border closures and restrictions on trade have, like Ghana, availed themselves of the public health exceptions in the GATT 1994 and the GATS. The logical implication of all countries availing themselves of the derogations under Articles XX(b) and XIV(b) of the GATT 1994 and the GATS respectively is that the aggregate of such legitimate domestic trade restriction measures have had a concomitant effect on significantly shrinking international trade flows.

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15 Article I of General Agreement on Tariff and Trade, 1994.
16 Ibid.
17 Article III of General Agreement on Tariff and Trade, 1994.
18 Imposition of Restrictions Act, 2020 (Act 1012).

III. AFRICA AND THE INTERNATIONAL TRADE REGIME

For African countries, this shrinkage in international trade flows globally has serious economic implications as even in the pre-COVID-19 era, the continent's contribution to international trade flows was about 3%.[19] However, of the 164 members of the WTO, 44 are African states. Africa's participation in the WTO in terms of membership accounts for a little over a quarter (i.e. 26.8%) of the entire membership of the WTO. Of the various continents of the world, Africa has the highest membership in the WTO. As the above stated statistics show, African countries have not been able to translate their numerical strength in the WTO into actual contribution to international trade flows. As one of the main objectives for the establishment of the AfCFTA is the promotion of intra-African trade, it can only be a positive development for Africa's contribution to international trade if done right. Thus, while the domestic measures adopted by states the world over have negatively affected global trade generally, and in particular trade flows from Africa, trading under the AfCFTA in the post-COVID-19 era can hold a credible key for Africa's economic recovery and a more assertive contribution to international trade.

A. The African Continental Free Trade Area after the Pandemic

The drive for economic integration in Africa has been ongoing since the early days of the Pan-African movement that led to the founding of the Organization for African Unity (OAU). This long-awaited dream of a continent-wide economic integration in Africa took a giant leap forward when on 21 March 2018 44 Africa States signed up to the African Continental Free Trade Area (AfCFTA) which aims at liberalizing trade in goods and services. At the moment, 54 African countries have signed the AfCFTA Agreement.[20] 30 of the signatory states have ratified the AfCFTA Agreement hence paving the way for its coming into effect. The Agreement Establishing the AfCFTA envisions further liberalization and rules in the areas of investment, intellectual property rights and competition policy. When all the 54 signatory states ratify the AfCFTA, it will become the biggest free trade agreement outside the World Trade Organization (WTO) in terms of number of country participants and geographical coverage. With a population of 1.3 billion people,[21] an Africa-wide single market under the AfCFTA offers a huge incentive for domestic industries to scale production to reap the benefits of economies of scale. A market size of 1.3 billion people in the AfCFTA can also become a magnet for the needed foreign direct investment in Africa. With the Doha Round of trade negotiations in the WTO effectively dead, members of the WTO are increasingly seeking opportunities for their trade interests outside the global trade regime. The AfCFTA is thus a positive development for Africa as the continent seeks to advance its own interests through intra-African trade, especially in the post-COVID-19 era. For a region of the world that contributes to only about 3% of global trade [22],

19 Vera Songwe, Intra-African trade: A path to economic diversification and inclusion, https://www.brookings.edu/research/intra-african-trade-a-path-to-economic-diversification-and- inclusion/

20 Only Eritrea is yet to sign the AfCFTA Agreement.

21 https://www.worldometers.info/world-population/africa-population/.

22 22 Vera Songwe, Intra-African trade: A path to economic diversification and inclusion, https://www.brookings.edu/research/intra-african-trade-a-path-to-economic-diversification-and- inclusion/.

this new push toward increasing intra-African trade is a laudable project. For example, while intra-Asia and intra-Europe trade account for 59% and 69% of exports respectively, intra-African trade accounts for only 16.6% of total exports.[23]

While the AfCFTA's aim of increasing intra-African trade is evidently laudable, the efficacy of this project will, in a large measure, be only attainable if the rules established in the AfCFTA Agreement and its annexed protocols prevail over parochial national interests. A rules-based system that, in its operations and practices, reflects the rule of law is thus one of the most effective tools for operationalizing the rules established under the AfCFTA. For example, effective independent judicial decision making in the EU and WTO systems have become one of their most important pillars of success in reducing the barriers to trade. In this regard, the current impasse in the appointment of judges to the WTO Appellate Body has become perhaps the most important existential crisis in the WTO.[24] A failure of its dispute settlement system to deliver on its core mandate of amicable resolution of trade disputes certainly portends a fundamental constitutional and existential crisis in the WTO. Consequently, precedents from the EU and WTO regimes show that the judicial decision-making system established under the AfCFTA is of paramount importance to the success of intra-African trade and investment. Thus, while the establishment of the AfCFTA holds credible promise for African countries in the post-COVID-19 era, the importance of speedily and efficiently resolving trade disputes that will inevitably arise, should be central to the planning for a successful continental integration process.

B. The Dispute Settlement Processes in the AfCFTA

The Protocol on Rules and Procedures on the Settlement of Disputes establishes the procedures and processes for settlement of disputes in the AfCFTA. The AfCFTA dispute settlement system is modelled after the WTO system. In fact, the text of the Protocol on Rules and Procedures on the Settlement of Disputes is almost a direct replica of the WTO Dispute Settlement Understanding. The said Protocol establishes an entirely member-driven Dispute Settlement Body (or DSB) which is empowered to establish ad hoc Panels and a seven-member permanent Appellate Body.[25] Decisions of Panels can be appealed to the Appellate Body[26] and both Panel and Appellate Body decisions are automatically adopted unless the DSB decides by consensus not to adopt them.[27] This establishes the negative consensus provision with respect to adoption of Panel and Appellate Body reports and ensures the judicial independence of the Dispute Settlement System.

While the stated dispute settlement provisions in the AfCFTA ostensibly benefit from the positive aspects of the WTO system upon which it has been modelled, a more robust system could have been developed. For example, just as pertains in the WTO, the AfCFTA establishes a State v State dispute

23 Ibid. See also UNCTAD, Economic Development in Africa Report 2019: Made in Africa: Rules of origin for enhanced intra-African trade, https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=520.

24 See Alex Ansong, 'The WTO Appellate Body: Are There Any Viable Solutions?' Global Trade and Customs Journal 14(4) (2019) pp.169-178.

25 Article 5(3) of the Protocol on Rules and Procedures on the Settlement of Disputes.

26 Article 21 of the Protocol on Rules and Procedures on the Settlement of Disputes.

27 Articles 19(4) and 22(9) of the Protocol on Rules and Procedures on the Settlement of Disputes.

settlement system. Article 3(1) of the Protocol on Dispute Settlement states that: "This Protocol shall apply to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement." Thus, unlike EU law where domestic courts can refer cases to the Court of Justice of the European Union (CJEU) for a preliminary ruling on interpretation, this very useful approach to law enforcement does not feature in the AfCFTA system. Consequently, the important principle of direct effect that is so fundamental to EU law and that has allowed private entities to pursue enforcement of their rights under EU law is absent in the AfCFTA dispute settlement system.

One of the major disadvantages of State v State dispute settlement on matters relating to trade is that States may choose to act out of political expediency instead of an objective commitment to ensuring compliance with a rules-based system. The self- help retaliatory measures adopted by various countries in response to ostensibly illegal US tariffs in the WTO system is a typical case in point.[28] Supposing this had happened in the context of EU law, a private importer could have sued the US in its domestic courts due to the principle of direct effect. Thus, government actions that breach provisions in AfCFTA law could have been challenged in the domestic courts of the government in question without the need for triggering a State v State dispute settlement. Considering the fact that the main actors in international trade are private natural and legal persons, it stands to reason to give these persons the power to enforce their rights in domestic courts against States that breach such rights. Their vested commercial interests serve as a natural motivation for seeking the enforcement of rules that are beneficial to them. Private enforcement through the operation of the principle of direct effect relieves States of the logistical burdens and the politics that result from seeking redress on behalf of their citizens through State v State dispute settlement.

Also, considering the fact that there are pending negotiations aimed at broadening the remit of AfCFTA to include a protocol on investment, it is hard to conceive how a State v State dispute settlement system would be a viable prospect for investment related disputes. One of the most notable advances in international investment law in the post-World War II era is the standing investors have to sue host States in international dispute settlement forums for breaches of their rights protected under customary international law, bilateral investment treaties and investment contracts. For instance, the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) has made it possible for foreign investors to sue host States on matters of investment without relying on the diplomatic protection of their home States.[29]

Unless the proposed Protocol on Investment provides for a system of investor v State dispute

28 See Philip Blenkinsop, 'EU Nations Back Retaliating against U.S. Steel Tariffs', https://www.reuters.com/article/us-usa-trade-eu/eu-nations-back-retaliating-against-u-s-steel- tariffs-idUSKBN1JA27W (Accessed on 10 September 2020).

29 Article 25 (1) of the ICSID Convention states that: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

settlement (ISDS), reliance on the State v State dispute settlement system could stifle intra-African investment flows and foreign direct investment. It would result in the bizarre situation where foreign investors on the African continent benefiting from bilateral investment treaties with provisions for ISDS would have better protections than indigenous investors on the continent taking advantage of the provisions in the AfCFTA. One of the main founding objectives of the AfCFTA is to promote intra-African trade and investment.[30] The protections available to African investors would determine how eager they would be to invest in other African countries that have acceded to the AfCFTA Agreement.

In fact, adopting a dispute settlement system similar to that of the EU could have resolved any apprehensions of protections for investors. An aggrieved investor could sue in the domestic courts of the host State and the relevant court would be required to refer the matter to the AfCFTA dispute settlement system for a preliminary ruling on the matter.[31] Making AfCFTA law directly effective in national legal systems would have obviated the need for additional provisions on dispute settlement concerning investment.

C. Facilitating Liberalisation of Trade in Goods and Services

Trade in goods and services are the mainstay in international trade. With respect to trade in goods, two main barriers exist in international trade – tariff barriers and non- tariff barriers. A substantial reduction and ultimately, the elimination of customs duties or tariffs among AfCFTA members will contribute to increase in intra-African trade by the pulling down of tariff barriers among African countries. However, the non-tariff barriers can still become impediments in the AfCFTA. For example, in the latter part of 2019 and the early part of 2020, Nigeria closed its land borders to other countries in West Africa. This is not the first time Nigeria has taken such drastic measures against its West African neighbours. The border closures that Nigeria resorts to from time to time are done in spite of its treaty obligations under the ECOWAS Revised Treaty.[32] The Nigerian border closures is a typical example of a non-tariff barrier to trade. Nigeria did not impose tariffs on goods coming from other ECOWAS countries. It simply closed its borders. Such non-tariff barriers are more drastic and they have a greater negative impact on international trade in general and specifically, intra-African trade.

Disappointingly, none of the ECOWAS member states saw the need to challenge the Nigerian border closure at the ECOWAS Court of Justice even though the ECOWAS Treaty makes provisions for such dispute settlement measures.[33] The other West African states rather opted for diplomacy while traders were stuck at the Nigerian borders. The West African states chose political expediency over a commitment to enforcing the rules that they have enacted under the ECOWAS system. Under

30 See paragraphs 1 and 5 of the preamble to the Agreement Establishing the African Continental Free Trade Area.
31 The Factortame case in EU is an excellent illustration of this - R v Secretary of State for Transport, ex parte Factortame ECJ [1990] 2 Lloyds Rep 351, [1990] 3 CMLR 1, C-213/89.
32 See Articles 35 and 41 of the ECOWAS Revised Treaty.
33 See Articles 15 and 76 of the ECOWAS Revised Treaty.

the ECOWAS system, even though the Nigerian action could have also been challenged in the domestic courts in Nigeria, this did not also happen. In the AfCFTA system, if such arbitrary acts that flagrantly breach AfCFTA law go unchallenged, the aspirations of rebooting Africa's economic recovery post-COVID-19 will fail.

Quite apart from possible intra-African trade barriers, the incentive to drive trade among African countries has also been impeded by the similarity of manufactured products. Where the bulk of exports are similar primary agricultural products, the incentive to export such products to other African countries is greatly diminished. Even where exports within Africa would have been viable due to the existence of ready markets, the transportation infrastructure and networks on the continent linking various African countries is woefully underdeveloped.[34] Thus while a ready market in another African country may be geographically nearer than, for example, Europe, the cost of exporting goods to a European country may be cheaper and the duration may be shorter.[35] Thus, breaking down the legal barriers to trade in the AfCFTA, does not guarantee that it will translate in actual significant increase in intra-African trade. The adequate infrastructure needed to oil the wheels of trade on the continent is lacking.[36] If this infrastructure deficit is not addressed as a matter of urgency on both the domestic and continental fronts, the current low level of intra- African trade will not witness any significant change for the better.

The services sector is steadily overtaking goods in international trade. For some countries like the UK, services have overwhelmingly become the tradeable products in international trade. The services sector contributes 80% to the UK's GDP.[37]In Ghana, the services sector has overtaken goods in the area of contribution to GDP. According to the Ghana Statistical Service, the services sector contributed 56% to Ghana's GDP in 2018.[38] Tradeable services in international trade cover areas like tourism, transport, finance, education, communication, recreation and construction. Tourism, international transport, and recreation are among the hardest hit service sectors in the current pandemic. However, they also offer opportunities for a reboot in international trade post-COVID-19. A service sector like education can become an important export sector for African countries with very well-established educational infrastructures. For example, according to the Higher Education Policy Institute in the UK, international students contribute 20 billion Pounds annually to the UK economy.[39] In London alone, international students contribute 4.6 billion Pounds to the local economy.[40]

These financial injections from foreign students to the UK economy reflect deductions from the cost

34 George Baffour Asare-Afriyie, 'An Assessment of the Continent-Wide Trade Related to Infrastructure for Effective Implementation of the AfCFTA by Ghana', GIMPA Law Review, Vol.5 (2020), pp.214-226.
35 Ibid.
36 Ibid
37 Office of National Statistics, 'Services sector, UK: 2008 to 2018', https://www.ons.gov.uk/economy/economicoutputandproductivity/output/articles/servicessectoru k/2008to2018 (Accessed on 25/09/20).
38 Ghana Statistical Service, 'Rebased 2013-2018 Annual Gross Domestic Product', (April 2019 Edition), http://statsghana.gov.gh/gssmain/storage/img/marqueeupdater/Annual_2013_2018_GDP_April% 202019%20Edition.pdf (accessed 01/02/2020).
39 Sean Coughlan, 'Overseas Students 'Add £20bn' to UK Economy' https://www.bbc.com/news/education-42637971 (accessed 01/02/2020).
40 Ibid.

of hosting them. Thus, the 20 billion Pounds is their net contribution to the UK economy.[41] The UK did not have to export goods like cocoa, gold, or crude oil to get this 20 billion Pounds injection into its economy. Foreign students took money from their own countries or generated income in the UK and spent the money in the UK. Reference has been made here to goods like cocoa, gold and crude oil because in a lot of African countries, over reliance on traditional exports in the agricultural and extractives industries have become the foundation of their contribution to international trade and investment.

D. Enhancing the Ease of Doing Business

Ease of doing business is fundamental to the flourishing of domestic industries and attracting foreign investors. The domestic regulatory, infrastructural and administrative hurdles in African countries will have to be significantly lowered or eliminated in order for intra-African trade and investment to take off and thrive. In the 2019 World Bank Ease of Doing Business Report,[42] only one African country (Mauritius) made it to the top 20. Mauritius was ranked 13th and has consistently been in the top 20 for some years now. Only two African countries made it in the top 40. Rwanda placed 38. Out of 190 countries, only ten African countries made it in the top 100. In West Africa, only Togo made it to the top 100. Togo was ranked
97. There were seven African countries in the bottom 10. Eritrea was ranked 189 and Somalia brought the rear at number 190. If African countries want to enhance the competitiveness of their domestic industries and attract foreign direct investment into their economies, unnecessary regulatory and administrative hurdles must be eradicated.

IV. CONCLUSION: INTERNATIONAL TRADE AND INVESTMENT RELATIONS POST-COVID- 19: AFRICA RISING?

Considering current problems in the WTO like the demise of the Doha Round of Trade negotiations, the trade war between the US and China and the virtual collapse of the Appellate Body in the WTO dispute settlement system, the establishment of the AfCFTA is one of the most positive developments in international trade. More importantly, if African countries adhere to the rules they have instituted under the AfCFTA, a lot of the legal barriers to trade will either be greatly diminished or eliminated altogether. This can shore-up intra-African trade and potentially increase foreign direct investments into Africa. However, as the discussion above has shown, breaking down the legal barriers to trade is not enough. The implementation of the legal rules in the AfCFTA would have been more effective if the principle of direct effect had been incorporated.

The resort to State v. State dispute settlement will potentially slow down the enforcement and implementation of AfCFTA law. As pertains in EU law, individuals and commercial entities in the AfCFTA that are engaged in trade should have been given the standing in domestic courts to pursue redress of any wrongs. On the more practical front, even if the AfCFTA established the most

41 Ibid.
42 The World Bank, 'Ease of Doing Business', https://www.doingbusiness.org/en/rankings (accessed 1st February 2020).

efficient legal system, it would still not guarantee the success of this drive to promote intra-African trade if the domestic and continental infrastructures needed to facilitate the conduct of trade are lacking. Thus, while in the post-COVID-19 era the AfCFTA holds a credible key to unlocking Africa's economic recovery, there are still some important hurdles to scale to make the full realization of the benefits of intra-African trade a reality.