



African Participation in WTO E-Commerce Negotiations: Policy Positions and Development Issues

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Executive summary

In comparison with other regions, such as Asia and Europe, Africa's participation in the digital economy is relatively limited. However, the growing demand for e-commerce, combined with pandemic-related restrictions, has highlighted the significance of digitalisation for the African continent. Perhaps more importantly, the pandemic has brought to light the deep digital divide that exists between developed and developing countries. Given the economic significance of e-commerce in bridging the digital divide and ensuring greater digital inclusion, efforts are being made to tackle the digital divide at the regional and national levels in Africa. However, this involves more than simply developing new e-commerce policies and tools to enter the global data economy. Myriad challenges must be addressed, including weak regulations, infrastructure shortcomings, a lack of digital skills and inadequate internet access, among others.

With the WTO's Work Programme on Electronic Commerce having stalled, a number of WTO members have been exploring other ways to advance e-commerce negotiations, including adopting the joint statement initiative (JSI) approach which involves plurilateral negotiations. To date, only a few African countries have participated in the JSI on e-commerce negotiations, with many countries' lack of digital knowledge, infrastructure and negotiating capacity serving as deterrents to their active involvement. Moreover, the African Group has called for negotiations on e-commerce to take place at the multilateral level, under the auspices of the WTO's Work Programme, as otherwise African countries' developmental interests are at risk of being overlooked.

All things considered, the conclusion reached in this policy insight is that it is better for African countries to participate in the JSI on e-commerce (either actively or as observers) than to remain removed from it so that they can help to influence the tone and outcome of the negotiations – particularly as a swift return to the multilateral negotiating model is unlikely. The JSI negotiations could even prepare African countries for continental talks on e-commerce under the auspices of the African Continental Free Trade Area and offer important insights which would help countries drive an e-commerce-enabled industrialisation agenda at the national and regional levels, supported by appropriate policy and regulatory frameworks.

Introduction

COVID-19 has made it clear that digitalisation is critical to the global economy. Perhaps more importantly, the pandemic has highlighted the substantial digital divide that exists between developed and developing countries. With more goods and services being bought and sold online, there have been increasing calls for new, common rules to govern cross-

border e-commerce in goods and services.¹ Ultimately, the net result of e-commerce will be determined by national and international policies implemented to develop the competencies required for countries to benefit from this technological shift.²

Africa's participation in the digital economy has been relatively subdued compared to that of other regions, such as Asia and Europe. However, a surge in e-commerce,³ coupled with pandemic-related restrictions, has highlighted the increasingly important role of digitalisation on the African continent. Yet the stark reality is that many African countries (except for a few) are yet to develop digital competencies. As a result, there is a growing digital divide between African countries and developed countries. Owing to a lack of infrastructure, information and data, most African countries have not been at the forefront of e-commerce developments and negotiations. Despite this, efforts are being made to narrow the digital divide at the regional level. For example, African countries have included an e-commerce agenda in the African Continental Free Trade Area (AfCFTA) under Phase III of the negotiations. In addition, across the African Union (AU) membership, there are several free trade agreements with e-commerce provisions. Domestically, some African countries have implemented e-commerce laws and regulations.

However, African countries have not been very active in e-commerce negotiations at the World Trade Organization (WTO). Instead, some like-minded member states have been negotiating new rules on e-commerce under joint statement initiatives (JSIs). Given the economic significance of e-commerce in bridging the digital divide and ensuring greater digital inclusion on the continent, the glaring lack of involvement of most African countries in shaping the digital rules of the future could fundamentally impact the continent's developmental interests and trajectory. In this context, this policy insight delves into the reasons for Africa's limited WTO participation, and the policy implications thereof, and offers some recommendations to African WTO member states.

Background

The WTO plays a crucial role in liberalising and making rules for global trade across different sectors through various trade agreements. Notably, these agreements serve to update the fundamental WTO rules. However, the ongoing Doha impasse and the stagnation of the Work Programme on Electronic Commerce (hereafter referred to as the Work Programme) have largely redirected negotiations to other forums, including plurilateral negotiations. For this reason, discussions on e-commerce at the WTO have been taking place under two parallel tracks: the first under the multilateral track (the Work Programme) and the second under the plurilateral track (the JSI on e-commerce). While the multilateral track

1 UNCTAD, *What is at Stake for Developing Countries in Trade Negotiations on E-Commerce? The Case of the Joint Statement Initiative* (Geneva: February 19, 2021), <https://unctad.org/webflyer/what-stake-developing-countries-trade-negotiations-e-commerce>.

2 UNCTAD, *What is at Stake*.

3 The WTO's Work Programme defines e-commerce as the production, distribution, marketing, sale or delivery of goods and services by electronic means.

involves the entire WTO membership, the plurilateral track consists of a subset of the WTO members only but who are much more driven to negotiate binding rules of e-commerce.

The Work Programme was launched at the second Ministerial Conference in Geneva in 1998 following the Declaration on Global Electronic Commerce.⁴ The declaration also placed a moratorium on customs duties on e-commerce, meaning that duties could not be imposed on 'electronic transmissions'. The moratorium has been renewed every two years, with the last renewal in 2019 being extended until the next Ministerial Conference which is expected to take place in June 2022. The 1998 Work Programme represents exploratory work whose purpose, according to the WTO, is to investigate the relationship between current WTO agreements and e-commerce; it is not intended to establish negotiating norms. However, no progress has been made with the Work Programme. It was in the face of this stagnation in the rule-making process that some WTO members spearheaded the JSI process to advance negotiations on e-commerce.

The JSIs were launched as a negotiating device at the 11th WTO Ministerial Conference (MC11) in Buenos Aires in 2017 by 71 WTO members.⁵ This group signed a Joint Statement on E-commerce announcing their intention to 'initiate exploratory work together toward future WTO negotiations on trade-related aspects of e-commerce'.⁶ The JSI aims to level the playing field by agreeing to a common set of rules covering a range of e-commerce issues. These negotiations are intended to ultimately produce a binding agreement between the members, without having to adhere to the consensus-driven decision-making rule involving the entire WTO membership. In 2019, 76 WTO members issued a second Joint Statement and confirmed their intention to commence negotiations on trade-related aspects of e-commerce.⁷

The JSI negotiations on e-commerce are open to the entire WTO membership and, since their launch, the number of WTO members joining the initiative has steadily increased. Currently there are 86 WTO members with six African countries, namely Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Kenya and Nigeria. Given the diversity of interests within the WTO and the size of its membership, it is not surprising that no consensus has been reached between WTO members on the negotiating track for e-commerce. In the light of the Doha impasse and the stagnation of the Work Programme, this lack of consensus is likely to continue. Proponents of the JSI see it as a vehicle for advancing e-commerce rules and trade liberalisation in general, while opponents argue that JSIs go against the principle of consensus decision-making, which is at the heart of the WTO's operational model and, if not upheld, would result in their interests being neglected.

4 WTO, *Second Session - Ministerial Conference: Declaration on Global Electronic Commerce* (Geneva: May 25, 1998), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q/WT/MIN98/DEC2.pdf&Open=True>.

5 A total of 71 members signed the JSI, comprising developed countries, economies in transition and developing countries, and least developed countries (LDCs).

6 WTO, *Joint Initiative on E-commerce* (Geneva: February 2022), https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm.

7 Geneva Trade Forum, 'Joint Statement Initiative on Electronic Commerce,' https://wtoplurilaterals.info/plural_initiative/e-commerce/.

Scope of issues covered by the JSI on e-commerce

Once WTO members had launched the JSI on e-commerce, a consolidated negotiating text was circulated in December 2020, bringing together the proposals of several different JSI members on various digital rules being negotiated. These consolidated proposals were split into six main topics, with an Annex covering the scope and general provisions. The six topics categorise the digital rules as: i) Enabling electronic commerce; ii) Openness and electronic commerce; iii) Trust and electronic commerce; iv) Cross-cutting issues; v) Telecommunications; and vi) Market access (see Table 1 below). These issues are also reflected in bilateral and regional trade agreements that have increasingly included digital issues, such as the US-Kenya free trade agreement, the Morocco-USA free trade agreement and the Economic Partnership Agreements (EPAs) with the EU.

TABLE 1 JOINT STATEMENT INITIATIVE ON E-COMMERCE		
Issues/Topics	Sub-categories	
A. Enabling e-commerce	A.1 Facilitating electronic transactions	Electronic transaction frameworks; electronic authentication and e-signatures; electronic contracts; electronic invoicing; and electronic payment services/facilitation of e-payment
	A.2 Digital trade facilitation and logistics	Paperless trading; de minimis; customs procedures; improvements to trade policies; single windows data exchange and system interoperability; logistics services; and enhanced trade facilitation, use of technology for the release and clearance of goods, provision of trade facilitating and supportive services
B. Openness & e-commerce	B.1 Non-discrimination and liability	Non-discriminatory treatment of digital products; interactive computer services (limiting liability); interactive computer services (infringement)
	B.2 Flow of information	Cross-border transfer of information by electronic means/cross-border data flows; location of computing facilities; financial information/location of financial computing facilities for covered financial service suppliers
	B.3 Customs duties on electronic transmissions	
	B.4 Access to internet & data	Open government data; open internet access/principles on access to and use of the Internet for [electronic commerce/digital trade]; access to online platforms/competition
C. Trust & e-commerce	C.1 Consumer protection	Online consumer protection; unsolicited commercial electronic messages
	C.2 Privacy	Personal information protection/personal data protection
	C.3 Business trust	Source code: ICT products that use cryptography

D. Cross-cutting issues	D.1 Transparency, domestic regulation and cooperation	Transparency; electronic availability of trade-related information; domestic regulation; cooperation; cooperation mechanism
	D.2 Cybersecurity	
	D. Capacity building	Options for capacity building and technical assistance
E. Telecommunications	E.1 Updating the WTO Reference Paper on telecommunications services	Scope; definitions; competitive safeguards interconnection; universal service; licensing and authorisation; telecommunications regulatory authority; allocation and use of scarce resources; essential facilities, resolution of disputes, transparency
	E.2 Network equipment and products	Electronic commerce-related network equipment and products
F. Market access	Services market access; temporary entry and sojourn of e-commerce-related personnel; goods market access	
Annex 1: Scope and General Provisions	Preamble; definitions; principles; scope; relation to other agreements; general exceptions; security exception, prudential measures, taxation, dispute settlement, committee on trade-related aspects of e-commerce	

Sources: Author's compilation from: WTO negotiating documents; confidential interviews with staff from the WTO, Kenyan Mission in Geneva and the Nigerian Mission in Geneva; Yasmin Ismail, 'E-commerce Joint Statement Initiative Negotiations among World Trade Organization Members' (International Institute for Sustainable Development and CUTS international, Geneva, April 2021), <https://www.iisd.org/system/files/2021-06/e-commerce-negotiations-wto-members-covid-19-en.pdf>; Geneva Internet Platform DigWatch, 'The Joint Statement Initiative (JSI) on e-commerce,' <https://dig.watch/processes/wto-ecommerce#What-is-a-JSI->; WTO, *Joint Initiative on E-commerce* (Geneva: June 2022), https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm

Currently, negotiations are taking place through small groups⁸ and plenary sessions covering the different sub-categories listed in Table 1. The adoption of the small groups approach aims to increase efficiency (since the groups work in parallel) and reduce the number of divergent views on specific issues where quick progress is more likely to be made.⁹ In addition, all negotiating texts, including member proposals and consolidated negotiating texts providing updates on the negotiations, are published on the WTO webpage.¹⁰ To date, the working groups have finalised negotiations in the following areas: e-signatures and authentication, consumer protection, open government data, and spam. In addition, pending the WTO's 12th Ministerial Conference (MC12), which was originally scheduled to take place from 30 November to 3 December 2021, members also intensified

8 There are 10 small groups covering 10 topics. Each group focuses on a specific negotiation issue, such as digital trade facilitation, consumer protection or source code, among others. Each group consists of the different representatives of the state in question.

9 Geneva Internet Platform, 'The WTO Joint Statement Initiative (JSI) on E-commerce,' <https://dig.watch/processes/wto-ecommerce#Modus-operandi>.

10 However, not all texts are available to the public; consolidated negotiating texts are available only to WTO members.

negotiations to finalise a few topics, including e-invoicing, cybersecurity, customs duties on electronic transmissions, open internet access and paperless trading.

Negotiations at the multilateral level have not yielded any consensus. Nevertheless, the African Group has called for negotiations to focus on unresolved Doha issues and continuing discussions on e-commerce within the existing mandate of the Work Programme. As mentioned above, the moratorium on customs duties on e-commerce was last extended in 2019, and the next extension is scheduled to take effect at the MC12. Owing to COVID-19 and the ensuing travel restrictions, MC12 was postponed indefinitely.¹¹ However, the General Council has announced that MC12 will be held on 13 June 2022.

African participation in the JSI on e-commerce

Currently, 86 WTO members (more than half the WTO's total membership) participate in JSIs. This group represents more than 90% of global trade and all major geographical regions and levels of development.¹² However, some regions continue to be significantly underrepresented, such as Africa, the Caribbean and the Pacific Island countries, with the latter two regions having no representation at all.

As African countries' involvement in JSIs has been limited, they remain notably underrepresented. Of the 43 African WTO members, only six are participating in the JSI negotiations: Benin, Burkina Faso,¹³ Cameroon, Côte d'Ivoire, Kenya and Nigeria. This low participation rate has been attributed to a complex set of reasons, as noted by the African Group, the ACP group and other African WTO members, notably South Africa.¹⁴ They highlight and affirm the importance of the Work Programme¹⁵ 'to industrialisation and structural transformation' and 'stress that the work undertaken in multilateral trade and rule-making [should] support Africa's continental integration agenda and, at a minimum, not undermine it'. Based on these motivations, the JSI triggered a strong pushback from most African WTO members. They also cite additional reasons for their non-involvement, which are discussed in the paragraphs below.

11 WTO, *General Council Decides to Postpone MC12 Indefinitely* (Geneva: November 26, 2021), https://www.wto.org/english/news_e/news21_e/mc12_26nov21_e.htm.

12 WTO, *Joint Statement Initiative on e-commerce: Co-conveners update* (Geneva: December 2020).

13 WTO, *Joint Statement on Electronic Commerce. Communication from Burkina Faso* (Geneva: March 17, 2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/53.pdf&Open=True>.

14 The African Group consists of all 43 African WTO members, namely Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cabo Verde, Central African Rep., Chad, Congo, Congo (Democratic Rep.), Côte d'Ivoire, Djibouti, Egypt, Eswatini, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

15 WTO, *Ministerial Conference Eleventh Session Buenos Aires; The Work Programme on Electronic Commerce. Statement by the African Group* (Geneva: December 6, 2017), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/21.pdf&Open=True>.

First, the African Group believes that the plurilateral approach weakens multilateralism. For most African states, it is critical to mainstream e-commerce rules into the WTO multilateral process. Notably, the Work Programme already accommodates discussions on development-related issues.¹⁶ For this reason, African countries are sceptical and concerned that this approach may overshadow or ignore their developmental interests. In addition, most African countries suspect that the rules would marginalise them further¹⁷ and expose them to the risk of having to take or leave whatever others decide.¹⁸ This fear primarily stems from the multilateralisation of certain Tokyo Round codes under the single undertaking approach adopted during the Uruguay Round.¹⁹ The consensus rule works as a safeguard against a possible repeat of the Uruguay Round precedent regarding the incorporation of Tokyo Round plurilateral agreements into the single undertaking.²⁰ Thus, African countries may be erring on the side of caution. For example, they have been active in e-commerce issues in other international organisations, such as UNCTAD,²¹ indicating that African non-participation in WTO negotiations is not a definitive indicator of a lack of interest in e-commerce negotiations.

Moreover, some are of the view that developed countries are at an advantage because they are far more active in digital trade negotiations, which are important for their offensive trade interests, than in agricultural negotiations in which they primarily have defensive interests.²² As a result, African countries fear that an outcome on e-commerce without progress on multilateral issues could compromise the inclusive multilateral system. Spurred by these concerns, most African countries, led by South Africa and the African Group, continue to oppose JSIs. South Africa, in particular, questions the legality of JSIs and their potential outcomes. It argues that JSIs contravene the multilateral system's fundamental principles and objectives, including the consensus-based decision-making process.²³

Furthermore, African countries believe that the topic of e-commerce under the Work Programme 'has not been adequately explored, and where it has, it has barely touched the surface'.²⁴ They argue that the discussions on e-commerce have not evolved sufficiently to justify a structural change to start any rules-related negotiation,²⁵ particularly as discussions under the Work Programme remain useful in raising the awareness of the developmental implications of digital rules.²⁶ For example, discussions on the digital divide under the

16 WTO, *Ministerial Conference Eleventh Session*.

17 WTO, *Ministerial Conference Eleventh Session*.

18 WTO, *Joint Statement Initiative on Electronic Commerce: Communication from Côte d'Ivoire* (Geneva: December 16, 2019), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/49.pdf&Open=True>.

19 Peter Draper and Memory Dube, 'Strengthening the Global Trade System' (Think Piece, International Centre for Trade and Sustainable Development, December 2013), <https://e15initiative.org/wp-content/uploads/2015/09/E15-RTAs-Draper-and-Dube-Final.pdf>.

20 Draper and Dube, 'Strengthening the Global Trade System.'

21 African countries have been participating in eTrade Readiness Assessments conducted by UNCTAD, <https://unctad.org/topic/ecommerce-and-digital-economy/etrade-readiness-assessments-of-LDCs>.

22 WTO, *Joint Statement Initiative on Electronic Commerce: Communication from Côte d'Ivoire*.

23 WTO, *The Legal Status of Joint Statement Initiatives and their Negotiated Outcomes* (Geneva: February 19, 2021), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W819.pdf&Open=True>.

24 WTO, *Ministerial Conference Eleventh Session*.

25 WTO, *Ministerial Conference Eleventh Session*.

26 UNCTAD, *What is at Stake*.

Work Programme have focused on access to infrastructure and connectivity, while the JSI emphasises the free flow of data without referring in detail to the role played by data on market concentration – including in the e-commerce sector – and development.²⁷ In these circumstances, African countries would greatly benefit from discussions within the Work Programme on issues such as bridging the digital divide, facilitating digital technology transfers, developing digital infrastructure, building digital skills, and so on, rather than negotiations on digital rules outside the WTO.²⁸ Consequently, most African countries have opted to maintain the Doha architecture rather than JSIs.

Second, the work being done in the JSI appears to be based on the presumption that the necessary e-commerce infrastructure and regulatory framework, and even a certain level of e-commerce consumer culture, are already in place in the participant countries.²⁹ However, many African countries lack the e-commerce infrastructure and regulatory frameworks necessary to fully exploit the potential of e-commerce. As a result, some African countries feel ill-equipped and unprepared to effectively defend their interests in these complex and highly technical issues. Moreover, since the launch of the negotiations, only a handful of participating African countries (Nigeria and Cameroon)³⁰ have made submissions to the e-commerce discussions. As digital infrastructure is critical for accessing opportunities created by the digital economy, it is difficult to develop in the digital trade sphere without a solid foundation of regulatory and institutional frameworks, which include establishing national policies and strategies on the digital economy.

Finally, most African missions in Geneva have limited capacity to engage in negotiations. Most African delegations tend to be relatively small and expensive to run, with officials having various obligations outside the WTO. In such circumstances, most African delegations cannot afford to send staff to cover all areas of negotiation at the WTO. In addition, African missions cannot afford to draw on technical support from their respective capitals, like the more advanced countries can. With insufficient capacity, missions are forced to direct their limited resources at matters of importance to their countries. Hence, they have difficulty allocating resources to subjects as complex as e-commerce.³¹

In sum, it is critical to take stock of what this all means for African states. The WTO is mired in a multilateral crisis, with an appellate body dilemma and trade wars between major powers. Consequently, as a new approach to global governance, plurilateralism has become a more viable option for multilateral trade negotiations within the WTO. Moreover, this has become the realistic default approach for WTO members who want negotiation outcomes.

27 Leonila Guglya and Marilia Maciel, 'Addressing the Digital Divide in the Joint Statement Initiative on E-commerce: From Enabling Issues to Data and Source Code Provisions' (International Institute for Sustainable Development and CUTS International, December 2020), <https://www.iisd.org/system/files/2021-01/digital-divide-e-commerce-en.pdf>.

28 UNCTAD, *What is at Stake*.

29 Guglya and Maciel, 'Addressing the Digital Divide'.

30 WTO, *Joint Statement Initiative on Electronic Commerce: Communication from Nigeria. Proposal on Flow of information* (Geneva: June 15, 2021), INF/ECOM/62/Rev2, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Context=Script&DataSource=Cat&Query=%40Symbol%3DINF%2FECOM%2F*&DisplayContext=popup&rwndrnd=0.7614743416834473.

31 Interviews conducted for this policy insights.

While some analysts argue that if developing countries are left out of negotiations or lack the capacity to participate more meaningfully, there is then an understandable justification for developing countries to be concerned that the rules developed in JSIs will eventually be imposed upon the entire membership without their input.³²

For this reason, there has been a general reluctance to join JSIs, with South Africa openly rejecting JSIs and opting for the multilateral approach. However, despite the majority opposing the plurilateral approach, other major African economies such as Nigeria and Kenya have opted to participate in JSIs as independent trading countries. Incidentally, these countries also have national e-commerce policies in place. In addition, Nigeria and Côte d'Ivoire have been advocating for developing countries' interests in the negotiations.³³

Future expectations

E-commerce still stirs strong sentiments among WTO members, and it appears that it will be difficult to reach a consensus on this issue at a multilateral level. While JSIs have prompted a strong pushback from the African Group and South Africa, some African states have slowly moved away from this position and joined the plurilateral discussions as independent trading nations. Since the launch of the JSIs, the number of African countries joining has increased, while a few have opted to observe the negotiations (eg, Senegal).³⁴ Going forward, it appears that some African countries will not join, as a mark of African solidarity, while others do not feel equipped and hence are not ready to join. Other countries may join later as they introduce national e-commerce laws and policies. Despite South Africa having one of Africa's most advanced e-commerce policy frameworks, it is unlikely to join as it has been the most vocal critic of JSIs by far, while Egypt has not issued any statements in this regard.

Nonetheless, the JSI remains open to any state that wants to join the negotiations. As African countries prepare for regional negotiations under the AfCFTA, e-commerce issues discussed at the WTO will strongly influence other e-commerce negotiations, including those provided for under the AfCFTA. In the run-up to the negotiations for the AfCFTA e-commerce protocol, some African countries may, in principle, be enticed to join the JSI negotiations in preparation for regional talks. However, the AU could leverage its position for a unified position in the ongoing negotiations. Despite not having observer status at the

32 Fiamma Angeles, Riya Roy and Yulia Yarina, 'Are Joint Statement Initiatives the World Trade Organization's Future?' *Trade Experettes* (blog), February 22, 2021, <https://www.tradeexperettes.org/blog/articles/are-joint-statement-initiatives-the-world-trade-organizations-future>.

33 This is evident in the submissions it has made in the negotiating group, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Context=Script&DataSource=Cat&Query=%40Symbol%3DINF%2F%2F%2F%2F&DisplayContext=popup&rwndrnd=0.7614743416834473

34 The JSI negotiations do not have official observer status; hence countries that are not officially registered as participants observe in their capacity as WTO members but cannot make any proposals.

WTO, the AU as an institution could play the role of interlocutor and adopt a more assertive role in respect of Africa's position in the multilateral trading system.

While the AU's engagement at the continental level has primarily focused on political diplomacy, security and peacekeeping, a shift to economic diplomacy would be critical in addressing Africa's global trade challenges. With the AfCFTA now a reality, a transition to economic diplomacy would enhance African WTO members' position within the WTO. However, much will depend on African leaders' commitment and political will to maintain a unified negotiating position at the WTO.

Policy implications for African countries in the digital economy

For developing countries that are not currently participating in the JSI negotiations, an important policy question is whether their participation would enhance or restrict their efforts to develop their digital economy and their capacity to engage productively in e-commerce.³⁵ Indeed, many developing countries are yet to develop national policy and regulatory frameworks to effectively manage their digital economy and, critically, lack the readiness to engage in e-commerce.³⁶ For example, some studies have found numerous divergences in the approaches adopted by African countries to e-commerce.³⁷ In addition, many developing countries face capacity challenges. Hence, the digital divide remains a binding constraint for these economies.³⁸ To address these issues, African countries could tap into the resources of the UN's International Telecommunication Union (ITU) and the UN Broadband Commission, which have many policies and regulatory strategies and programmes designed for developing nations and LDCs to bridge the digital divide, as well as many tools to assist in the development of appropriate ICT and broadband strategies.

Bridging the digital divide, however, involves more than just developing new e-commerce policies and tools to enter the global data economy. Instead, it requires states to embark on complex and deep structural changes and industrialisation efforts akin to the China model. As a result, e-commerce policies will have to be aligned to industrialisation policies. A model like this can only produce tangible results if a competent state implements it.

While taking on commitments relating to e-commerce may seem overwhelming for African countries, participating in the negotiations could enhance their efforts to develop their digital economy with a view to bridging the digital divide. E-commerce has the

35 UNCTAD, *What is at Stake*.

36 UNCTAD, *What is at Stake*.

37 Rutendo Tavengerwei, Valary Mumbo and Beatriz Kira, 'What to Consider Ahead of the AfCFTA Phase II Negotiations: Focus on Digital Trade Policy Issues in Four Sub-Saharan African Countries' (Policy Report, Digital Pathways at Oxford Paper Series, no. 16, UNECA, Oxford, 2022), <https://www.bsg.ox.ac.uk/sites/default/files/2022-01/Digital%20Trade%20AfCFTA%2012Jan22.pdf>.

38 Tavengerwei, Mumbo and Kira, 'What to Consider Ahead.'

potential to minimise many existing challenges across the continent, including poverty, by introducing training and capacity-building in e-commerce,³⁹ reducing distribution costs of e-commerce deliveries by removing tariff barriers, and upgrading digital infrastructure by establishing more reliable payment solutions and improving internet access across the continent.⁴⁰

Their vulnerability should spur African countries to facilitate an appropriate policy response to address e-commerce-related concerns. Indeed, non-participation in negotiations will restrict their efforts to develop their digital economy interests. Research conducted by UNCTAD found that the e-commerce proposals from developed countries could have severe, adverse economic consequences for developing countries by undermining their digital industrial development efforts. If adopted, the proposals could also result in huge financial losses for developing countries as the cost of compliance would be very high for developing countries and LDCs.⁴¹ For example, much of the complexity surrounding the adoption of e-commerce stems from the fact that it overlaps with other areas, including consumer protection, cybersecurity, data protection, intellectual property rights protection and competition policy. Furthermore, if implemented, the proposed rules could undermine the existing trade competitiveness of developing countries and restrict their capacity to regulate their imports of both goods and services.⁴² Through their participation in the negotiations, African countries could ensure that their e-commerce developmental needs are not overlooked and their implementation challenges are considered. Therefore, African countries need to be present in the negotiations to defend their economic and developmental interests, and thus counter the adverse effects.

Potential impact on Phase III AfCFTA negotiations

At the continental level, negotiations on e-commerce are yet to start. In 2020, the AU Heads of State and Government decided to include e-commerce negotiations under Phase III of the AfCFTA.⁴³ Subsequently, they endorsed the decision to conclude Phase II and Phase III negotiations by 31 December 2021. However, that deadline passed, and members are

39 While some jobs will disappear, digitalisation will also create new jobs, emanating from new occupations. However, this will require support from the government in the form of investment in education and upskilling of the population with resources being redeployed to productive sectors of the economy. Some studies conducted by McKinsey Global Institute estimate that digital sectors such as AI have the potential to incrementally boost global economic activity by up to 16%. Hence there is scope to increase the number of jobs created.

40 Caitlin Naidoo and Lona Fica, 'The E-commerce Protocol of the AfCFTA: Possible Considerations', *Centurion Lawyers and Business Advisors* (January 2022), <https://centurionlg.com/2022/01/26/the-e-commerce-protocol-of-the-afcfta-possible-considerations/>.

41 UNCTAD, *What is at Stake*.

42 Rashmi Banga, 'Joint Initiative Statement on E-Commerce (JSI): Economic and Fiscal Implications for the South' (Research paper no. 58, UNCTAD, Geneva, February 2021), https://unctad.org/system/files/official-document/ser-rp-2021d1_en.pdf.

43 African Union, *Decision on the African Continental Free Trade Area (AfCFTA) Assembly/AU/Dec.751(XXXIII)* (Addis Ababa: February 2020), <https://www.tralac.org/documents/resources/cfta/3176-au-assembly-decision-on-the-afcfta-february-2020/file.html>.

yet to finalise Phase I of the negotiations.⁴⁴ As a result, the Secretary-General of the AfCFTA announced that the aim was to conclude Phase II of the negotiations by 22 September 2022. This could also include Phase III on e-commerce, as members have been encouraged to simultaneously conclude Phase II and Phase III negotiations. Hence e-commerce will potentially be negotiated under Phase II.

There are potential synergies in scope and content between e-commerce discussions in the plurilateral context and e-commerce discussions at the AfCFTA level, and these should not be overlooked. When e-commerce negotiations commence at the AfCFTA level, they will not reinvent the wheel but will instead look to pre-existing negotiating texts and policy documents for guidance at the national, bilateral, regional and international levels. For example, the AU Digital Transformation Strategy,⁴⁵ which builds on the existing initiatives and frameworks,⁴⁶ will be critical for negotiating a text on e-commerce. Thus, it would be helpful for AfCFTA negotiators to consider any e-commerce-related negotiations for the E-Commerce Protocol. UNCTAD research found that the outcome of the JSI negotiations can have important implications for the future development of e-commerce and the evolution of the multilateral trading system.⁴⁷ Indeed, combined with AU digital policies, JSIs can serve as a springboard to future plurilateral and multilateral discussions, which African countries can tailor to their specific interests. In addition, some African countries already have domestic policies and strategies on e-commerce;⁴⁸ they could thus bring their regulatory experience in this regard to AfCFTA negotiations.⁴⁹

Furthermore, AfCFTA negotiators will have to consider the different national approaches adopted by African countries in regulating e-commerce. As indicated, a few African states have already established national strategies and policies, whereas others lag. Therefore, while the AfCFTA negotiations aim to harmonise trade rules to advance regional integration, AfCFTA members must take cognisance of the existing differences in domestic policies and regulatory approaches. This knowledge should be applied to narrow the differences and seek standard policies that are suitable for all.

44 Phase I of the negotiations has focused on trade in goods, trade in services and dispute settlement. These negotiations have yet to be concluded as there are still outstanding issues. Under trade in goods and dispute settlement, outstanding issues include rules of origin (87.7% complete) and modalities on dispute settlement. Trade in services negotiations are scheduled to be concluded by 30 June 2022 (AfCFTA Media Briefing for the 8th meeting of the Council of Ministers, 28–29 January 2022). Phase II of the negotiations will focus on investment, intellectual property, competition policy and a Protocol on Women and the Youth, while Phase III will focus on the E-commerce Protocol, <https://www.youtube.com/watch?v=O6x2VTIDBo0>.

45 The Digital Transformation Strategy aims to use digital technologies and innovation to transform African societies and economies to promote African integration, generate inclusive economic growth, stimulate job creation, close the digital divide and eradicate poverty, while securing the benefits of the digital revolution for socioeconomic development. It addresses a number of key features, including e-commerce, broadband and fibre infrastructure, digital skills and the empowerment of micro, small and medium-sized enterprises (MSMEs).

46 The Policy and Regulatory Initiative for Digital Africa (PRIDA), the Programme for Infrastructure Development in Africa (PIDA), the African Continental Free Trade Area (AfCFTA), the African Union Financial Institutions (AUFIs), the Single African Air Transport Market (SAATM) and the Free Movement of Persons (FMP) to support the development of a digital single market (DSM) for Africa.

47 Rashmi Banga, 'Joint Initiative Statement.'

48 Notably South Africa, Kenya, Nigeria and Zambia.

49 There are other African countries with e-commerce regulations but they are not as advanced as those in South Africa, Kenya and Nigeria. Others with regulations include Egypt, Zambia, Senegal, Rwanda and Uganda, among others.

Policy developments in e-commerce in African countries

Research conducted by UNCTAD revealed a strong link between the existence of legal and regulatory frameworks, on the one hand, and the preparedness for e-commerce, on the other.⁵⁰ However, due to disparities in development and fragmented frameworks across African countries, many have yet to develop national policy and regulatory frameworks for e-commerce. As a result, bridging the digital divide in African countries continues to be hampered by a lack of regulatory preparedness, among other challenges. For instance, according to the UNCTAD Global Cyberlaw Tracker, only 20 countries out of the 54 have laws and regulations covering all four areas of e-commerce, namely e-transactions, cybercrime, consumer protection, and data protection and privacy laws.⁵¹

Table 2 summarises the regulatory frameworks and estimates that 35 African countries out of 54 currently have formal data protection and privacy legislation, four have draft legislation, and 16 have no legislation yet. Furthermore, with regard to cybercrime, only 38 African countries have formal legislation, none have draft legislation and 16 have no legislation.⁵² Similarly, at the regional level, economic communities such as SADC have an e-commerce strategy, while COMESA announced the launch of a digital free trade area⁵³ and ECOWAS introduced a Supplementary Act with e-commerce provisions.

TABLE 2 SUMMARY OF E-COMMERCE LEGISLATION IN AFRICA		
Data protection and privacy legislation		
Formal legislation	Draft legislation	No legislation
35 countries	4 countries	15 countries
Cybercrime		
Formal legislation	Draft legislation	No legislation
38 countries	0	16 countries
Electronic transactions		
Formal legislation	Draft legislation	No legislation
32 countries	6 countries	16 countries
Consumer protection		
Formal legislation	Draft legislation	No legislation
27 countries	3 countries	24 countries

Source: UNCTAD, Cyberlaw Tracker: Country Detail, <https://unctad.org/page/cyberlaw-tracker-country-detail>

50 UNCTAD, *What is at Stake*.

51 UNCTAD, *What is at Stake*.

52 UNCTAD, *Cyberlaw Tracker: Country Detail*, <https://unctad.org/page/cyberlaw-tracker-country-detail>.

53 Ify Ogo, 'An Agenda for the AfCFTA Protocol on E-commerce', *Tralac*, June 24, 2020, https://www.tralac.org/news/article/14692#_ftn5.

Conclusion and policy recommendations

If they are to drive their digital economy, African states can benefit more by participating in the ongoing JSI negotiations as observers or active participants than by not participating in the negotiations. Such participation would minimise the adoption of different or even conflicting provisions that may impede their developmental objectives and (potentially) the AfCFTA provisions. In addition, there are synergies between the JSI negotiations and the E-Commerce Protocol as the issues raised are the same as those faced globally.

As there has been no progress in the Work Programme, the only plausible route is to monitor and track the rules and make the necessary interventions. Interventions at a later stage may prove difficult and, in that context, this policy insight makes the following recommendations:

- African states, despite their opposition to the JSI process, must monitor and participate in the negotiations to intervene and advocate for their interests while the rules are being developed. Although taking on e-commerce commitments may seem overwhelming for African countries, participating in the negotiations could enhance their efforts to develop their digital economy and thus bridge the digital divide. Therefore, African states must establish their position and the digital commitments they are willing to make on e-commerce issues. Such digital commitments will set an important precedent and serve as a benchmark for the AfCFTA discussions.
- African WTO members must shift their focus to digital inclusion and broad-based digitalisation by investing in e-commerce objectives, such as digital infrastructure, research and development, and digital information to reap the full benefits of digital technologies. Digitalisation can serve as an essential tool for socioeconomic inclusion, while also unlocking the potential for development-gearred structural transformation.
- Regarding capacity challenges, the WTO has a skilled Secretariat to support negotiators and also offers technical assistance. African WTO members can tap into these resources to supplement their own, which will enable their fuller participation in negotiations such as e-commerce. In the light of the Doha impasse, like-minded coalitions at the WTO are likely to forge ahead, and African WTO members risk being left behind if they are not proactive. African countries should also use the resources at their disposal provided by the UN's ITU and Broadband Commission.
- Digitalisation cannot be achieved in isolation. African policymakers should endeavour to develop and improve their existing e-commerce policies and regulations so that they remain responsive to new developments in e-commerce. To build their e-commerce governance and regulatory frameworks, policymakers have a critical role to play in reducing barriers and creating a conducive environment for the digital economy to flourish. Hence, governments must update and reconcile the different regulations to create a comprehensive legal framework. Adopting and streamlining these laws will help to accelerate the deeper integration of companies, ie, small and medium-sized

enterprises (SMEs), into the digital economy. Formulating the right regulations and building the institutional capacity to implement these regulations is an important step towards bridging the digital divide and addressing the lack of readiness to participate in e-commerce negotiations. Policies and regulations will also be critical for establishing and introducing common principles at the regional level to realise legitimate e-commerce objectives. These instruments can then constitute the foundation for broader debate, adaptation and adoption at the continental level.

- African states must conclude Phase I of the negotiations before proceeding to negotiate the AfCFTA e-commerce agenda. The e-commerce agenda should be tied to the industrial agenda. Having an incomplete Phase I will have developmental implications for the agreement's implementation as critical e-commerce components will be missing.
- African states can rely on the secretariats of (sub-)regional economic communities (RECs) and their relatively well-established programmes. Therefore, in the short term, the AfCFTA and its implementation should be concentrated at the sub-regional level as well. In this regard, more research is required on the current state of play and the potential for trade and value chains in the sub-regions.
- Finally, when negotiating new agreements, the AU should take the lead in assisting member states to negotiate as a bloc and support the REC when dealing with powerful players, such as the EU and the US – particularly in agreements linking the digital agenda to trade and agriculture. Developed countries' trade strategies ultimately harm Africa's development objectives by limiting countries' true development agendas and industrialisation efforts. As a result, the African Union Commission must develop new-generation trade protection measures and trade strategies and tools that are independent of the donor agenda.

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Cover image

Accra, Ghana: Informal worker Sandra Ocran at her store in East Legon (Jonathan Torgovnik/Getty Images)

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