

# E-commerce Provisions in Regional Trade Agreements and what they mean for African MSMEs

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## 1. Introduction

The e-commerce negotiations at the World Trade Organization (WTO) are taking place at a time when other members already have entered into Regional Trade Agreements (RTAs) covering e-commerce. As of 19 July 2022, there are 193 RTAs with e-commerce chapters.<sup>1</sup> The most relevant RTAs with e-commerce chapters include the United-States-Mexico-Canada Agreement (USMCA),<sup>2</sup> the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Agreement (CPTPP),<sup>3</sup> and the Regional Comprehensive Economic Partnership (RCEP)<sup>4</sup> and the European Union (EU)-United Kingdom (UK) Trade and Cooperation Agreement (TCA).<sup>5</sup> The United States is the world's largest digital market,<sup>6</sup> while both CPTPP and RCEP Parties, combined are large economies,<sup>7</sup> with huge populations.<sup>8</sup> The UK and EU are big players in services trade and data flow, which is central to the digital economy. The regulatory agreements regarding the free flow of data and data protection between the EU and UK have a significant economic and social impact, affecting digital trade on a global scale, including in Africa, given that 11.5% of global cross-border data flows pass through the UK, of which 75% are with the EU.<sup>9</sup>

This chapter examines the e-commerce chapters of the four RTAs enumerated above with the aim of identifying the main provisions, and the spill-over effects of these RTAs on ongoing WTO e-commerce negotiations as well as on the African Continental Free Trade Area (AfCFTA) negotiations. Section 2 presents a brief typology of e-commerce regulation approaches shaping the RTAs, while section 3 highlights an overview of USMCA, TPP, RCEP, and TCA. Section 4

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<sup>1</sup> WTO, "Regional Trade Agreements Database", available at: <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last accessed 19 May 2022).

<sup>2</sup> USMCA (2020): Agreement between the United States of America, the United Mexican States, and Canada, 1 Jul 2020 [hereinafter USMCA].

<sup>3</sup> CPTPP (2018) Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 Mar 2018 [hereinafter CPTPP].

<sup>4</sup> RCEP (2020) Regional Comprehensive Economic Partnership Agreement, 15 Nov 2020 [hereinafter RCEP].

<sup>5</sup> TCA (2020) The EU–UK Trade and Cooperation Agreement, 30 Dec 2020 [hereinafter TCA].

<sup>6</sup> Leblond (2022) "USMCA Forward: Building a More Competitive, Inclusive, and Sustainable North American Economy – Digital", available at: <https://www.brookings.edu/essay/usmca-forward-building-a-more-competitive-inclusive-and-sustainable-north-american-economy-digital/> (last accessed 31 July 2022).

<sup>7</sup> Government of Australia Department of Foreign Affairs and Trade, "CPTPP Text and Associated Documents," Australian Government Department of Foreign Affairs and Trade, available at: <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents> (last accessed May 19 2022).

<sup>8</sup> Government of Australia Department of Foreign Affairs and Trade, "Regional Comprehensive Economic Partnership," available at: <https://www.dfat.gov.au/trade/agreements/in-force/rcep> (last accessed 12 May 2022).

<sup>9</sup> Borchert and Morita-Jaeger (2021), Petropoulos (2020), pp. 8–9.

analyses the spillover effects of e-commerce provisions in RTAs on African Micro, Small, and Medium-sized Enterprises (MSMEs), while section 5 examines the effect of RTAs on e-commerce negotiations at the WTO and what they mean for African MSMEs. Section 6 provides a conclusion.

## **2. A typology of e-commerce regulation approaches shaping the RTAs**

There are different approaches to the regulation of the digital economy, which in effect shape the RTAs. Although different countries have their distinct approaches to e-commerce regulation, three approaches are dominant: the US approach, the Chinese approach, and the EU approach.<sup>10</sup> In as much as the various e-commerce regulation approaches are different, there are similarities which means they converge in certain areas that are crucial in formulating e-commerce rules in the RTAs.<sup>11</sup>

The highly liberal agenda for regulating the digital economy informs the US position in e-commerce negotiations, whereby they seek to sustain an open, interoperable, and dependable global network.<sup>12</sup> The US approach promotes cross-border transfer of information by placing a ban on measures requiring the localization of cloud computing facilities.<sup>13</sup> Conversely, the Chinese approach to trade and internet policies embodies the increased role of the state in formulating digital industrial policy, restricting the free flow of information, and personal privacy while promoting the growth and development of domestic firms in the digital economy.<sup>14</sup> The EU's approach to internet regulation, including digital trade, is more regulated and prescriptive than the US approach although it is less state-controlled than China's approach.<sup>15</sup>

## **3. An overview of USMCA, TPP, RCEP, and TCA**

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<sup>10</sup> Willemys (2020), p.227.

<sup>11</sup> Ibid., 222.

<sup>12</sup> Fefer (2020), p. 9.

<sup>13</sup> Huang (2017), p. 328.

<sup>14</sup> Fefer (2020), p. 10.

<sup>15</sup> Fefer (2020), p. 12 and Article 44. "REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)," L 119/1 § (2016).

The USMCA is an agreement among three countries (United States, Mexico, and Canada) that came into force in 2020<sup>16</sup> and offers the strongest disciplines on digital trade of any international agreement.<sup>17</sup> The CPTPP incorporates the e-commerce provisions of the Trans-Pacific Partnership Agreement (TPP) covered under Chapter 14 of the agreement,<sup>18</sup> with parties to the agreement consisting of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, and Vietnam.<sup>19</sup> RCEP is an agreement among the Association of Southeast Asian Nations (ASEAN) members which include Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam, and ASEAN's free trade agreement partners which include Australia, China, India, Japan, New Zealand, and the Republic of Korea.<sup>20</sup> The TCA which came into force on 1 January 2021 resulted from negotiations between the EU and the UK following the withdrawal of the UK from the EU in January 2020.<sup>21</sup>

### **3.1 Principle and objectives**

The principles of RTAs are related to promoting internet access as an instrument for facilitating e-commerce. Article 19.10 of USMCA tackles the principles of access and the use of the internet for digital trade. RCEP also covers internet access and use for e-commerce under Article 12.2 of the agreement. The USMCA and RCEP recognize the importance of consumers accessing and utilizing consumer-selected services and applications available on the internet, allowing parties to adopt or maintain measures such as comprehensive privacy, personal information, or personal data protection laws, sector-specific privacy laws, or laws that provide for the enforcement of voluntary privacy commitments by businesses.<sup>22</sup> The TTP covers the protection of personal information

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<sup>16</sup> Gantz (2018), p.1.

<sup>17</sup> Wragg (2022), "USMCA: A High-Water Mark for Digital Trade?" Global Trade Review (GTR), available at: <https://www.gtreview.com/magazine/volume-18-issue-3/usmca-high-water-mark-digital-trade/> (last accessed 16 May 2022).

<sup>18</sup> Chaurasia (2018), p. 25.

<sup>19</sup> Government of Australia Department of Foreign Affairs and Trade, "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)," Australian Government Department of Foreign Affairs and Trade, available at: <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership> (last accessed 12 May 2022).

<sup>20</sup> Ministry of Economy, Trade and Industry, "Regional Comprehensive Economic Partnership (RCEP) Signed," Japan Government, available at: [https://www.meti.go.jp/english/press/2020/1115\\_001.html](https://www.meti.go.jp/english/press/2020/1115_001.html) (last accessed 12 May 2022).

<sup>21</sup> Hallak (2022), p. 1.

<sup>22</sup> Article 19.10 USMCA (2018); Article 12.2 RCEP (2020).

within the principles and guidelines of relevant international bodies.<sup>23</sup> The TCA takes the EU approach to e-commerce regulation by emphasizing the protection of personal data as stipulated under Paragraph 11 of the Preamble where each party is to respect the autonomy of the other to regulate the digital economy. The TCA recognizes the need of removing unjustifiable obstacles to data flows and facilitating trade using electronic means while maintaining the Parties' policies regarding the protection of personal data.<sup>24</sup>

### **3.2 Scope**

The USMCA and TPP describe a digital product as a digitally encoded computer program, text, video, image, sound recording, or other digitally or electronically transmitted product, generated for commercial sale or distribution.<sup>25</sup> of the USMCA and TPP stipulate that the chapter on digital trade applies to a measure that affects trade by electronic means.<sup>26</sup> The TCA has a unique provision that identifies services that must be regarded as computer and related services to liberalize trade in services and investment, regardless of whether they are delivered via a network, including the internet.<sup>27</sup> The identified services include consulting, adaptation, strategy, computer programs, data processing, data storage, data hosting or database services, maintenance and repair services for office machinery and equipment, and training services for staff of clients, related to computer programs, computers, or computer systems.<sup>28</sup>

### **3.3 Obligations**

RTAs cover obligations to digitalize trade, obligations to increase trade in digital products, services, and information/data, and obligations to increase transparency and cooperation in the digital economy.

#### **3.3.1 Digitalize trade**

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<sup>23</sup> Article 14.8 CPTPP, TPP § (2016), para. 2, available at: <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents> (last accessed 12 May 2022).

<sup>24</sup> "TCA," L 149/10 § (2021), para. 11.

<sup>25</sup> Article 19.1 USMCA; Article 14.1 CPTPP (2016).

<sup>26</sup> Article 19.2 USMCA, para. 2; Article 14.2. CPTPP (2018).

<sup>27</sup> Article 212 TCA, para. 1.

<sup>28</sup> Article 212 *ibid.*

RTAs have specific provisions covering electronic transactions. The RTAs observe that Parties shall maintain a legal framework for electronic transactions in a manner consistent with the principles of the 1996 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce.<sup>29</sup> In addition, Parties to USMCA and CPTPP shall endeavor to reduce the regulatory burden on electronic transactions.<sup>30</sup> RCEP and the TCA however, emphasize the right to regulate a wide range of public policies,<sup>31</sup> all four RTAs reflect the three approaches to e-commerce regulation which facilitate e-commerce as they provide for the digitalization of trade through the recognition of e-signatures.<sup>32</sup> These RTAs also seek to digitalize trade by facilitating paperless trading, a measure that covers the acceptance of electronic trade documents as a legal equivalent of paper versions.<sup>33</sup>

### **3.3.2 Increase trade in digital products, services, and information/data**

These RTAs have provisions covering measures such as cross-border transfers of information, limiting data localization measures, promoting openness in terms of providing information to users or consumers, banning customs duty on electronic transmissions, and ensuring non-discrimination of digital products.<sup>34</sup> The provisions promote the cross-border transfer of information by electronic means by forbidding any restriction or prohibition on cross-border information transfer via electronic means, including personal information, provided the action is for the conduct of the business of a covered person.<sup>35</sup> However, a Party can still restrict or ban the cross-border flow of information if doing so is necessary to a legitimate public policy objective, as long as the measure is not used in a way that amounts to arbitrary or unreasonable discrimination or a disguised trade restriction and does not place more limits on information transfers than are necessary to achieve the goal.<sup>36</sup>

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<sup>29</sup> Article 19.5 USMCA; Article 14.5 CPTPP, 2018.

<sup>30</sup> Article 19.5 USMCA, para. 2; Article 14.5 CPTPP, 2018, para. 2.

<sup>31</sup> Article 12.10 RCEP, para. 2; Article 198 TCA.

<sup>32</sup> Article 19.6 USMCA; Article 14.6 CPTPP, 2016; Article 12.6 RCEP; Article 206 TCA.

<sup>33</sup> Article 19.9 USMCA; Article 14.9 CPTPP, 2016; Article 12.5 RCEP.

<sup>34</sup> Articles 19.3, 19.4, 19.11, 19.12. USMCA; Articles 14.3, 14.4, 14.11, 14.13. CPTPP, 2018; Articles 12.7, 12.11, 12.14, 12.15. RCEP; Articles 201.1, 203.2, TCA.

<sup>35</sup> Article 19.11 USMCA; Article 14.11 CPTPP, 2018; Article 12.15 RCEP; Article 201 TCA, para. 1.

<sup>36</sup> Article 19.11 USMCA, para. 2; Article 14.11 CPTPP, 2016, para. 3; Article 12.15 RCEP, para. 3.



These RTAs promote openness in terms of availing information to consumers. USMCA promotes openness in the provision of government data as per Article 19.18 of the agreement since public access to and use of government data promotes economic and social growth, as well as competitiveness, productivity, and innovation.<sup>37</sup> However, TTP and RCEP do not have specific provisions dealing with open government data.

In addition, RTAs ban the imposition of customs duties on electronic transmission, which increases trade in digital products -as seen in the USMCA.<sup>38</sup> The elimination of customs duties on electronically transmitted digital products also includes any other fees or charges related to imports or exports.<sup>39</sup> While the CPTTP and TCA have similar provisions to the USMCA regarding the elimination of customs duties on electronic transmission,<sup>40</sup> RCEP in line with the Chinese cautious approach to e-commerce regulation adopts a different approach, stipulating that each Party shall maintain the current practices of not imposing customs duties on electronic transmissions between the Parties.<sup>41</sup> Moreover, the RCEP leaves room for changes in customs duties by observing that each Party may alter its practice in light of any additional WTO decisions.<sup>42</sup>

The USMCA and the CPTPP stipulate that no Party shall treat a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in another Party's territory, or a digital product whose author, performer, producer, developer, or owner is a person of another Party, any less favorably than it treats other similar digital products.<sup>43</sup> The RCEP does not have a hard non-discrimination obligation, instead taking quite a different approach to non-discrimination in terms of the treatment of digital products, taking the China approach to e-commerce regulation by placing it under areas for dialogue on e-commerce.<sup>44</sup>

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<sup>37</sup> Article 19.18 USMCA, para. 1; Article 210 TCA, para. 1.

<sup>38</sup> Article 19.3 USMCA, para. 1.

<sup>39</sup> Article 19.3 *ibid.*, para. 2.

<sup>40</sup> Article 19.3 *ibid.*, para. 1; Article 14.3 CPTPP, 2018, para. 1; Article 203 TCA, para. 2.

<sup>41</sup> Article 12.11 RCEP, para. 1.

<sup>42</sup> Article 12.11 *ibid.*, 3.

<sup>43</sup> Article 19.4 USMCA, para. 1; Article 14.4 CPTPP, 2018, para. 1.

<sup>44</sup> Article 12.16 RCEP.

Moreover, obligations to increase digital trade in RTAs consider the protection of consumers or users, address unsolicited commercial communications, and provide for cyber security measures.<sup>45</sup> All the RTAs provide for online consumer protection, which is in recognition of the need to protect digital economy consumers from fraudulent or deceptive commercial activities that cause or potentially cause harm to consumers.<sup>46</sup>

The RTAs also cover measures to address unsolicited commercial communications, which obligates each Party to adopt or maintain measures providing for the limitation of unsolicited commercial electronic communications.<sup>47</sup> With similar language, the provisions under various Articles mentioned above state that Parties shall endeavor to adopt or maintain systems that allow customers to decrease or eliminate unwanted commercial electronic communications addressed to addresses other than their email addresses.<sup>48</sup>

All four RTAs provide for the protection of personal information or data. While USMCA and CPTTP start by acknowledging the economic and social benefits of protecting users' personal information in digital trade, as well as the role that this plays in boosting consumer trust in e-commerce, RCEP does not and instead focuses on the protection of personal information by adopting a common language with USMA and CPTTP.<sup>49</sup> The TCA, in line with the EU approach, acknowledges that people have a right to the protection of their personal information and privacy and that high standards in this area help build public confidence in the digital economy.<sup>50</sup>

The RTAs also have provisions related to cybersecurity, particularly the USMCA and CPTPP, and RCEP. Under the three RTAs, Parties shall endeavor to enhance the cybersecurity incident response capabilities of their respective national institutions.<sup>51</sup> In terms of disclosure of source codes, the USMCA CPTPP and TCA stipulate that as a condition for the import, distribution, sale,

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<sup>45</sup> Articles 19.7.1, 19.8, 14.13 USMCA; Articles 14.7, 14.8, 14.14 CPTPP, 2016; Articles 12.7.2, 12.8, 12.9, 12.13 RCEP; Articles 208.1(a), 209, 703 TCA.

<sup>46</sup> Article 19.7 USMCA, para. 1; Article 14.7 CPTPP, 2016, para. 1; Article 12.7 RCEP, para. 2; Article 208 TCA, para. 1 (a).

<sup>47</sup> Article 19.13 USMCA; Article 14.14 CPTPP, 2018; Article 12.9 RCEP; Article 209 TCA.

<sup>48</sup> Article 19.13 USMCA; Article 14.14 CPTPP, 2018; Article 12.9 RCEP; Article 209 TCA.

<sup>49</sup> Article 19.8 USMCA, para. 1; Article 14.8 CPTPP, 2018, para. 1; Article 12.8 RCEP, para. 1.

<sup>50</sup> Article 203 TCA, para. 1.

<sup>51</sup> Article 19.15 USMCA, para. 1; Article 14.16 CPTPP, 2016; Article 12.13 RCEP.

or use of such software, or of products including that software, no Party shall require the transfer of, or access to, a source code of software owned by a person of another Party, or to an algorithm expressed in that source code.<sup>52</sup>

While CPTTP, RCEP, and TCA do not have specific provisions related to interactive computer services, USMCA, in line with the US approach to e-commerce rules through disciplines that seek to constrain governments' regulatory powers has obligations covering interactive computer services.<sup>53</sup> Under USMCA's obligations on interactive computer services, the Parties agree that promoting interactive computer services, including for small and medium-sized businesses, is critical for the growth of digital trade.<sup>54</sup>

### **3.3.3 Increased transparency and cooperation**

All four RTAs have provisions related to the promotion of transparency and cooperation among Parties, which demonstrate the US, EU, and Chinese approaches to seeking cooperation to govern the digital economy. Of these RTAs, the USMCA, CPTPP, and RCEP promote cooperation for enhancing digital trade.<sup>55</sup> In promoting cooperation, Parties agree to share knowledge and experiences on digital commerce regulations, policy, enforcement, and compliance, including personal data protection, notably to bolster current international mechanisms for cooperating in the enforcement of privacy legislation, electronic communication security, authentication, and the use of digital tools and technologies by the government to improve government performance.<sup>56</sup> Conversely, the TCA binds the Parties to cooperate on regulatory matters of e-commerce, including the recognition and facilitation of interoperable electronic authentication and electronic trust services, the handling of direct marketing communications, consumer protection, and any other matter pertinent to the growth of electronic commerce, including emerging technologies.<sup>57</sup> However, other than other RTAs, provisions for cooperation in the TCA do not apply to a Party's

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<sup>52</sup> Article 19.16 USMCA, para. 1; Article 14.17 CPTPP, 2016, para. 1; Article TCA, para. 1.

<sup>53</sup> Article 19.17 USMCA.

<sup>54</sup> Article 19.17 *ibid.*, para. 1.

<sup>55</sup> Article 19.4 *ibid.*; Article 4.15 CPTPP, 2016; Article 12.4 RCEP, para. 1.

<sup>56</sup> Article 19.4 USMCA, para. 1; Article 4.15 CPTPP, 2016; Article 12.4 RCEP, para. 1.

<sup>57</sup> Article 211 TCA, para. 1.

privacy and data protection policies, particularly those governing cross-border transfers of personal data.<sup>58</sup>

### **3.4 Exceptions**

These RTAs provide exceptions that reflect the level of negotiations and the different interests of the Parties to the agreement. The exceptions are meant to allow Parties to deviate from the obligations of the agreements due to general reasons, known as general exceptions, security reasons, known as security exceptions, and prudential reasons.<sup>59</sup> One of the main exceptions is the cross-border transfer of information obligations.<sup>60</sup> Through the exceptions, all Parties to the RTAs have the right to restrict cross-border transfer of data if such restrictions are necessary to achieve a legitimate public policy objective, and as long as such measures are not applied discriminately or impose restrictions beyond the levels necessary for achieving such legitimate policy objectives.<sup>61</sup>

### **3.5 Special and differential treatment**

Provisions related to special and differential treatment in the RTAs cover different areas including interactive computer services, dispute resolution, and other obligations on paperless trading, and electronic transactions.<sup>62</sup> While all the other RTAs have elements of SDT, the TCA does not offer any SDT provisions. In the USMCA, provisions related to interactive computer services were not to immediately apply to Mexico but rather three years upon entry into force of the agreement.<sup>63</sup> Moreover, as a least developed country member with an ambition to build its digital economy,

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<sup>58</sup> Article 211 *ibid.*, para. 2.

<sup>59</sup> Article 19.17 USMCA: this is covered under Article 32.1 which deals with General Exceptions. CPTPP (2018): the exception incorporates those covered under Chapter 9 (Investment), Chapter 10 (Cross-Border Trade in Services) and Chapter 11 (Financial Services). RCEP: the exceptions are applicable to the obligations in chapter 8, covering trade in services or chapter 10, covering investment. Article 199 TCA: the exceptions apply to three areas, namely 1) measures for prudential reasons (Article 184) such as for the protection of investors, depositors, policy-holders, or persons to whom a fiduciary duty is owed by a financial service supplier; or ensuring the integrity and stability of a Party's financial system; 2) measures compatible with Article XX of GATT 1994, which are related to those necessary to protect human life or health (covered under Article 412); and 3) measures necessary for security reasons covered under Article 415.

<sup>60</sup> Article 19.11 USMCA, para. 2; Article 14.11 CPTPP, 2016, para. 3; Article 12.15 RCEP, para. 3; Article 199 TCA.

<sup>61</sup> Article 19.11 USMCA, para. 2; Article 14.11 CPTPP, 2016, para. 3; RCEP, para. 3; Article 199 TCA.

<sup>62</sup> Articles 19.17, 19.9, 19.5 Annex 19-A.2. USMCA; Articles 14.5, 14.11 CPTPP, 2016; Articles 12.5, 12.6, 12.15, 12.17 RCEP, para. 3.

<sup>63</sup> Annex 19-A USMCA, para. 1.

Mexico's compliance with the provisions under interactive computer services will be in line with the country's constitutional provisions, which guarantee free access to plural and timely information, access to information and communication technology, access to the services of a radio broadcast, telecommunications, and broadband internet,<sup>64</sup> as well as and protects freedoms of speech, opinion, ideas, and information.<sup>65</sup> In the CPTPP, Brunei Darussalam and Vietnam, two of the less developed Parties in this RTA, are not under obligation to apply provisions related to personal data protection before the date on which they implement their legal frameworks that protect personal data for e-commerce.<sup>66</sup> CPTPP also exempts Brunei Darussalam from implementation measures regarding unsolicited commercial electronic messages before implementing its laws regarding the same.<sup>67</sup>

The CPTPP covers SDT measures in the dispute resolution mechanism of the agreement.<sup>68</sup> The CPTPP SDT dispute settlement measure specifically stipulates that Malaysia and Vietnam shall not be subjected to dispute settlement under chapter 28 of the agreement concerning their obligations related to the non-discriminatory treatment of digital products, and cross-border transfer of information by electronic means for a period of two years after the date of the agreement's entry into force.<sup>69</sup> Vietnam is further exempted from dispute settlement under obligations related to the location of computing facilities, for an additional two years after the date of entry into force.<sup>70</sup> For the RCEP, although the agreement provides for dispute resolution, there are no specific SDT provisions.<sup>71</sup>

The most extensive SDT in the RTAs is in the RCEP. For instance, obligations on paperless trading,<sup>72</sup> electronic authentication, and electronic signature<sup>73</sup> exempt poorer countries namely Cambodia, Lao PDR, and Myanmar for a period of five years upon the agreement entering into

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<sup>64</sup> Article 6, Mexico's Constitution of 1917 with Amendments through 2015 (1917), available at: [https://www.constituteproject.org/constitution/Mexico\\_2015.pdf?lang=en](https://www.constituteproject.org/constitution/Mexico_2015.pdf?lang=en) (last accessed 28 July 2022).

<sup>65</sup> Article 7 *ibid.*

<sup>66</sup> Article 14.8 CPTPP, 2018.

<sup>67</sup> Article 14.14 *ibid.*

<sup>68</sup> Article 14.18 *ibid.*

<sup>69</sup> Article 14.18 CPTPP, 2016, paras. 1 and 2.

<sup>70</sup> Article 14.18 *ibid.*, para. 2.

<sup>71</sup> Article 12.17 RCEP.

<sup>72</sup> Article 12.5 *ibid.*

<sup>73</sup> Article 12.6 *ibid.*

force. In addition, the agreement exempts the three countries from the obligation to implement provisions related to the protection of consumer fraud,<sup>74</sup> protection of personal information,<sup>75</sup> or recourse against suppliers of unsolicited commercial electronic messages<sup>76</sup> until five years after the agreement enters into force. Regarding recourse for unsolicited commercial electronic messages, RCEP exempts Brunei Darussalam from implementing any measure for a period of three years from the date of entry into effect of the Agreement.<sup>77</sup> Regarding the domestic regulatory framework, the RCEP exempts Cambodia from maintaining or adopting electronic transactions for a period of five years upon the agreement entering into force.<sup>78</sup> Even greater flexibility is provided for obligations related to the location of computing facilities and cross-border transfer of information where Cambodia, Lao PDR, Myanmar, and Vietnam maintain the right to require the location of computing facilities within their respective jurisdictions for a period of five years upon entry into force of the agreement.<sup>79</sup> Moreover, Cambodia, Lao PDR, and Myanmar are provided with an additional three years to require the domestic location of cloud computing facilities as a condition for companies conducting businesses within their territories if necessary.<sup>80</sup>

In terms of data localization and data privacy, the CPTPP's approach is more liberal than the RCEP's, but not as much as the USMCA's. The RCEP's approach acknowledges the Parties' freedom to implement restrictive measures when they consider their essential security interests.<sup>81</sup> These obligations also have exceptions and important special and differential treatment obligations, especially for RCEP.<sup>82</sup> Other critical issues in the RTAs, particularly the USMCA, cover regulation for SMEs, state-owned enterprises, and data localization, which could set a precedence for future digital trade agreements.<sup>83</sup>

#### **4. Spillover effects of e-commerce provisions in RTAs on African MSMEs**

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<sup>74</sup> Article 12.7 *ibid.*, para. 6.

<sup>75</sup> Article 12.8 *ibid.*, para. 1.

<sup>76</sup> Article 12.9 *ibid.*, para. 2.

<sup>77</sup> Article 12.9 *ibid.*

<sup>78</sup> Article 12.10 RCEP.

<sup>79</sup> Article 12.14 *ibid.*, para. 2; Article 12.15 *ibid.*

<sup>80</sup> Article 12.14 RCEP, para. 2.

<sup>81</sup> Article 12.15 *ibid.*, 3 (b).

<sup>82</sup> Articles 12.15.2, 12.15.3 (b), 12.14 (2-3). RCEP.

<sup>83</sup> Gantz (2018), p.1.

This section examines the spillover effects of e-commerce provisions in USMC, TPP, and RCEP on MSMEs in African countries using six factors as normative criteria. These include 1) facilitating imports and exports,<sup>84</sup> 2) addressing tariffs as a form of government revenue,<sup>85</sup> 3) attracting investment,<sup>86</sup> 4) preserving policy space for digital industrialization,<sup>87</sup> 5) providing for development assistance,<sup>88</sup> and 6) providing for different rights and obligations according to development levels.<sup>89</sup> The six factors have been chosen for analysis because they incorporate sustainable development issues in addressing e-commerce,<sup>90</sup> Moreover, several international policy processes focus on the impact of digitalization on industrial activities, foreign direct investment, trade, and sustainable development.<sup>91</sup> I elaborate below.

#### **4.1 Facilitating imports and exports**

The RTAs provide opportunities for increased imports and exports among the Parties. Despite not using the term non-discrimination, the regulations on cross-border data flow in the chapters on digital trade arguably have the same effect.<sup>92</sup> RTAs increase import and export through trade creation since they generate opportunities for distance teaching and education for instructors, remote employment for office workers, online shopping without leaving home, and delivery of cashless takeaways, especially during the COVID-19 pandemic -all of which demonstrate the enormous potential of cross-border e-commerce and the digital economy among Parties.<sup>93</sup> However, this increased trade may lead to trade diversion as previous would-be markets for African MSMEs have less trade restrictive and e-commerce facilitative frameworks than other Parties to the RTAs. Therefore, for African countries, increased imports and exports for both goods

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<sup>84</sup> Terzi (2011), p. 747.

<sup>85</sup> Darsinouei and Kaukab (2017), p. 21.

<sup>86</sup> Foster and Azmeh (2019), p. 4.

<sup>87</sup> Mayer (2009), p. 337; Chang (2006), p. 630.

<sup>88</sup> Development assistance in this case means building and strengthening provisions in an agreement to better achieve the objectives of the Aid for Trade initiative, which was launched at the Hong Kong Ministerial Conference in December 2005. See: WT/MIN(15)/DEC.

<sup>89</sup> This borrows the approach from the Trade Facilitation agreement, WT/L/940.

<sup>90</sup> Leal-Arcas and Wilmarth (2015), p. 99.

<sup>91</sup> UN, "Maximizing the Development Gains from E-Commerce and the Digital Economy," Note by the Secretariat, TD/B/EDE/1/2 (Geneva: United Nations Conference on Trade and Development, July 26, 2017), 9, available at: [https://unctad.org/meetings/en/SessionalDocuments/tdb\\_ed1d2\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/tdb_ed1d2_en.pdf) (last accessed 8 March 2021).

<sup>92</sup> Lester (2022), "Non-Discriminatory Treatment of Digital Trade Products in the EU-NZ FTA", available at: <https://ielp.worldtradelaw.net/2022/07/non-discrimination-on-digital-trade-in-the-eu-nz-fta.html> (last accessed 11 July 2022).

<sup>93</sup> Liu at al. (2022), p. 3.

and services resulting from the RTAs reduce their potential markets for trade in both goods and services. The reduced market potential markets result from the fact that more market opportunities are created by the RTAs through reduced digital trade barriers while such barriers remain for Third Parties.

#### **4.2 Addressing tariffs as a form of government revenue**

The RTA provisions on tariffs are likely to inform the position of Parties to the agreements in the WTO e-commerce negotiations, particularly the 1998 Work Programme that has since been extending the moratorium on customs duties on electronic transmissions.<sup>94</sup> Parties to the RTAs, being influential WTO Members are likely to use their RTA rulebook as motivation for making the WTO moratorium on customs duties on electronic transmission permanent. If the moratorium is made permanent, African countries, which rely on customs duties for revenue generation, may continue to lose revenues, denying them opportunities to generate revenue for building capabilities in the digital economy for the benefit of MSMEs.<sup>95</sup> Moreover, the loss of customs revenue to Sub-Saharan nations has increased over time, doubling the potential loss of tariff revenue to WTO developed-country Members,<sup>96</sup> potentially denying them opportunities to generate revenue for building capabilities in the digital economy for the benefit of MSMEs.<sup>97</sup>

#### **4.3 Attracting investment**

RTA e-commerce chapters have no specific provisions for attracting investment. However, the agreements play a significant role in attracting investment in the digital economy of Parties, since they cover key obligations on digitalizing trade and promoting trade in digital products. This is also evidenced by increased interest from large investment banks and sovereign investors in the digital economy.<sup>98</sup> RTAs can enable Parties to attract investment in their services sector such as telecommunications and logistics, as well as professional, financial, and computer-related services

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<sup>94</sup> WTO, "Work Programme on Electronic Commerce: General Council Decision Adopted on 10 December 2019," December 11, 2019, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1079.pdf&Open=True> (last accessed 24 May 2022).

<sup>95</sup> Banga (2019), p. 23.

<sup>96</sup> Abendin and Duan (2021), p. 716.

<sup>97</sup> Banga (2019), p. 23.

<sup>98</sup> Peters (2022) p. 1.



which are all crucial for building capabilities in the digital economy.<sup>99</sup> The RTAs would be expected to increase trade opportunities, incentivizing investments in the digital economy since, arguably, the future of trade and investment decisions lie in digital trade, which can use blockchain technology, artificial intelligence, and the Internet of Things to steer the spread of e-commerce and cross-border payments.<sup>100</sup>

The RTAs build a global network of digital trade rules that reinforce the dominant position of big technology firms such as those from the US and China, hindering the emergence of smaller companies such as MSMEs from African countries.<sup>101</sup> As a result, RTAs will build even more capacities for digital economy big players to enable them to widen their dominance in the respective regions, and possibly expand this dominance to African countries through investment.<sup>102</sup>

#### **4.4 Preserving policy space for digital industrialization**

RTA e-commerce rules appear to have been carefully crafted to limit the government's ability to regulate various issues in the digital economy.<sup>103</sup> These issues, under regulation in the digital economy as per RTAs, have potential spillover effects on the policy space of African countries. While Parties to the RTAs enforce these rules, they are likely to determine global standards and practices, since they encourage countries to provide e-commerce businesses with specific technical controls and standards to implement.<sup>104</sup>

RTA e-commerce provisions promote market access opportunities for big players in the digital economy with less attention to smaller players from developing countries, Africa inclusive. For instance, it has been argued that implementing a strong TPP and developing other high-standard agreements will help ensure that US businesses, many of which pioneered the Internet and other digital technologies, have more open access to their partners' markets and can transfer data across

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<sup>99</sup> Tham (2022) "Harnessing RCEP to Harvest ASEAN's Unicorns", available at: <https://fulcrum.sg/harnessing-rcep-to-harvest-aseans-unicorns/> (last accessed 17 May 2022).

<sup>100</sup> Peters (2022), p. 7.

<sup>101</sup> Alamilla and Cabañas (2022), "Digital Trade under the USMCA: A Modern Opportunity for North American Economic Growth", available at: <https://www.wilsoncenter.org/article/digital-trade-under-usmca-modern-opportunity-north-american-economic-growth> (last accessed 16 May 2022); Liu et al. (2022), p. 1.

<sup>102</sup> James (2020), p. 35.

<sup>103</sup> Monteiro and The (2017), p. 4.

<sup>104</sup> Bieron and Ahmed (2012), p. 568.

international borders more seamlessly.<sup>105</sup> Such an argument carries much significance considering that RTAs are dominated by big players such as the US and China, meaning that by design, they do not focus on the offensive trade interests of MSMEs from African countries. Despite not focusing on their interests, MSMEs from African countries would be expected to abide by standards set by the RTAs if they are to trade with Parties to such agreements.

#### **4.5 Provide for development assistance**

The RTAs do not provide for development assistance but rather cooperation and capacity building, ranging from obligations such as market access and regulatory issues to overcoming obstacles faced by MSMEs' participation in e-commerce.<sup>106</sup> Cooperation allows parties to the agreements to share information, coordinate both domestic and international policy measures, and negotiate the removal of e-commerce barriers.<sup>107</sup> The RTAs provide an avenue for Parties to cooperate and build digital capabilities at the respective national levels, which in turn increases the competitiveness of companies from these countries. Such cooperation measures would widen the digital divide since African countries, in addition to not being Parties to the RTAs, have low levels of digitalization and would see their MSMEs having to compete with counterparts from countries benefiting from cooperation with other established players in the digital economy.

#### **4.6 Providing for different rights and obligations according to development levels**

The spill-over effects of RTAs regarding the provision for different rights and obligations according to development levels are two-fold. On one hand, the approach which ignores SDT, taken by USMCA and TPP, if it is to shape the global standards for e-commerce agreements, would mean that such agreements would be designed in such a way that African countries would lack flexibility periods to build their domestic capacity for MSME growth and competitiveness for a longer transition. On the other hand, however, if the RCEP approach is to inform global standards

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<sup>105</sup> Buxbaum (2016), "TPP Critical for Ensuring Digital Trade", available at: <https://www.globaltrademag.com/tpp-critical-for-ensuring-digital-trade/> (last accessed 17 May 2022).

<sup>106</sup> Herman (2010), p. 15.

<sup>107</sup> Leblond (2022), "USMCA Forward: Building a More Competitive, Inclusive, and Sustainable North American Economy – Digital", available at: <https://www.brookings.edu/essay/usmca-forward-building-a-more-competitive-inclusive-and-sustainable-north-american-economy-digital/> (last accessed 31 July 2022).

for e-commerce agreements,<sup>108</sup> it implies that African countries have a leeway to demand longer transition periods similar to the provisions under Article 66.1 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.<sup>109</sup>

## **5. The effect of RTAs on e-commerce negotiations at the WTO and what they mean for African MSMEs.**

Adopting the RTA e-commerce would be a big step forward for trade governance, especially given the fact that CPTPP and the USMCA both contain comprehensive and binding next-generation standards for e-commerce.<sup>110</sup> The USMCA is aimed at promoting and facilitating the development of digital trade and the US is working on establishing rules and dialogues governing digital trade with its partners.<sup>111</sup> Other big players in the digital economy, for instance, China and India joining hands in RCEP, also indicates that the ASEAN region is stepping up into a leadership role in global trade negotiations.<sup>112</sup> As a result, RTAs shape the WTO e-commerce negotiations as per the e-commerce negotiations consolidated negotiating text that was released by WTO Members under the Joint Statements Initiative (JSI) on e-commerce.<sup>113</sup> The RTAs are also likely to shape e-commerce negotiations under the AfCFTA.<sup>114</sup>

### **5.1 The effect of RTAs in shaping the WTO e-commerce agreement**

The RTAs members, except Cambodia and Viet Nam, are active members of the WTO JSI on e-commerce negotiations, which increases the likelihood of shaping a future WTO e-commerce

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<sup>108</sup> So (2022), “E-Commerce Provisions in the Regional Comprehensive Economic Partnership: A Milestone for a Global Rule?”, available at: [https://www.ide.go.jp/English/ResearchColumns/Columns/2022/so\\_omezaki.html](https://www.ide.go.jp/English/ResearchColumns/Columns/2022/so_omezaki.html) (last accessed 8 January 2023).

<sup>109</sup> TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>110</sup> Froese (2019) p. 789.

<sup>111</sup> Nesamani (2021), “Talking Trade with Ambassador Tai”, available at: <https://nwAsianweekly.com/2021/08/talking-trade-with-ambassador-tai/> (last accessed 11 May 2022).

<sup>112</sup> Tobin (2019), “Explained: The Difference between the RCEP and the CPTPP”, available at: <https://www.scmp.com/week-asia/geopolitics/article/3017487/explained-difference-between-rcep-and-cptpp> (last accessed 7 January 2021).

<sup>113</sup> WTO, WTO Electronic Commerce Negotiations Consolidated Negotiating Text -December 2020, INF/ECOM/62 (World Trade Organization, December 7, 2020).

<sup>114</sup> Banga et al. (2021), p. 15.

agreement.<sup>115</sup> Moreover, the three coordinators for the JSI on e-commerce Japan, Australia, and Singapore, are all members of the RCEP.<sup>116</sup>

The e-commerce chapters in RTAs play a dual role in the landscape of trade rules in the digital era. On the one hand, they represent an attempt to compensate for the lack of progress in the WTO and remedy the ensuing uncertainties while on the other hand, they also set the standards for WTO e-commerce rules.<sup>117</sup>

RTA provisions included in the e-commerce negotiations consolidated negotiating text include provisions on paperless trading, electronic authentication and electronic signatures, customs duties, cross-border data flows, location of computing facilities, consumer protection, personal information protection, transparency, cybersecurity, and dispute settlement, all of which are similar or identical to the text RTAs. Due to the similar nature of RTA e-commerce provisions to the JSI consolidated negotiating text, the JSI proposals do not explicitly cover the most critical issue for bridging the digital divide capacity building. Instead, the JSI takes the best endeavor language for cooperation and capacity building that appears not to offer meaningful outcomes for the growth and development of MSMEs from African countries.<sup>118</sup>

## **5.2 The effect of RTAs in shaping the AfCFTA e-commerce protocol**

Under Phase III of the AfCFTA negotiation, an e-commerce protocol is to be included.<sup>119</sup> RTAs shape e-commerce issues related to definitions, application of WTO rules, non-discrimination, transparency, and a moratorium on customs duties on e-commerce transactions.<sup>120</sup> It also deals with domestic regulation issues such as regulatory barriers, electronic authentication, and consumer protection.<sup>121</sup> Consequently, market access, rules and regulations, and facilitation are the

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<sup>115</sup> WTO, "Joint Statement on Electronic Commerce," WT/L/1056 (World Trade Organization, January 25, 2019), available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1056.pdf&Open=True>. (last accessed 24 February 2021).

<sup>116</sup> Oh (2021), pp. 417–18.

<sup>117</sup> Burri (2021), p. 82.

<sup>118</sup> Ismail (2020), p. 21.

<sup>119</sup> Banga et al. (2021), p.10.

<sup>120</sup> Ibid., 15.

<sup>121</sup> Herman (2010), p. 4.

main issues identified as forming the core structure of a future AfCFTA e-commerce protocol.<sup>122</sup> What is, however, unclear at present is how African countries can balance their digital development ambition to bridge the digital divide, build domestic MSME competitiveness on one side, the non-discrimination principles and other obligations in the RTAs that constrain the policy space for digital industrialization on the other side.<sup>123</sup>

Since African countries are at relatively similar levels of development, it may appear that the AfCFTA e-commerce protocol application of non-discrimination principles is not a complex issue. However, tackling non-discrimination in the e-commerce agreement is important because the world's largest digital platforms, which are primarily established in the US and China, display monopolistic trends and growing market dominance due to network effects, data access, and economies of scale and scope.<sup>124</sup> This means that if the AfCFTA e-commerce protocol adopts the RTA approach, it would lock in the dominance of external big players in Africa's e-commerce agenda while making it harder for African MSMEs to build a competitive edge in the domestic markets before taking advantage of international markets.

The Africa Group<sup>125</sup> has always emphasized that e-commerce and digital trade must be developed in an inclusive way to avoid exacerbating the current global trade imbalances.<sup>126</sup> The Africa Group's position at the WTO implies that the AfCFTA e-commerce protocol is likely to adopt the SDT approach taken by RCEP since countries such as Kenya are more developed and attracts more investment in the digital economy than others such as Uganda.<sup>127</sup> Moreover, RCEP recognizes that

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<sup>122</sup> Sasi (2022), "AfCFTA Protocol on Digital Trade: Core Provisions That Drafters Should Address - Fie-Consult", available at: <https://fieconsult.com/afcfta-protocol-on-digital-trade-core-provisions-that-drafters-should-address/> (last accessed 21 May 2022).

<sup>123</sup> The e-commerce agreement issues constraining policy space include the provisions to digitalise trade, increase trade in digital products and the obligations therein, as per the JSI on e-commerce consolidated negotiating text and the e-commerce chapters in the various RTAs.

<sup>124</sup> UNCTAD, Digital Economy Report 2021: Cross-Border Data Flows and Development: For Whom the Data Flow, UNCTAD/DER/2021 (New York: United Nations Conference on Trade and Development), 22, available at: [https://unctad.org/system/files/official-document/der2021\\_en.pdf](https://unctad.org/system/files/official-document/der2021_en.pdf) (last accessed 4 November 2022).

<sup>125</sup> This is a group of WTO Members and Observers from Africa. More information is available at: [https://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm) (last accessed 10 January 2023).

<sup>126</sup> WTO, Strengthening the WTO to Promote Development and Inclusivity: Communication from the African Group, Cuba and India, WT/GC/W/778/Rev.3 (World Trade Organization, December 4, 2020), para. 4.3.

<sup>127</sup> Collins (2022), "Can Uganda's Tech Scene Compete with Kenya?", available at: <https://african.business/2022/04/technology-information/ugandas-tech-scene-slowly-matures/> (last accessed 21 May 2022).

its members' readiness for quick adoption of e-commerce obligations varies, hence it provides flexibility.<sup>128</sup> Therefore, future free trade agreements such as the AfCFTA e-commerce protocol would be expected to adopt the RCEP approach and include robust exceptions for less developed county members inclusive of their MSMEs from complying with certain provisions of the agreement.<sup>129</sup>

The RTAs also have the potential to shape the AfCFTA e-commerce protocol, not only by what they cover but by what they do not cover, especially on the issue of cooperation and capacity building. The RTA approach for cooperation is more oriented toward dialogue and collaboration but the AfCFTA e-commerce protocol, considering the low levels of digital capabilities in the continent compared to other continents need more capacity building.<sup>130</sup> Moreover, since many small developing countries need support to reach the necessary scale and critical mass for digitalization, capacity-building efforts. may be better addressed through a regional approach.<sup>131</sup> Globally, different countries are at various stages of readiness to participate in and profit from the e-commerce and data-driven digital economy.<sup>132</sup> Most of the developing and least developed countries, especially in Africa must improve their ability to digitalize and process data into digital intelligence to support their MSMEs which emphasizes the importance of capacity building to bridge the digital and data barriers.<sup>133</sup>

## **6. Conclusion**

There are 193 RTAs with explicit e-commerce provisions, with the USMCA, CPTPP, RCEP, and TCA being the most significant to African countries. This chapter examined the e-commerce chapters of the RTAs with the aim of identifying the main provisions, and the potential effects of these RTAs on the WTO e-commerce negotiations as well as the AfCFTA e-commerce protocol. The RTAs do not cover SDTs, a critical issue for African countries, except for the RCEP. They

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<sup>128</sup> Oh (2021), p 423.

<sup>129</sup> Bieron and Ahmed (2012), p. 566.

<sup>130</sup> UNCTAD, Digital Economy Report 2021: Cross-Border Data Flows and Development: For Whom the Data Flow, UNCTAD/DER/2021, p. 190, available at: [https://unctad.org/system/files/official-document/der2021\\_en.pdf](https://unctad.org/system/files/official-document/der2021_en.pdf) (last accessed 4 November 2022).

<sup>131</sup> Ibid.

<sup>132</sup> Ibid., 189.

<sup>133</sup> Ibid.

instead focus on cooperation among the parties to address barriers to SME participation in e-commerce. The RTAs are likely to play a significant role in setting standards for e-commerce rules both at the WTO and the AfCFTA level. These standards converge in areas where the three Parties agree on liberalization to facilitate digital trade but also differ in areas where the Parties take more protectionist and cautious measures to e-commerce regulation. At the WTO, the JSI on e-commerce consolidated negotiating text has similar provisions to the RTAs, the three coordinators- Australia, Japan, and Singapore all Parties to the RTAs. If the RTAs shape e-commerce rules in their current form, it is likely to offer more opportunities for bigger players in the digital economy, especially from US and China to lock in their dominance of global e-commerce while making it harder for African countries to build the competitiveness of the MSMEs to take advantage of the opportunities brought by e-commerce.

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