



FIDEL MWAKI

& COMPANY ADVOCATES



SPECIAL
AFRICA
EDITION

According to the World Trade Organization, trade in services has become the most dynamic aspect of international trade and presently accounts for about 7% of the world's GDP. The United Nations Conference on Trade and Development notes that for developing countries, trade in services has become the new frontier for enhancing their participation in international trade.

In Africa, there has been a concerted effort since the colonial era to integrate trade in services within the continent through regional economic communities. This has led to the recent enactment of a trade agreement establishing the Africa Continental Free Trade Area (AFTA Agreement) which was scheduled to commence implementation on 1st July 2020 but has since been postponed due to the Covid-19 Pandemic. Nonetheless, the AFTA Agreement reflects a desire by African states to promote regional integration and economic cooperation with the aim of creating a single market for goods and services in Africa.

In this Special Africa Edition of the FMC Newsletter, we look at the current state of regional economic integration in Africa with particular focus on Trade in Services.

CONTRIBUTORS



FIDEL MWAKI

Fidel is an Advocate of the High Court of Kenya. A key practice area of his firm is in the field of international commercial law in which he has advised a variety of clients on cross-border transactions including those related to trade in goods and services. A holder of a master's degree in international economic law, he has previously taught the subject at undergraduate level and co-authored a paper "International Public Policy, Corruption and Investor to State Arbitration" in the area of international trade and investment disputes, which was recently published in the Manchester Journal of International Economic Law.



QUINTER OTIENO

Quinter is a final year student at Kenyatta University School of Law. She enjoys research and has particular interest in the field of international trade and investment law. She participated in the first edition of the Nairobi Centre for International Arbitration Moot on international trade and investment law and was part of the winning team. She was also a member of the Kenyatta University TradeLab Pilot Clinic that conducts research on pro bono basis on international trade and investment law and was able to co-author a high quality memorandum titled "EU-ACP Economic Partnership Agreements: A case for African States".

TIMELINE FOR REGIONAL INTEGRATION IN AFRICA

Phase	Year(s)	Key Events
Colonial period	Pre-1950	Customs Union formed in 1917 between Kenya and Uganda with Tanganyika joining in 1927
Independence Era	1950-1965	Clamor for unification of Africa under one political state leading to formation of the Organization for African Unity in 1962 (now the African Union)
Post-Independence Era and early attempts at integration	1965-1980	<p>Defunct East African Community formed in 1967 between Kenya Uganda and Tanzania but dissolved in 1977</p> <p>Economic Community for West African States (ECOWAS) formed in 1975 between 15 West African states</p>
The Lagos Plan of Action and rising integration	1980-1990	<p>Strengthening of existing regional economic communities in Africa, establishing them in regions they did not exist and strengthening sectoral integration at the continental level</p> <p>The Southern African Coordination Conference was formed in 1980 among Southern Africa states. Later renamed in 1992 to Southern African Development Community (SADC)</p> <p>The Preferential Trade Area for Eastern and Southern Africa formed in 1981 between several Eastern and Southern African states. Later transformed in 1994 into the Common Market for Eastern and Southern African States (COMESA)</p> <p>Economic Community of Central African States (ECCAS) formed in 1983 between Central Africa states</p> <p>Arab Maghreb Union (AMU) formed in 1989 between Algeria, Libya, Mauritania, Morocco, and Tunisia, but currently not operational due to disputes among member states</p>



Phase	Year(s)	Key Events
African Economic Community Era	1991-2000	<p>Abuja Treaty of 1991, which recognized formation of the Common Market as one of the phases leading up to the establishment of an African Economic Community (AEC)</p> <p>The Inter-Governmental Authority on Development (IGAD) formed in 1996 by African States from the Horn of Africa, Nile Valley, and the African Great Lakes region</p> <p>Community of Sahel Saharan States (CEN-SAD) formed in 1998 but Saharan African states</p> <p>East African Community (EAC) relaunched in 1999 by East African states</p>
The African Union	2002	<p>Launch of the African Union (AU) in 2002 to replace the OAU.</p> <p>Recognized the Regional Economic Communities (RECs) such as ECOWAS, IGAD, and CEN-SAD as the pillars of integration</p>
Collaboration among the RECs	2008	SADC, EAC and COMESA agree to launch negotiations on a Tripartite Free Trade Area Agreement that was officially launched in 2015
The Boosting Intra-African Trade Plan	2012	Aim of the Plan was to deepen African market's integration and boost, significantly, the volumes of intra-African trade
A New Era for African Integration	2012-2020	<p>In 2012, a decision made at the 18th Ordinary Session of the AU Assembly to fast-track the establishment of the African Continental Free Trade Area (AFTA)</p> <p>In 2015, negotiations on the AFTA begin and the AFTA Agreement presented for signature in 2018</p> <p>Entry into force of the AFTA Agreement in May 2019 after ratification by 24 African states</p> <p>As of 2020, at least 54 African states have signed the AFTA Agreement but operationalisation postponed due to Covid-19 pandemic</p>



TRADE IN SERVICES IN AFRICA

FIDEL MWAKI & QUINTER OTIENO

How the Regional Economic Communities can shape the realization of the African continental free trade area.

Trade in services remains an area of marginal growth in Africa when compared to the rest of the world. While the services sector within Africa is starting to gain a greater share of total Gross Domestic Product, the volume of import and export of trade in services is still emergent when compared to advanced economic blocks around the world. Bridging the services gap is one reason that lead to African nations signing on to the African Continental Free Trade Area Agreement (the AFTA Agreement), which seeks to create a single liberalized market and customs union to facilitate the free movement of people, goods, and services within Africa and enhance the competitiveness of African economies within the continent and globally.





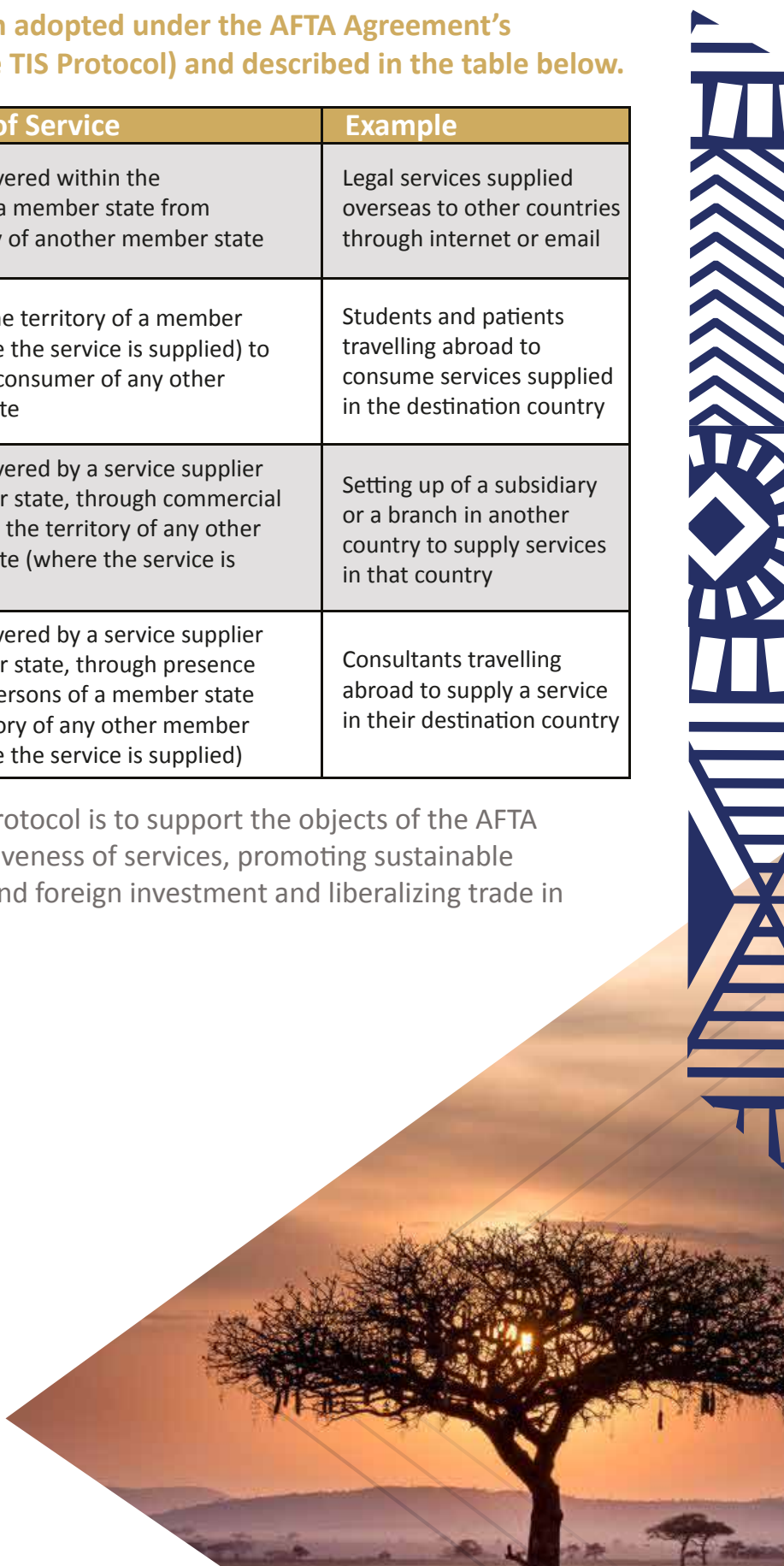
TRADE IN SERVICES UNDER THE AFTA AGREEMENT

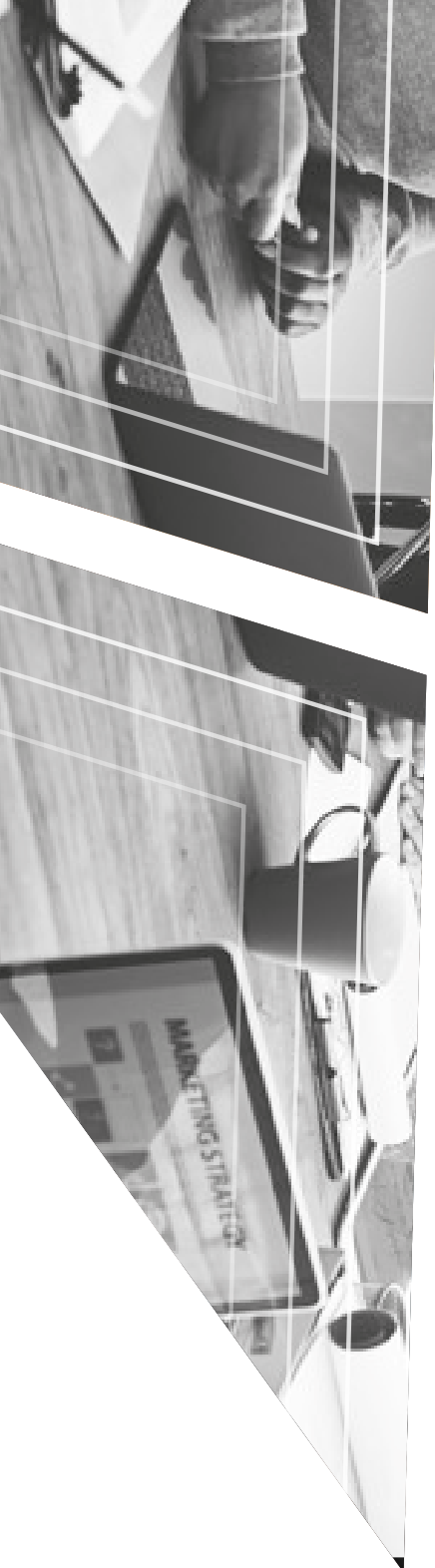
Trade in services is commonly understood to mean the sale and delivery of a “service” (as an intangible product) by a producer/provider to a consumer. The General Agreement on Trade in Services, a treaty of the World Trade Organization that applies the multilateral trading system to the services sector, originally established a criteria for supply of trade in services based on four “modes of supply” namely: (i) cross border, (ii) consumption abroad, (iii) commercial presence, and (iv) presence of natural persons.

These modes of supply have been adopted under the AFTA Agreement's Protocol on Trade in Services (the TIS Protocol) and described in the table below.

Mode	Supply	Delivery of Service	Example
One	Cross Border Supply	Service delivered within the territory of a member state from the territory of another member state	Legal services supplied overseas to other countries through internet or email
Two	Consumption Abroad	Service in the territory of a member state (where the service is supplied) to the service consumer of any other member state	Students and patients travelling abroad to consume services supplied in the destination country
Three	Commercial Presence	Service delivered by a service supplier of a member state, through commercial presence in the territory of any other member state (where the service is supplied)	Setting up of a subsidiary or a branch in another country to supply services in that country
Four	Presence of Natural Persons	Service delivered by a service supplier of a member state, through presence of natural persons of a member state in the territory of any other member state (where the service is supplied)	Consultants travelling abroad to supply a service in their destination country

The principal objective of the TIS Protocol is to support the objects of the AFTA Agreement by enhancing competitiveness of services, promoting sustainable development, fostering domestic and foreign investment and liberalizing trade in services across the continent.





Some of the general obligations of member states under the TIS Protocol include:

01

Rendering services and service suppliers of other member states treatment that is no less favorable than that accorded to like services and service suppliers of non-member states (Most-Favored-Nation Treatment);

02

Rendering services and service suppliers of other member states treatment no less favorable than that provided for under a member state's specific market access commitments (Market Access);

03

Recognizing the education, experience obtained, licenses or certifications granted in another member state (Mutual Recognition); and

04

Negotiating sector-specific obligations through the development of regulatory frameworks (Progressive Liberalization).





IMPLEMENTATION OF TRADE IN SERVICES WITHIN THE REGIONAL ECONOMIC COMMUNITIES

The 1991 Abuja Treaty recognized Regional Economic Communities (RECs) as instrumental in achieving an African Economic Community, whose overlapping membership would form the key building blocks for African economic cooperation and integration. Highlighted below is a brief snapshot of the state of implementation of trade in services under four RECs which offers some insight on the challenges member states face as they gear themselves towards executing the TIS Protocol in the coming decade.

1

Trade in services in the East Africa Community (EAC)

Under the EAC treaty, trade in services is regulated by the Common Market Protocol which provides for free movement of persons, labour, services and capital and partner states are required to liberalize high priority sectors such as business services, ICT, financial services, tourism, and transportation. Taking an example of business services in the legal sector, implementation remains inconsistent across the partner states with Burundi having fully liberalized under Modes One and Two of supply highlighted above but retains freedom to restrict market access for qualified lawyers from partner states under Mode Three, while in contrast, Kenya has liberalized under all the Modes with qualified lawyers from EAC partner states permitted to be admitted as advocates in Kenya on the basis that they are deemed to be duly qualified. Tanzania however is yet to liberalize legal services under any of the Modes.



2

Trade in services in the Common Market for Eastern and Southern Africa (COMESA)

Under the COMESA treaty, partner states are to adopt necessary measures to progressively attain the free movement of persons, labour and services. The COMESA committee on trade in services came up with regulations in 2009 and critical to the implementation of the framework has been the negotiation on commitments to liberalize seven priority sectors of telecommunications, finance, tourism, and transport as well as business, energy, and construction services. There is however concern that partner states have adopted a more protectionist approach for instance Burundi, a member of both COMESA and the EAC, has only fully liberalized Mode One and Two under its schedule of commitments for its transport sector.



Trade in services in the Economic Community of West African States (ECOWAS)

The ECOWAS community has made some progress on trade in services, with one of its aims being the establishment of a common market through the removal of obstacles to free movement of services. Trade in services in ECOWAS is still largely regulated by sectoral agreements such as the Convention Regulating Inter-State Road Transportation unlike the EAC and COMESA, whose approach to liberalization of trade in services has taken the form of more comprehensive agreements.

4

Trade in services in the Southern Africa Development Community (SADC)

The SADC treaty requires partner states to develop policies aimed at progressive elimination of obstacles to free movement of capital, labour, goods, services, and people. A protocol governing trade in services has been adopted which focuses on communication, construction, finance, energy, tourism, and transport, however it does not have liberalization obligations requiring partner states to negotiate the progressive removal of barriers to trade in services. Partner states have since finalized offers in the areas of communication, finance, tourism, and transport with negotiations on other areas still ongoing.

A STRATEGIC WAY FORWARD FOR TRADE IN SERVICES IN AFRICA

Changing demographics, cultural barriers, regional politics, and the fight against corruption are some of long-term challenges to tackle before African nations can fully enjoy integration and liberalisation of trade in services in the African economy. More immediate concerns however can be addressed under the RECs where national governments should act fast to remove barriers to trade and protectionist measures across all relevant services sectors and make efforts to conclude negotiations on outstanding commitments while setting realistic timelines for harmonisation of national laws and implementation of REC agreements and protocols. What is clear is that realisation of the TIS Protocol will not happen immediately and the inconsistent progress under the RECs highlights the roadblocks that remain to full liberalisation of trade in services within Africa. Nevertheless, African states and governments should reflect on the strategic benefits that the TIS Protocol brings to the continent and see this as an opportunity to create a regional economic powerhouse in the services sector that can rival other economies around the world and benefit the African Economic Community as a whole.

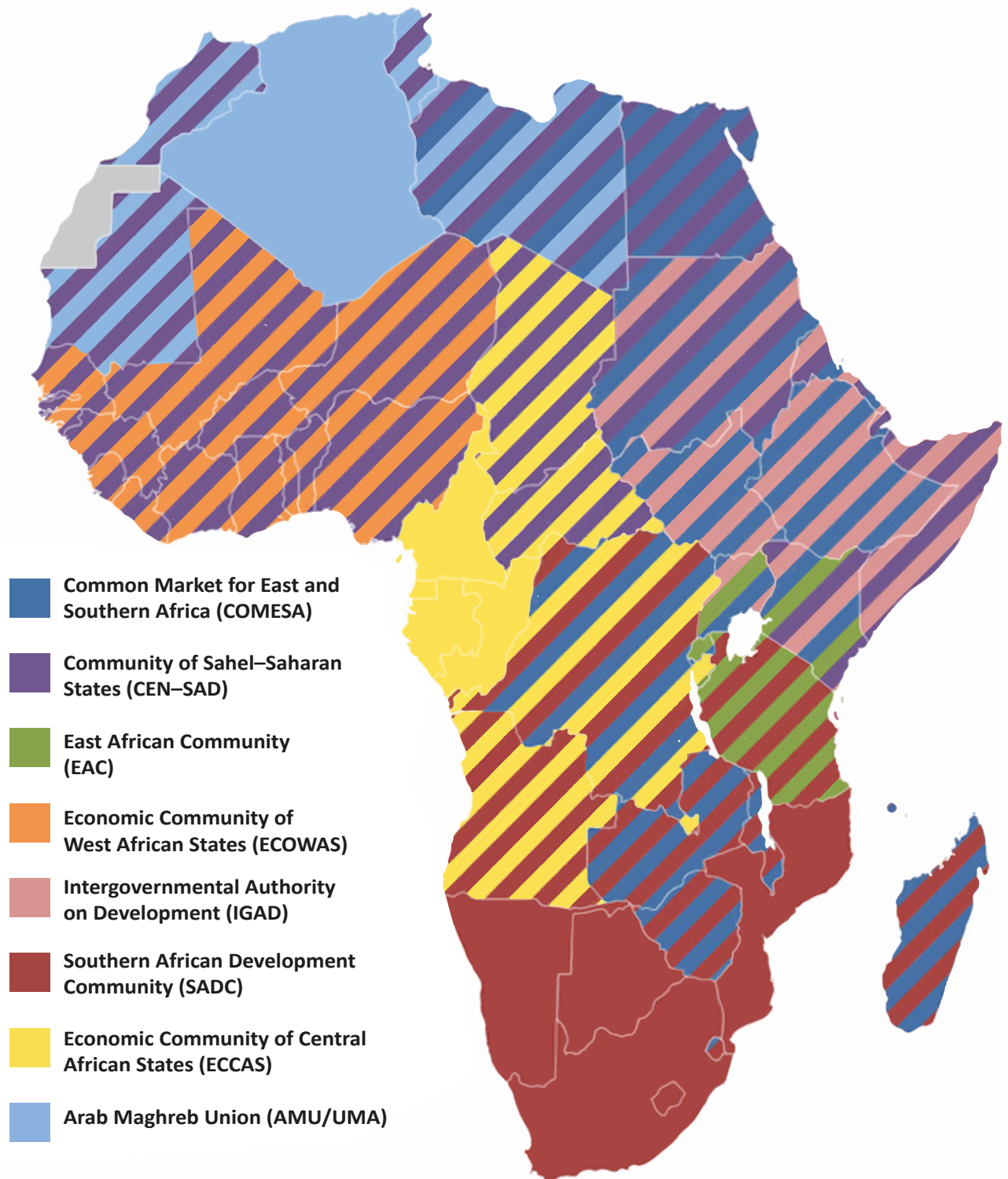
REGIONAL ECONOMIC COMMUNITIES

Regional Economic Community	Member States		
Common Market for East and Southern Africa (COMESA)	<ul style="list-style-type: none"> -Burundi -Egypt -Eswatini -Kenya -Madagascar -Mauritius -Seychelles -Sudan -Tunisia -Zambia 	<ul style="list-style-type: none"> -Djibouti -Eritrea -Ethiopia -Libya -Malawi -Rwanda -Somalia -The Comoros -Uganda -Zimbabwe 	To promote economic prosperity through regional integration
Community of Sahel-Saharan States (CEN-SAD)	<ul style="list-style-type: none"> -Benin -Cape Verde -Chad -Egypt -Gambia -Guinea -Ivory Coast -Liberia -Mali -Morocco -Nigeria -Senegal -Somalia -The Comoros -Tunisia 	<ul style="list-style-type: none"> -Burkina Faso -Central African Republic -Djibouti -Eritrea -Ghana -Guinea-Bissau -Kenya -Libya -Mauritania -Niger -São Tomé and Príncipe -Sierra Leone -Sudan -Togo 	To promote and create a free trade area within Africa
East African Community (EAC)	<ul style="list-style-type: none"> -Burundi -Rwanda -Uganda 	<ul style="list-style-type: none"> -Kenya -South Sudan -United Republic of Tanzania 	To promote a powerful and sustainable East African economic and political bloc
Economic Community of West African States (ECOWAS)	<ul style="list-style-type: none"> -Benin -Cape Verde -Guinea -Ivory Coast -Mali -Nigeria -Sierra Leone -Togo 	<ul style="list-style-type: none"> -Burkina Faso -Ghana -Guinea Bissau -Liberia -Niger -Senegal -The Gambia 	To promote collective self-sufficiency for its member states by creating a single large trade bloc and building a full economic and trading union.

Regional Economic Community	Member States		
Intergovernmental Authority on Development (IGAD)	-Djibouti -Ethiopia -Somalia -Sudan	-Eritrea -Kenya -South Sudan -Uganda	To promote peace, prosperity, and regional integration in the IGAD region
Southern African Development Community (SADC)	-Angola -Comoros -Eswatini -Madagascar -Mauritius -Namibia -South Africa -Zambia	-Botswana -Democratic Republic Of Congo -Lesotho -Malawi -Mozambique -Seychelles -United Republic of Tanzania -Zimbabwe	To promote regional Integration and poverty eradication within Southern Africa through economic development and ensuring peace and security
Economic Community of Central African States (ECCAS)	-Angola -Cameroon -Chad -Gabon -Rwanda -São Tomé and Príncipe	-Burundi -Central African Republic -Democratic Republic of Congo -Equatorial Guinea -Republic of the Congo	To promotion of regional economic co-operation in Central Africa
Arab Maghreb Union (AMU/UMA)	-Algeria -Mauritania -Tunisia	-Libya -Morocco	To promote economic and future political unity among Arab countries of the Maghreb in North Africa



MAP OF REGIONAL ECONOMIC COMMUNITIES





Fidel Mwaki & Company

Kalson Towers 2nd Floor, Left Wing,
The Crescent Off Parklands Road
Westlands Nairobi - Kenya.

Cell: +254 725 762 784

legal@fidelmwaki.com

www.fidelmwaki.com