CROSS-BORDER DIGITAL POLICIES FOR AFRICA
Scoping, Framing and Mapping Trends

Knowledge Dialogue Workshop 13 December 2021

KNOWLEDGE DIALOGUE ON CROSS-BORDER DIGITAL POLICIES FOR AFRICA

The first of two planned Knowledge Dialogues kicked off the project on the consultations for *Cross-border Digital Policies for Africa,* an initiative of the Internet and Jurisdiction Policy Network (I&JPN) on 13 December 2021. This report captures the contributions from the multi stakeholder participants from Africa in the first Dialogue and will inform the second Dialogue which will be extended to a wider international audience in early 2022.

These Dialogues aim to:

◆   bring together relevant experts and practitioners from Africa in a recurring and safe space;

◆   collect and frame the most relevant questions;

◆   share knowledge and expertise;

◆   support peer-to-peer learning; and

◆   consult on upcoming trends and challenges.

This report summarises the key takeaways from stakeholder inputs and discussions, as well as the results of the informal instant online polling conducted during the first knowledge dialogue workshop. The poll results and the breakdown of the stakeholder groups who participated in that workshop are included in the report.

SUMMARY

Participants in the workshops discussed, in two virtual breakout rooms, at least nine major themes emerging from the stakeholder-driven workshop including:

◆   the nature of data,

◆   capacity building,

◆   policy reform,

◆   problem-solving approaches,

◆   data sovereignty,

◆   data justice,

◆   African agency in international data policy,

◆   data security,

◆   the need for trusted environments.

Under these themes, participants raised the following issues:

- legislation on data flows,
- harmonisation of laws dealing with data,
- the public interest in data governance,
- alternative rights-based approaches to data regulation,
- data indicators,
- the importance of non-personal data as well as personal data,
- data localisation,
- data sovereignty,
- specialised and sensitive data regulation,
- access to data for cross-jurisdictional evidence gathering.

Some of the key discussions that the participants identified revolved around how as a continent, African countries are seeking to align themselves with the goals of the African Continental Free Trade Area (AfCFTA) Agreement. Making its way up most countries' agenda is the movement of goods and services both in the digital and physical spheres, and why that matters.

Participants also noted that policy attention had until the Africa Data Policy Framework recently proposed by the African Union Commission, been focused on the protection of personal data leading to the neglect of policy on other kinds of data and the data flows that form vital parts of the digital economy and society system. The participants discussed the importance of the unfettered movement of data across borders to the maintenance and extension of a free and open Internet acknowledging the need to limit associated harms and mitigate risk through the harmonisation of laws and policies that relate to the cross-border movement of data. Participants also discussed the need for equitable sharing of the benefits of data flows, between and within countries.

Acknowledging that it now required updating, some participants called for more countries to ratify and adopt the African Union Convention on Cyber Security and Personal Data Protection (the Malabo Convention),[1] which has still not been ratified more than six years after its adoption. While conceding the need to safeguard the privacy of individuals and communities, the participants highlighted the recognition and enabling of other rights pertinent to data generation, access, use and flows that are often ignored - such as the right to freedom of expression, access to information, and other second and third generation economic and social rights.

Other interventions emphasised the importance of consumer protection and cross-border dispute resolution as being potentially key proponents of creating a trusted digital environment. Participants also underscored the way in which the unfolding COVID-19 pandemic has accelerated the adoption of technology by those with access to it, but has exacerbated digital inequality, with compounding effects on those unable to access digital substitutes for work, schooling, business, financial access and social relief.

CASE STUDIES

Two research fellows from the I&JPN incubated Datasphere Initiative presented case studies on the importance of data to development and related challenges for regulation including cross- border regulation of data.

Benjamin Akinmoyeje made a presentation on democratizing health data innovation and value.
He highlighted the fact that, despite advancements in technology and the unprecedented rush to deploy digital health solutions to respond to the COVID-19 pandemic, the real value of data is not sufficiently discussed. Specifically, he observed that, although health data underpins the new data economy, research and innovation,

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[1] As of 12 January 2022, only eight (out of 55) member states have ratified or acceded to the Malabo Convention, namely Angola, Ghana, Guinea, Mozambique, Mauritius, Namibia, Rwanda, and Senegal.

Africa faces the triple challenge of limited infrastructure, limited data policies, and limited understanding of the value of health data. This situation led him to ask: "Do we really know the value that the health data offers?"

Governments and agencies reacted to data questions by intervening in policy areas such as data privacy, data protection, digital sovereignty, and data ownership. However, these data policies operate in silos and often contradict one another. He reiterated that it is essential to speak more freely about data because there are too many unilateral approaches to managing data flows and there are multiple structures and processes that address interdependent data issues in separate silos, without systemic coordination and with only a few actors involved in systematic approaches. Lack of a common vocabulary and mechanism represents an institutional and procedural vacuum.

He thus proposed awareness raising and capacity building as critical interventions. In particular, he recommended incorporating cultural values in all data collection tools, increasing access to data to spur local innovation, and developing local capacity and infrastructure.

He proposed a less siloed approach that supports:
- social contracts around the value of data;
- the complex contexts of health data;
- a multistakeholder approach;
- shared value for all stakeholders;
- the democratization of value of data and processes;
- a level playing field for all; and
- bridging infrastructure and capacity gap for engagement.

Akinmoyeje also encouraged the adoption of a 'Datasphere', which he defined as the ecosystem encompassing all types of data and the complex dynamics between data, human groups and norms. The 'Datasphere' approach is motivated by the need to:
- foster coordination among a diversity of actors;
- raise awareness by producing evidence-based analysis, accelerating the adoption of concrete proposals to overcome the current tensions and polarization around data; and
- catalyse human-centric technical, policy and institutional innovations.

He emphasised that governance of the 'Datasphere' will determine the capacity of African countries to deal with global challenges such as health, energy and climate.

Nashilongo Gervasius made a presentation on developing open data guidelines for Namibia.
Her presentation focused on open data and addressed aspects of data sovereignty and the free flow of data as well as data re-use (legally and technically). She emphasised that a framework for open (government) data can take the form of law, regulation, policy, or guidance. She called upon the government to commit to making non-sensitive, government-held data available for reuse both legally (e.g., through licenses and terms of use) and technically (e.g., through providing data in machine-readable formats).

Gervasius said Namibia does not have any policy framework for open data and that data is not commonly shared, or openly available or publicly licensed. Generally, it was also not machine readable as Namibia does not set data standards. As a consequence, Namibia has been ranked very low in terms of data openness. Namibia ranked 130th in the Open Data Inventory[2] in 2020 and 78th in the Global Open Data Index[3] in 2018, with 0% openness.[4] Nonetheless, she observed that Namibia meets some indicators of the Global Open Data Index, albeit to a limited extent, particularly in the area of national statistics, government budget, procurement and national laws.

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[2] Out of 187 countries ranked on that index.
[3] Out of 94 countries ranked on that index.
[4] The relevant slide of Gervasius's PowerPoint presentation also indicated that Namibia ranked 4th in Southern Africa.

She stressed that policy guidelines would enable the country to create data value; improve public service delivery; stimulate innovations; and contribute to the openness and accountability of the government. Finally, she expressed the wish that the subject of open data would prove vital in Africa and that it could apply to other African countries and form part of the planned African Union's Data Policy Framework.

HIGHLIGHTS FROM THE WORKSHOP

What are emerging trends related to cross-border digital policies for Africa from your perspective?

Value of data and data indicators

"How do we measure data flows and how do we measure the value of data?"

"When we talk about the policy tensions around data localization, we are starting off from the position where data has no value in and of itself. So, if you localize data and you do not have the capacity to process it or to create value, then it is exactly not going to benefit your economy and society… [It is] more important for local people to be able to *access* data in order to create value for it; [and not] to simply say we are going to keep the data here because it is a strategic asset, but you are not actually using it strategically."

"… Do we have enough data on data? Do we actually know what is flowing across borders? Do we know what is available but maybe siloed?"

Emerging importance of non-personal data.

"Most data protection [frameworks] speak of adequate mechanisms to allow the free movement of data, there is a need to create new and creative ways of ensuring data safety even where data is non-personal within our unique contexts."

"There seems to be a preoccupation with data protection legislation continentally. However, countries such as Ghana are starting to show an interest in cyber security as well. This is largely owing to a newfound interest in the movement in goods and services. This is indicative of a newfound interest in data that does not fall under the umbrella of 'data protection', i.e., non-personal data."

The (in)justice of the data economy: a different 'rights' approach to cross-border data flows

"… of course, at the moment the benefits, the opportunities that exist, and indeed the harms [of the data economy] are very unevenly distributed. So, it is really important that initiatives like this [*Cross-Border Digital Policies for Africa* project] can support broader initiatives on the continent… to ensure that Africa takes its place in the global economy, that we are also able to use it and optimize our own data in order to bring those benefits to our citizenry."

"… some economies [in Africa] are better able to grasp the opportunities from digital trade and from using data than others… How can we ensure that there is not a skewing within Africa between countries that are able to grasp these opportunities to the benefit of their economies and other countries that are not in as good a position to grasp the opportunities?"

"Other rights that accompany the movement of data are often ignored. We are often pre-occupied with the strict human rights approach. It could be worthwhile to think of other approaches that prioritise ancillary rights such as the right to information as being the basis of cross-border data policy. Think of the implications of Internet shutdowns on cross-border communication, harmonisation, trade, etc. The important question to ask is: Does data policy necessarily require a human rights framework in order to create to be a trusted and functioning environment?"

Implicit and explicit data localisation requirements of financial regulation

"There is a tendency to focus on data localisation laws and the impact of such laws needs to be explored. Tendency among African countries [that] want to own the narrative around cross-border data flows."

"But, when it comes to cross-border flow, we have on the one hand, the African Continental Free Trade Agreement, which envisages that data will flow in order to support free trade. And, at the same time, we have countries already engaging in siloing data… Already there are a number of countries that have required that data be localized for financial services."

Data localisation and flows

"… beyond the security concerns or the disadvantages of data localisation, it was also argued [by some workshop participant(s)] that, in fact, data localisation could actually have its benefits for Africa, as data localisation could help build African capacity, especially if the growing data centres that are happening on the continent build African trade."

"… if we simply did the free flow of information that is being proposed by certain parties, it would be asymmetric. It would have all the information being extracted out of the continent. So, we need to protect our citizens, then we also need to think about developing our own communities… to think of data localization and data sovereignty more as an issue of data control, [data] that you regulate positively and negatively to ensure other outcomes."

Collaboration and harmonisation of laws

"The main concern as far as it relates to cross-border digital policies is to have the laws harmonised. Data Protection Authorities (DPA's) need to work together and strengthen capacity building."

"The importance of harmonisation cannot be understated. It is important to look at data beyond the Malabo Convention (data protection and cyber security). As a first step towards harmonisation, the Malabo Convention needs to be ratified and modernised as well as the current provisions are becoming obsolete."

"Harmonisation is an ideal at the moment. The Malabo Convention can be thought of as a guideline. But on the ground very few countries have the necessary frameworks to adequately protect data. The conversation should drift towards how African countries can create common ground for data to move freely. It is worth bearing in mind the concerns surrounding the free movement of data such as security and actively dispelling those myths."

"Often when we think of cross-border data flows, we think about data protection. The two do not necessarily feed into one another and the difference has to come to the fore. We must be more intentional about legislating around cross-border data flows."

"Geopolitics and national agendas often override public interest and benefits. This is possibly why there is a reluctance to harmonise laws. It is important to realign government policy with public interest to ensure that policy is informed by and beneficial to the citizens, regionally or continentally."

Legal efforts and policy reform

"The legal fraternity has an important role to play in the adoption of comprehensive digital policies. Efforts at harmonisation have to be backed by sound legal policy."

"Consumer protection and dispute resolution can potentially have a huge role to play in forging a trusted environment in which digital policies can be adopted. COVID has already accelerated the adoption of technology as

a way to dispense justice. Thus, by extending such legal functions to the digital divide, we are presented with the opportunity to further cement general trust in the adoption of digital policies."

"Accountability has a huge role to play in harmonisation efforts. Governments have always been major influencers in tech adoption and they need to push forward the data agenda."

"It is absolutely imperative that these national data strategies [in Africa] are internationally interoperable so that we can see and… unleash this economic and social potential that this has while mitigating these harms and risks."

What initiatives and organizations are you familiar with that work on these topics?

The African Continental free Trade Area (AfCFTA)

The African Continental Free Trade Area (AfCFTA) Agreement requires the negotiation of protocols on e-commerce, competition and intellectual property. The e-commerce protocol is intended to establish an African Digital Single Market (DSM) and will necessarily deal with the cross-border data flows vital to e-commerce. The intellectual property and competition protocols must harmonise with the e-commerce protocol particularly in their treatment of data. Overall, the AfCTA must ensure equitable sharing of the benefits from the emerging digital economy.

The African Union Digital Transformation Strategy for Africa (2020-2030)
A specific objective of the strategy is to "promote open standards and interoperability for cross-border trust framework, personal data protection and privacy". To serve this objective the policy recommendations include: "Support the development and implementation of national, regional and continental digital
transformation strategies to stimulate demand, supply and enable scaling up of digital initiatives to address developmental challenges affecting the African continent; and the development of regulation aimed at enabling free flow on non-personal data."

The African Union Data Policy Framework for Africa

Arising from the African Union Commission's Digital Transformation Strategy 2020-2030, the Data Policy Framework for Africa was presented to the Meeting of African Ministers of Communications in late November 2021. The framework is guided by the broad principles of transparency, accountability of institutions and actors, inclusion of stakeholders, equity among citizens and fair competition amongst market players. The principles guiding the framework include trust, accessibility, interoperability, security, quality and integrity, representation and non-discrimination.

As the framework emphasises, transversal collaboration needs to be underpinned by mechanisms to increase institutional capacity and individual capabilities to optimise data value, both public and private, stimulate demand for data, which includes incentivising innovative data communities, and, on the supply-side, ensuring the quality, interoperability, and relevance of data in both the public and private sectors, and civil society.

The Framework presents a set of detailed recommendations and arising actions to guide member states through the formulations of policy in their domestic context as well as recommendations to strengthen cooperation among countries and promote intra-Africa flows of data.

African Economic Regional Consortium (AERC)

The AERC is currently embarking on a project on data governance in Africa. This project is supported by the Hewlett Foundation and aims to develop a research program around data governance in Africa. This will be done by identifying the most pressing issues surrounding the production, distribution (access) and use of a wide variety of socioeconomic data. The project primary outcomes are to:
  ◆ provide an understanding of the state of data governance principles and practices in Africa through benchmarking with global practices;

◆ identify knowledge and policy gaps across a wide spectrum of data sub-sectors, from generation through use to governance;

◆ bring together an interdisciplinary reference group on African data governance consisting of a community of experts (including economists, lawyers, technologists and critical policymakers) on data generation, data management, data policy and data governance; and

◆ produce concrete ideas for future research and capacity building on implementing data policy, management and governance protocols across Africa.

The African Information Society Initiative (AISI)

AISI is a framework that has guided information and communication activities since 1996. That year, the United Nations Economic Commission for Africa (UNECA) through its council of planning ministers launched this initiative. AISI serves as the continent's common vision to bridge the digital divide between Africa and the rest of the globe, to enable the continent to quickly enter into the information and knowledge economy, and to open opportunities developed by Africans and their development partners. Though concerned with the digital divide and the knowledge economy, AISI mostly seeks to empower Africans to improve the quality of their lives and to better fight poverty.

The Policy and Regulation Initiative for Digital Africa (PRIDA)

PRIDA is a joint initiative of the African Union (AU), the European Union (EU) and the International Telecommunication Union (ITU), that is addressing various dimensions of broadband demand and supply in Africa and building the capacities of AU Member States in the Internet Governance space with the aim of enabling the African continent to reap the benefits of digitalisation. PRIDA project is looking at ways to enhance the level of harmonization of ICT & Telecommunication Policy, Legal and Regulatory frameworks in Africa, strengthen cooperation between National Telecommunications Regulatory Authorities (NRAs) and Regional Association of Regulators as well as sensitize and raise awareness of African policymakers, decision makers, public authorities and civil society on the cross cutting and increasing use ICTs in all sectors. PRIDA is supporting the monitoring and development of legal harmonization mechanisms, including data protection. The overall objective of PRIDA is to create a favourable policy environment and regulatory conditions that support and facilitate Africa Digital Transformation and Integration.

Pan-African Payment and Settlement System (PAPSS)

This digital payment system is one of the five instruments that Afreximbank and the African Union used to realise the AfCFTA. This digital payment system entails the movement of financial data across borders. The way that PAPSS operates seems to suggest ways in which states can ensure that data flow across borders safely and lawfully.

What are key challenges you see to develop adequate cross-border digital policies?

Challenges

1. Regulation of cross-borders data flows is disharmonious, not only do laws differ widely from country to country but the movement of some types of data is heavily regulated. How can data flow easily across borders but be regulated to ensure personal data is secure, and all data is used for lawfully and ethically?

2. Prerequisites for Data Value:
   In order to realise the full value of data fully functional data centres are required, to establish these centres it is necessary for a country to have:
      ◆ reliable electric power
      ◆ appropriate climate – cooling
      ◆ water for cooling

- high bandwidth connection
- data centre skills
- an appropriate legal environment including rule of law
- no Internet disconnections for political purpose
- data analytic and business skills
- data regulation skills/human capital

How many of the prerequisites are in place in African countries and the continent as a whole to realise the value of data?

3. With the increasing necessity for the adoption of digital policies and cross-border data flows, is the continent ready to meet the demand for the data revolution?

4. Most digital policies at the moment have adopted a human rights approach. Should additional digital rights, based on human rights, be developed?

5. Digital trade will, if appropriately structured, support economic development. What role do data flows play in digital trade? How may data policy and regulation support development of developmental digital trade.

6. How may data sovereignty be realised? Do restrictive understandings of 'data sovereignty' as mandatory data localisation undermine economic development?

7. How can countries Identify data needed for development and ensure it is collected, standardised and available for data-driven development?

8. What legal mechanisms are required to enable data mining?

9. Does a preoccupation with personal data protection and consequent lack of regulation/recognition of other types of data of a non-personal nature hinder development of digital economies?

10. What effect do consumer protection (laws) have on sharing and movement of data especially across borders? What role should consumer protection play?
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11. What is the effect of national personal data protection laws on free movement of data, especially across borders? How do the different mandates and duties of national data protection authorities (DPA's) influence digital policies and the free movement of data, especially across borders?

12. What is the effect of cross-border movement of data on competition? How should competition regulation engage with cross-border movement of data?

13. Making unsensitive public data open by design or default can drive development. For public data to be effectively open requires:
- public data standardisation;
- public data infrastructure;
- open data mandates; and
- open data licences.

How many of the prerequisites are in place in African countries and the continent as a whole to realise the value of open public data?

14. How should private data be treated in relation to openness?
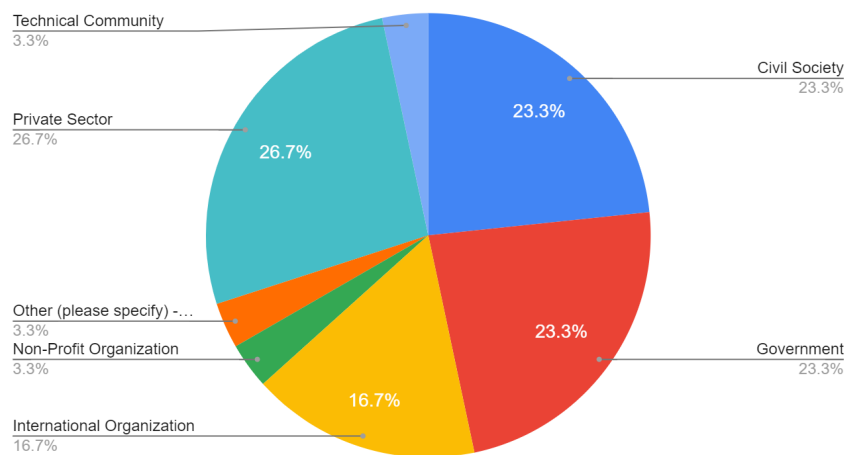
15. To what extent have specific regimes emerged for sensitive data such as health data and financial data? How will these affect harmonisation efforts?

16. The legal status of data is determined by divergent legal regimes, including copyright, competition law and privacy. How can these regimes be harmonised?
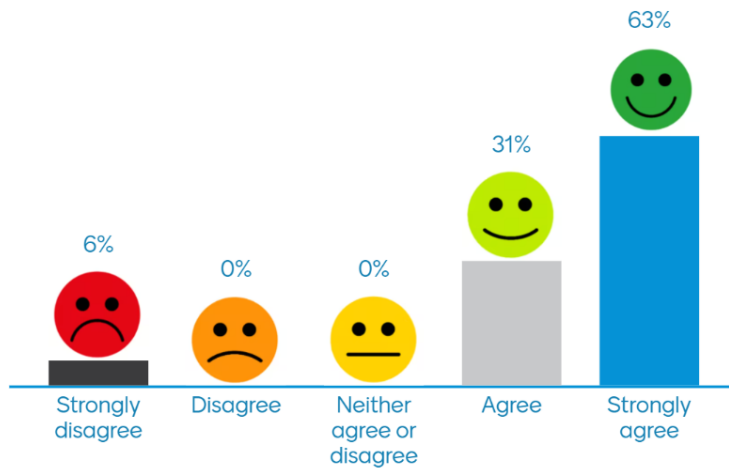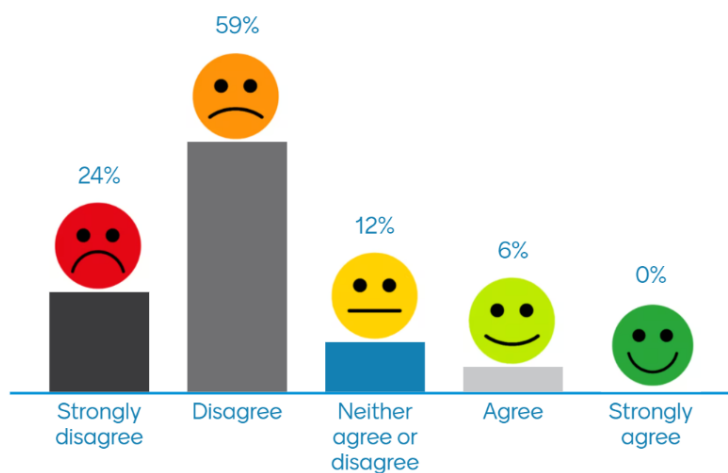
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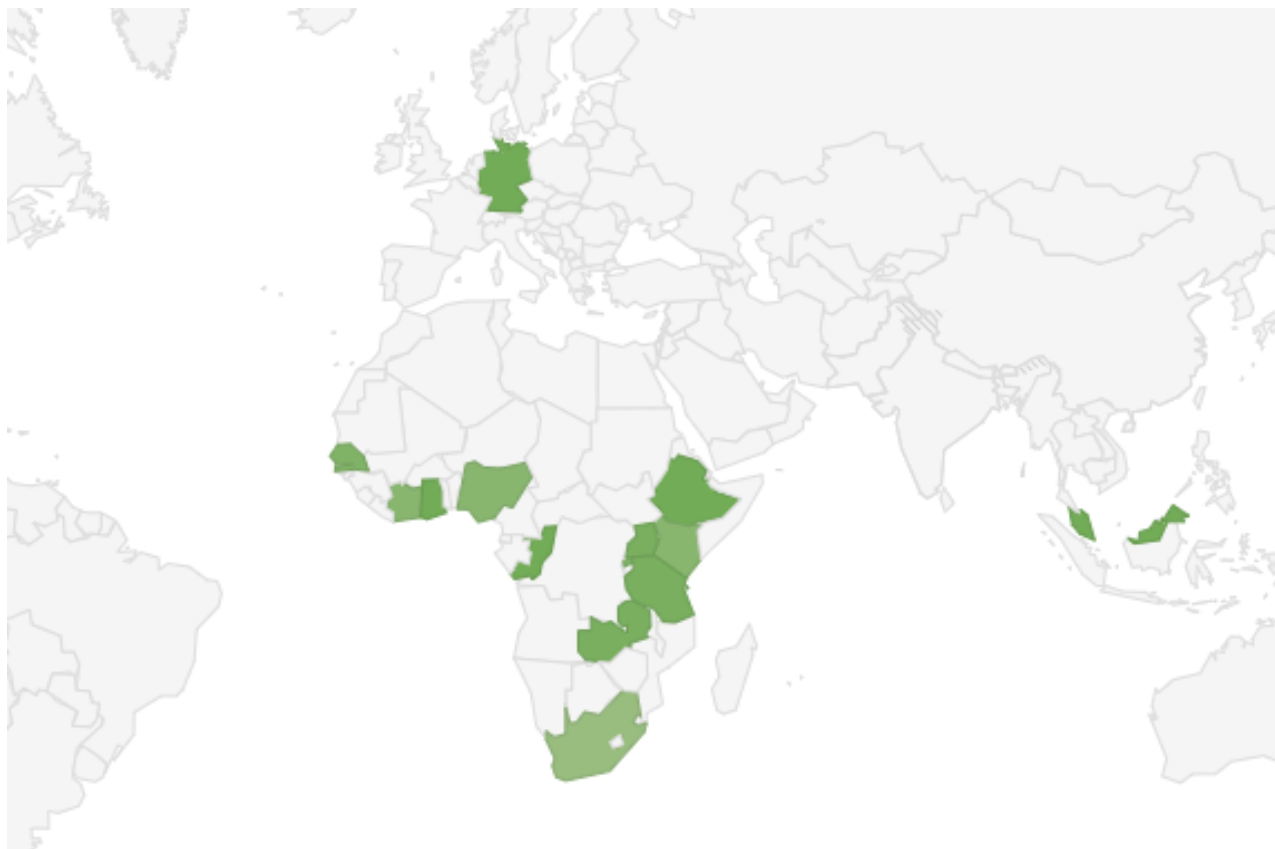
Stakeholder Groups

ONLINE SURVEY HIGHLIGHTS

In addition to the discussion, participants responded to an online survey. Responses to three questions were compiled.
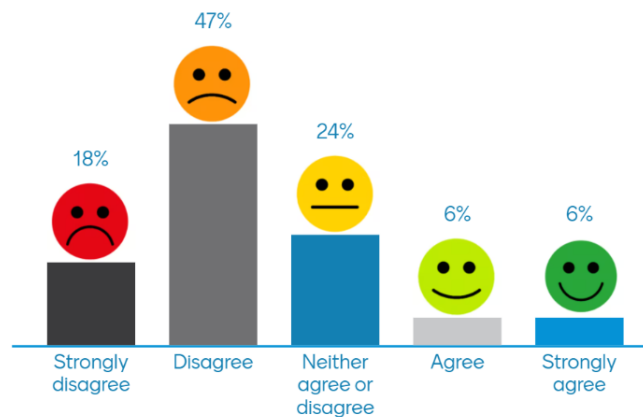
Cross-border digital policies will become increasingly important in the next three years

INTERNET & JURISDICTION POLICY NETWORK

Strongly disagree	Disagree	Neither agree or disagree	Agree	Strongly agree
6%	0%	0%	31%	63%

There is sufficient African coordination and coherence to develop adequate cross-border digital policies

INTERNET & JURISDICTION POLICY NETWORK

Strongly disagree	Disagree	Neither agree or disagree	Agree	Strongly agree
24%	59%	12%	6%	0%

There is sufficient African participation in international coordination and coherence mechanisms to develop adequate cross-border digital policies

DISCUSSION OF ONLINE SURVEY

Overall, the vast majority (i.e., 65% or upwards) of participants think that cross-border digital policies will become prominent in the next three years and that African governments do not, yet work together enough, and participate enough in international mechanisms, to develop those policies.

Several participants commented on the way that the questions were framed. They suggested that, rather than asking respondents to show whether they agree or disagree with leading statements, the questions should ask the respondents to express what they perceive or think. In this manner, the question designers would keep themselves from infusing Afro-pessimism into their questions. Another participant brought up decoloniality and said that, by spotlighting the growing importance of data, the first question makes data a 'resource', like gold, a resource originating from certain countries. She then claimed that, seen as a resource, data becomes interesting and topical for decolonial scholars, who will view this question through the lens of concepts such as data sovereignty and data control.

The second question (i.e., on African coordination and coherence) elicited two very distinct views. One view is that there is the possibility of, and that calls for, much greater coordination and coherence. A more pessimistic view is that increased coordination is unlikely, remains rhetorical or will prove inadequate. This question would be better phrased as: "There is a need for greater African coordination to realise the value of data."

Similarly, the third question (i.e., on African participation in international policymaking) should be rephrased as: "There is a need for far greater African influence in international coordination and cooperation mechanisms to develop adequate cross-border digital policies."

The third question evoked the issue of agency. Do Africans participate in setting digital norms and standards? What are the measures of participation? Attendance at meetings, leadership positions, agenda setting, influence? If so, do they 'own' these norms and standards? Ownership here is used in the informal sense of being invested in the standards. How do African countries have to effectively shape the contents of norms and standards? In other words, does participation ripen into agency? Seen from this perspective, agency closely intersects with participation,

capacity, and ownership. Underlining the necessity of African agency and of evidence-based, informed policymaking that could empower Africa to become an "agenda setter", one workshop participant remarked:

"We have not historically participated in those global governance forums. And the effect of that is… whether it is cybersecurity frameworks or trade frameworks, or all these things that are going to affect our data framework, that we have seen large levels of involuntary incorporation. So, Africa is just simply the standard receiver. These standards are set elsewhere; these decisions are made, and the normative basis of them is decided elsewhere. And Africa is simply left to respond to those."

These are the main issues and discussion points from the first Knowledge Dialogue, and which will inform the second Dialogue to be held in early 2022.

Participating entities from 14 countries:
Access Partnership - South Africa   African Academic Network on Internet Policy - Nigeria   African Development Bank - Ivory Coast   ANSUT- Ivory Coast   Centre for Human Rights, University of Pretoria - South Africa   Centre for the Fourth Industrial Revolution Rwanda - Rwanda   Centre for the Studies of Economics of Africa - Nigeria   Cipit- Kenya Co-creation Hub / iHub Nairobi - Kenya   CTIN - South Africa   Cyber Policy Centre - Kenya   Department of Communications and Digital Technologies - South Africa   DGDE - Democratic Republic of the Congo   Ecommerce Forum Africa - South Africa   FGI CÔTE D'IVOIRE - Ivory Coast   GFCE - Ethiopia   GSMA - Senegal   Lagos State House of Assembly - Nigeria Lagos State Traffic Management Authority - Nigeria   Law, Faculty, International Islamic University Malaysia - Malaysia Lectrad-Africa - Uganda   Ministry of Technology and Science - Zambia   Nigerian Communications Commission - Nigeria Niyel - Rwanda   Paradigme Initiative - Senegal   Renaissance Law Chambers - Ghana   Directorate of Foreign Trade Ministry of Commerce - Senegal   Smart Africa - Rwanda   Strathmore University - USA   Tech Hive Advisory - South Africa   Uganda Communications Commission - Uganda   University of Passau - Germany   Zambia Police Service - Zambia