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UNCTAD

REAPING THE POTENTIAL BENEFITS OF THE African Continental Free Trade Area FOR INCLUSIVE GROWTH

ECONOMIC DEVELOPMENT IN AFRICA

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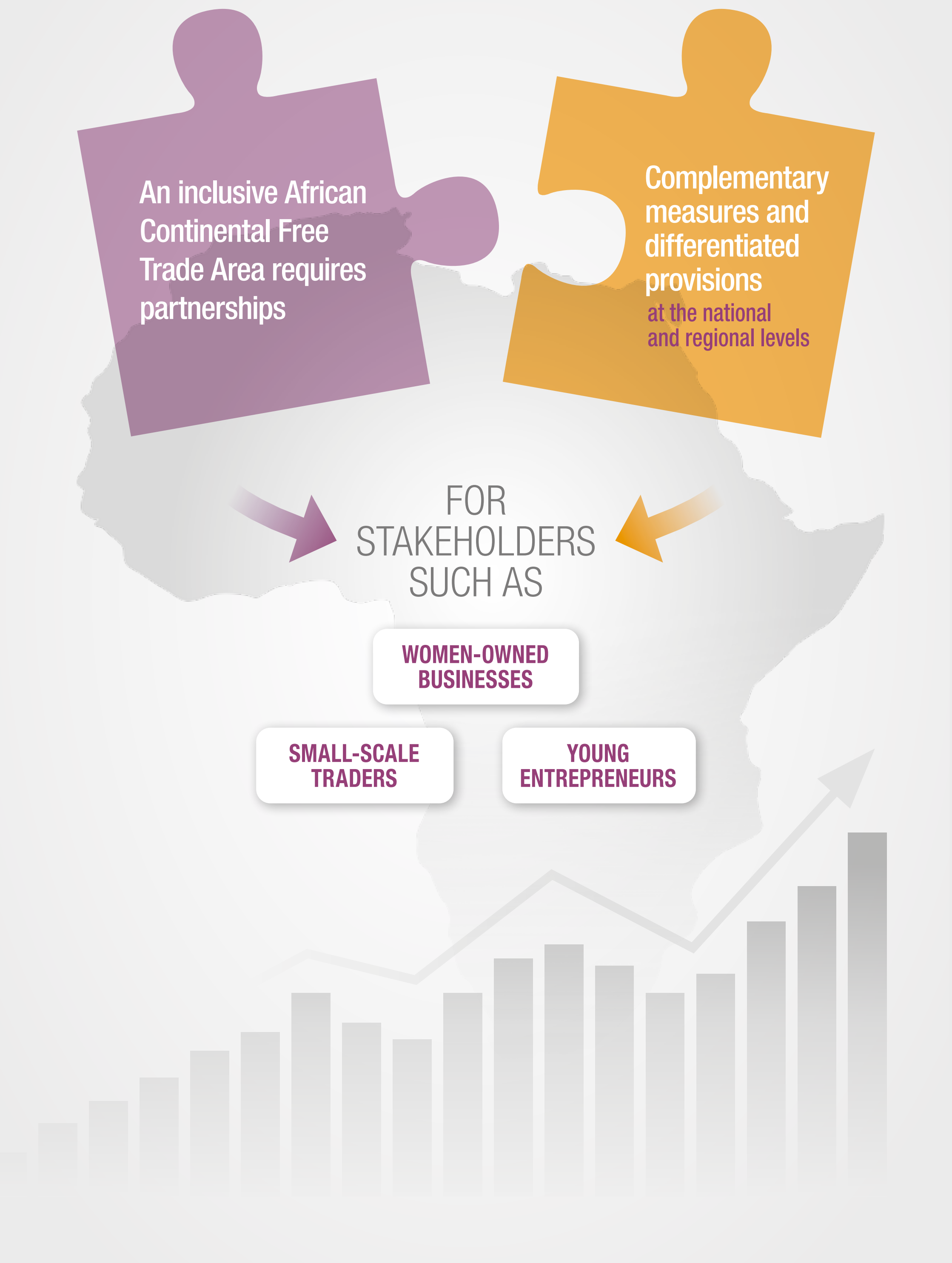
Chapter 4

An integrated framework and cost-efficient trade measures

As discussed in the previous chapters, the African Continental Free Trade Area can support post-pandemic recovery and inclusive growth across the continent through job creation, the expansion of business opportunities and the promotion of regional value chains for trade in goods and services. With appropriate policies, it can help to create a conducive environment for small-scale traders and often-marginalized businesses to produce and trade goods and services fairly in intra-African markets. The inclusive benefits of the African Continental Free Trade Area as discussed in the previous chapters can materialize if trade reforms and the necessary complementary interventions are efficiently implemented and the costs of compliance minimized. The multidimensional characteristics of the Agreement suggest that achieving this will entail cooperation to optimize synergies among the various stakeholders. This, in turn, will require reforms to be implemented in an integrated manner that ensures not only coherence among regional and national regulatory and policy frameworks but also alignment with multilateral agendas.


An inclusive African Continental Free Trade Area requires partnerships
Complementary measures and differentiated provisions
at the national and regional levels
FOR STAKEHOLDERS SUCH AS
WOMEN-OWNED BUSINESSES
SMALL-SCALE TRADERS
YOUNG ENTREPRENEURS

Achieving an inclusive free trade area will depend significantly on the extent to which non-tariff measures are streamlined, as posited in this chapter. Drawing on the main issues addressed in the previous chapters, critical elements of an integrated framework that can foster cooperation at all levels in support of the inclusive implementation of the Free Trade Area are discussed in this chapter. Streamlining trade measures is critical to ensuring an inclusive free trade area, as discussed in section 1, and an integrated framework, from the design of policy actions to their implementation and monitoring, including through a strong institutional set-up, is a prerequisite to creating enabling conditions for the Free Trade Area to yield inclusive benefits, as discussed in section 2. In section 3, the interplay between international trading systems and the African Continental Free Trade Area is explored, to identify how synergies can be built to reduce the burden of trade measures on policymakers and businesses and, in section 4, the dispute settlement mechanism of the Agreement and related challenges are discussed. Concluding remarks are provided in the final section.

4.1 Streamlined trade measures across Africa, to achieve continental integration

The discussions in the previous chapters suggest that, besides tariff liberalization, achieving gains under the African Continental Free Trade Area requires streamlined trade facilitation measures, that is, trade rules that are simple to comply with and less disruptive to the production of and trade in goods and services. Conversely, stringent and costly trade measures could become barriers to an inclusive free trade area by affecting, in particular, small and medium-sized enterprises and informal cross-border traders, a large number of whom comprise women and young entrepreneurs (UNCTAD, 2020f).

4.1.1 Lowering the costs of non-tariff measures

Technical barriers to trade and sanitary and phytosanitary measures that have the objective of ensuring food safety and protecting human, plant and animal health could help to improve sustainability. In addition, compliance with non-tariff measures can help build consumer confidence and trust and thereby help to reduce transaction costs. However, such compliance can often be costly and burdensome, in particular for small and medium-sized enterprises with limited resources. To reap the potential benefits of non-tariff measures for sustainable growth, it is essential to reduce the costs of compliance through the transparency and harmonization of trade rules. Additional trade facilitation measures included in regional trade agreements can help increase trade flows (Disdier et al., 2019; Duval et al., 2016). Such regulatory cooperation has the potential to harmonize non-tariff measures and reduce the associated costs of compliance.

In this regard, UNCTAD has collected regulatory data in collaboration with Governments, disseminated on online portals such as the UNCTAD Trade Analysis and Information System database and the global trade help desk hosted by the International Trade Centre, UNCTAD and WTO. In addition, UNCTAD recently led a study on measuring the similarity in regulations between countries; measuring regulatory distance helps to provide evidence of the lack of regulatory cooperation and harmonization between countries in Africa, including within RECs (UNCTAD, 2020g). These initiatives help respond to the transparency provisions in several annexes of the African Continental Free Trade Area Agreement. Provisions on non-tariff measures related to goods are in the following annexes to the protocol: annex 2, rules of origin; annex 3, customs cooperation and mutual administrative assistance; annex 4, trade facilitation; annex 5, non-tariff barriers; annex 6, technical barriers to trade; annex 7, sanitary and phytosanitary measures; annex 8, transit; and annex 9, trade remedies. In addition, one of the objectives of the protocol on trade in services is to progressively liberalize trade in services by eliminating barriers to trade in services, including through transparency, the mutual recognition of standards and certification and the elimination of anticompetitive practices, among others. These provisions reflect the commitment by the member States of the African Union to address non-tariff barriers to trade with a view to improving the competitiveness of economies in Africa.

In Africa, challenges related to non-tariff measures are compounded by overlapping trade schemes and heterogeneous rules, with several countries belonging to more than one REC. The situation makes compliance with trade rules costly and has impeded trade within RECs (Chacha, 2014; Keane et al., 2010). Efforts are being made to harmonize trade rules among RECs, for example through the tripartite free trade area agreement between the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community. The African Continental Free Trade Area can also contribute to these efforts. If the proliferation and heterogeneity of trade rules across the various regional trade agreements continue unchecked, a situation that is likely to prevail in the short term, compliance with non-tariff measures under the Agreement may be costly for businesses, particularly small and medium-sized enterprises that constitute the bulk of the private sector in Africa.

4.1.2 Advancing the implementation of trade reforms

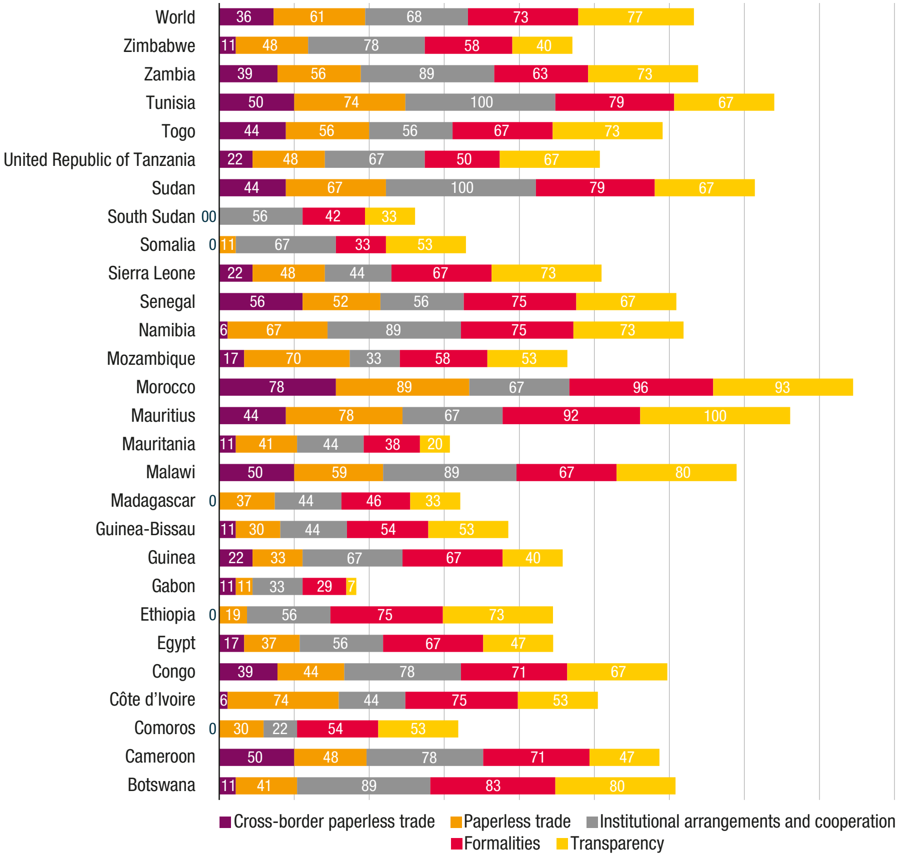
The implementation of trade reforms in Africa is underpinned by the commitments of countries at the global level (e.g. most countries in Africa have ratified the WTO Agreement on Trade Facilitation, which entered into force in 2017) and at the regional level (including in the context of the African Continental Free Trade Area). Implementing such commitments effectively at the regional and national levels has been slow across the continent. For example, in the Economic Community of West African States and the Southern African Development Community, regional integration efforts have been impeded by the limited translation of regional trade commitments into the domestic laws of member States (UNCTAD, 2015b; UNCTAD, 2018d).

The Implementation of trade reforms varies widely across the continent. In 2019, data were collected through regional and national surveys, with implementation rates computed as indices using several indicators that captured commitments under the WTO Agreement on Trade Facilitation and several other measures, including cross-border paperless trade; trade facilitation measures accounting more specifically for inclusiveness and sustainability included indicators for the following: trade facilitation for small and medium-sized enterprises; agricultural trade facilitation; and women in trade facilitation (United Nations, 2019). Overarching trade facilitation measures, including general and digital measures, are grouped into the following five categories (figure 25): a) cross-border paperless trade (in the surveys, this category included laws and regulations for electronic transactions, electronic collections of payment through letters of credit, electronic exchanges of certificates of sanitary and phytosanitary measures, recognized certification authority issuing digital certificates and electronic exchanges of customs declarations); b) paperless trade (automated customs systems, electronic applications for customs refunds, electronic payments of customs duties and fees, electronic applications for and issuance of preferential certificates of origin, electronic applications for and issuance of import and export permits, electronic submissions of air cargo manifests and customs declarations and whether there were electronic single window systems and Internet connections available to customs and other trade control agencies); c) institutional arrangements and cooperation; d) formalities; and e) transparency.

The overall slow pace of trade reform implementation across Africa contributes to undermining the competitiveness of regional and national economies in global markets. Higher rates of implementation of trade facilitation reforms are globally associated with lower trade costs and better logistical performances, a key determinant of economic competitiveness (United Nations, 2019). In addition, the digitalization of cross-border trading procedures has significant potential to foster inclusiveness.

Figure 25

Average implementation rates of trade facilitation measures, 2019



Source: UNCTAD calculations, based on United Nations, 2019.

However, the implementation of cross-border paperless trade procedures has yet to take off; only five countries have implemented more than half of the commitments related to digital trade, as shown in figure 25. If economies in Africa continue to fall behind in implementing global and regional trade facilitation measures, including those under the African Continental Free Trade Area, this is likely to undermine intra-African trade. For example, producers and traders may find it more cost effective to import intermediate goods from extracontinental markets, compromising the objectives of the Free Trade Area. In addition, there may be a positive correlation between GDP per capita and the rate of implementation of trade facilitation measures in countries in Africa, whereby more advanced economies tend to achieve higher rates of implementation than smaller economies or the least developed countries (United Nations, 2019). Correlation does not imply causation, however; further investigation is needed to establish this relationship. Yet countries with limited economic resources and capacities such as landlocked developing countries and the least developed countries may find it more difficult to implement trade facilitation measures. It should be noted that, as trade facilitation measures are a key determinant of trade costs, countries facing persistent non-tariff barriers are also likely to have relatively low economic and trade performance levels (United Nations, 2019). Countries that have experienced inclusive growth over the past decade face lower import and export costs. The slow pace of trade reform implementation in the least developed countries may also be underpinned by the special treatment (e.g. a longer period in which to implement trade reforms) often granted to this group of countries. Within the context of the African Continental Free Trade Area, fragile and vulnerable economies are therefore likely to require the most dedicated technical and financial assistance and capacity-building support in order to implement trade reforms.

4.1.3 Digitalizing trade and building hard infrastructure assets

The application of information and communications technology in the trading landscape contributes to increasing efficiency in processes such as logistics and distribution channels, as well as administrative procedures in ascertaining compliance with trade rules. For small and medium-sized enterprises that are greatly affected by trade barriers, digital trade provides significant opportunities to transcend physical constraints and minimize logistical costs (Nanyang Technological University Singapore, 2020; UNCTAD, 2020h). Digital trade facilitation measures are estimated to reduce trade costs for businesses by up to 40 per cent in the least developed countries in Asia and the Pacific (Duval et al., 2018). The COVID-19 pandemic has accelerated the digitalization of trade and promoted business-to-consumer sales and business-to-business electronic commerce across Africa (Economic Commission for Africa, 2021). In addition, some countries began to issue digital certificates of origin. It is important for such digital processes to be mutually recognized by partner countries and for customs officials to be trained to accept such certificates (African News Page, 2021). The most common barrier is with regard to the time required and the costs of obtaining the relevant certificate of origin from the relevant authority. The creation of one-stop points and electronic single windows can reduce the amount of paperwork required and may reduce the time required and transaction costs by 30 per cent (International Trade Centre, 2018). Mainstreaming digitalization in trade reforms under the African Continental Free Trade Area may not only help to increase efficiency in production and trade systems but also to reduce cross-border trade costs for both goods and services. The adoption of electronic certificates of origin, for example, allows producers and traders to electronically submit, on a dedicated web-based platform, all relevant documents for the issuance of electronic certificates of origin. Beyond contributing to efficiency gains associated with any electronically based system, electronic certification of origin allows for security and the traceability of goods while preventing businesses from having to store excessive copies of physical documents. By lessening compliance costs and delays, such a certification scheme has great potential to help level the playing field in order to assist small businesses to better integrate into regional value chains (UNCTAD, 2019a). To date, however, despite available systems such as the electronic certification of origin under the Common Market for Eastern and Southern Africa and the Southern African Development Community, progress in practical adoption by member States has been slow (Mafurutu, 2020). Other examples of digital applications in trade include automated customs clearance, electronic administration systems for trade procedures and the use of smart containers, that is, containers featuring devices and sensors that enable advanced monitoring functions such as of environmental conditions and hacking attempts, as well as location identification and handling and tampering controls. The digitalization of border procedures has already yielded some tangible outcomes in Africa. For example, in Rwanda, digitalized border management systems and biometric solutions have been credited for the increased efficiency and effectiveness of services provided to travellers at airports and other borders (United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, 2017). The Rwanda electronic single window, building upon the UNCTAD Automated System for Customs Data, also helped the country to implement at borders the physical distancing required during the pandemic, as it permitted the cross-border processing of goods, from declaration to the payment of duties and clearance, to be executed electronically (UNCTAD, 2020h). In Senegal, the digitalization of customs procedures such as through automated customs clearance, an electronic trade data platform and a paperless administration system for cargo, has contributed to significantly reducing the time required and the transaction costs; the time required for the registration of customs declarations declined from 2 days to 15 minutes; for pre-clearance customs procedures, from 2 days to 7 hours; and for the clearance of imports and exports, from 18 and 14 days, respectively, to 1 day (United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, 2017).

Streamlining trade processes, including through simplified, efficient and cost-effective non-tariff measures, can only partly contribute to unlocking production and potential intra-African trade. Building physical infrastructure, including development corridors (e.g. in transport, trade, agriculture and industry) that facilitate socioeconomic development activities, is essential. Despite some progress in recent years, transport and trade corridors that are critically needed to move people and goods efficiently within and across borders remain poor. Access to energy, required by manufacturers for cost-effective production, remains costly or unreliable in many countries. In addition, digital infrastructure gaps persist, both among economies in Africa and between the latter and economies worldwide (Calderón et al., 2018). In many parts of the continent, cross-border trading businesses have a lack of storage space, cold rooms or similar facilities that are critical for perishable goods, including those handled by small-scale traders. Such challenges are often compounded by lengthy manually conducted processes, malfunctioning Internet networks that make it difficult to use digital tools and electricity shortages, which are prevalent in rural and remote border areas. For women traders in particular, inexistent or poor sanitation and sleeping facilities, among others, often make cross-border trading a difficult activity (UNCTAD, 2019b).

Circumventing infrastructure bottlenecks also entails establishing well-functioning special economic zones as self-inclusive production and trade hubs. Such zones can provide businesses with cost-effective infrastructure assets and services to produce and trade in African Continental Free Trade Area markets. Economies of scale of industrial and services-related activities in such zones can translate into benefits such as growing inflows of foreign direct investment and transfers of knowledge, ideas and technologies, which are vital for innovation and growth among small and medium-sized enterprises (African Development Bank et al., 2016; UNCTAD, 2019c). In addition, such zones can provide businesses with access to a pool of workers, suppliers and inputs, which can help to achieve greater productivity and efficiency (African Development Bank et al., 2017; Economic Commission for Africa, 2017). In 2019, there were 237 special economic zones in Africa, of which 51 were under development, and an additional 53 were planned (UNCTAD, 2019c). Existing special economic zones in Egypt, Ethiopia, Kenya, Nigeria and South Africa, driven in most instances by strong public–private partnerships, have recorded high rates of capacity utilization, created jobs and linked businesses, including small and medium-sized enterprises and services-related start-ups, to larger companies (UNCTAD, 2019c). A number of such zones have created jobs for women in some industries. In 2020, of over 39 special economic zones surveyed across Africa, more than two thirds indicated a level of women's employment at between 20 and 50 per cent, with a greater prevalence of women's labour in light manufacturing, such as in apparel and electronic assembly industries (UNCTAD, 2021b). Negotiations with regard to the applicable rules for goods produced in such zones, such as rules of origin, are ongoing.

4.2 Integrated framework for the implementation of an inclusive free trade area

The limited success of regional trade agreements in Africa to date has been partly due to failures in trade governance and a lack of harmonized regulatory regimes (Erasmus, 2020; Keane et al., 2010). Timely compliance with the tariff dismantlement calendar and the cost-efficient implementation of non-tariff measures should be coupled with complementary policies, to ensure an inclusive African Continental Free Trade Area. By mid-January 2021, two weeks after the launch of trading under the African Continental Free Trade Area, only a few countries, including Egypt, Ghana and South Africa, had the required customs procedures in place to start trading (Daily Maverick, 2021). Ensuring the coordinated implementation of trade rules and complementary measures, to foster inclusiveness under the African Continental Free Trade Area, therefore requires a strong and integrated institutional set-up.

4.2.1 Integrated policy framework to achieve inclusive gains: How and why

The African Continental Free Trade Area is multidimensional and cross-cutting in nature. The Agreement covers a wide range of development issues in Africa, from trade in goods and services and industrialization to investment, competition policy, intellectual property rights and electronic commerce, among others. It recognizes other critical thematic issues, including gender and trade, public health, safety, the environment, public morals and the promotion and protection of cultural diversity, among others. Therefore, mutually reinforcing policy interests and the actions of different entities are required to create synergies towards achieving common objectives. This requires an integrated framework that ensures coherence and coordination between and across various policies and entities that guide development under a strong leadership. The coherence of policies is essential, to reap the benefits of a free trade area, since national interests may tend to incentivize the protection of domestic industries and thereby may jeopardize regional integration efforts. For example, the experience of the Southern African Development Community shows that the regional integration agenda has been hindered by conflicting national trade and industrial policies. Countries in the region have used non-tariff barriers in order to protect national industries despite the commitment to a regional industrialization agenda, such as by banning the imports and exports of products from other member States, such as cement, maize, poultry, salt, sugar and timber (Byiers et al., 2018). In some instances, such national policies are legitimated by imperatives to protect infant industries. In recognition of this, the protocol on trade in goods of the African Continental Free Trade Area Agreement allows up to 3 per cent of tariff lines to be excluded from the tariff liberalization scheme, thereby giving room to countries willing to do so to protect infant industries. States Parties to the Agreement should avoid instituting national policies or any action that could limit intra-African trade. Finally, recurrent border closures resulting from trade disputes or non-trade matters often impede trade flows across the continent (see section 4.4). If national policies and trade frictions continue to undermine regional integration, gains from the African Continental Free Trade Area cannot be achieved.

4.2.2 Complementary policies to ensure an inclusive free trade area

Inclusive growth led by ambitions under the African Continental Free Trade Area cannot be achieved without appropriate complementary policies, in order to address issues in a holistic manner. Inclusiveness is usually achieved through dedicated policies targeting specific sectors or groups. Such policies may aim to address specific issues faced by small and medium-sized enterprises, women’s businesses, young entrepreneurs and informal producers or traders. The goal of such policies is to better mainstream such actors into formal economies. Specific policies and legislation include affirmative action schemes to support targeted groups in public procurement (UN-Women, 2019). In Kenya, for example, public procurement rules aim to ensure that 30 per cent of all types of contracts are awarded to young people, women or persons with disabilities, without competition from established firms, and this scheme has yielded tangible outcomes; women have been able to expand businesses, increase profit margins and provide jobs in local communities, and survey results suggest that participation in such schemes has helped to reduce poverty among such marginalized groups, despite some challenges (Nganga, 2017). Within the context of the African Continental Free Trade Area, public procurement can provide for wealth creation and help small and medium-sized enterprises and women-owned businesses to grow (UN-Women, 2019). Affirmative actions in public procurement almost entirely target national businesses. Better integrated markets could therefore help ensure that domestic industries achieve improved access to markets, to assist their growth. Some of the inputs needed by such businesses could be sourced from regional markets under the African Continental Free Trade Area. Existing regional trade agreements make general references in their objectives to providing support to the informal sector and other groups, such as in articles 151 and 154 of the Common Market for Eastern and Southern Africa treaty; and the treaties of the East African Community and the Southern African Development Community, which aim to foster broader development that benefits all actors. The African Continental Free Trade Area Agreement does not include specific provisions on public procurement, yet States Parties may consider expanding the number of targeted groups intended as beneficiaries of affirmative action, in particular small and medium-sized enterprises operating at the continental and regional levels.

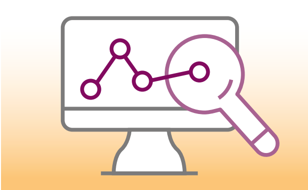
Simplified trade regimes can also provide significant opportunities to implement a free trade area that is inclusive and to make cross-border trade more efficient, allowing small-scale traders (whether formal or informal) to clear goods through a limited number of customs procedures, providing that the value of traded items does not exceed a certain threshold (e.g. up to $1,000 among member States of the Common Market for Eastern and Southern Africa that have adopted a simplified trade regime). In addition, simplified trade regimes may encourage the formalization of small and medium-sized enterprises. The simplified trade regime of the Common Market for Eastern and Southern Africa could provide a foundation for such a regime under the African Continental Free Trade Area.

Member States of the African Continental Free Trade Area are expected to have national strategies in place (African Union, 2018a). By March 2021, more than 40 member States were at various stages of preparing such strategies. National strategies can facilitate the identification of measures, including policy interventions (ranging from trade-related policies to policies related to, among others, industry, investment, competition, intellectual property, migration, infrastructure, the environment and gender) and the capacities required for a State to take full advantage of global, regional and national markets (Economic Commission for Africa, 2019). African Continental Free Trade Area national strategy documents should identify several priority actions dedicated to small and medium-sized enterprises, women and young traders, including, for example, with regard to capacity-building, awareness-raising, setting up trade infrastructure and establishing a simplified trade regime, as well as inclusive representation in institutional mechanisms of the Free Trade Area. The implementation of such actions will be supported by continental, regional and national partners.

4.2.3 Monitoring of implementation through integrated institutional arrangements

Proactive monitoring of the implementation of inclusive trade reforms

Monitoring the implementation of trade rules under the African Continental Free Trade Area is necessary in order to identify bottlenecks and address them in a timely manner. The online mechanism for reporting, monitoring and eliminating non-tariff barriers under the African Continental Free Trade Area is a key operational instrument available to businesses, in particular small and medium-sized enterprises, in order to report and resolve perceived non-tariff barriers to trade (box 9).



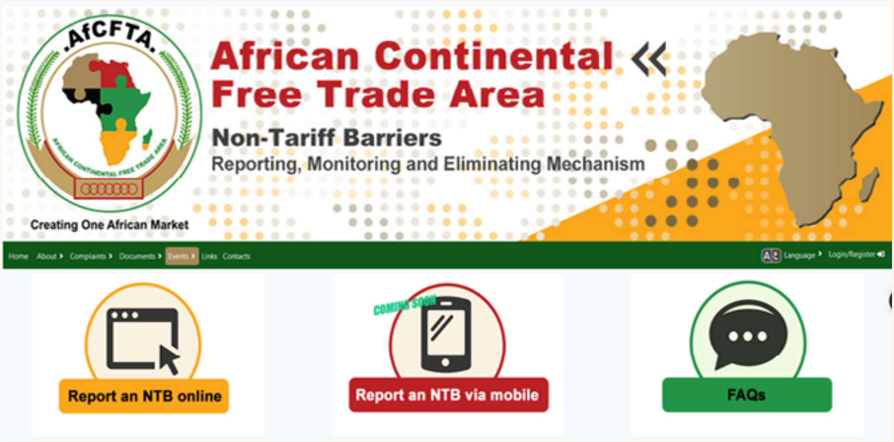
Monitoring the implementation **of trade rules under the African Continental Free Trade Area** is necessary to identify bottlenecks and address them in a timely manner

Box 9

Online mechanism for reporting, monitoring and eliminating non-tariff barriers

The African Continental Free Trade Area Agreement, in annex 5 of the protocol on trade goods, provides for a mechanism for reporting, monitoring and eliminating non-tariff barriers, in the form of an online platform. The platform was developed by the African Union Commission and the secretariat of the African Continental Free Trade Area, in collaboration with UNCTAD, and is aimed at the reporting and resolution of non-tariff barriers experienced by businesses. The landing page is shown in the figure.

Online platform for reporting, monitoring and eliminating non-tariff barriers



Source: African Continental Free Trade Area Agreement, 2021, Non-tariff barriers, available at https://tradebarriers.africa/ (accessed 9 July 2021).

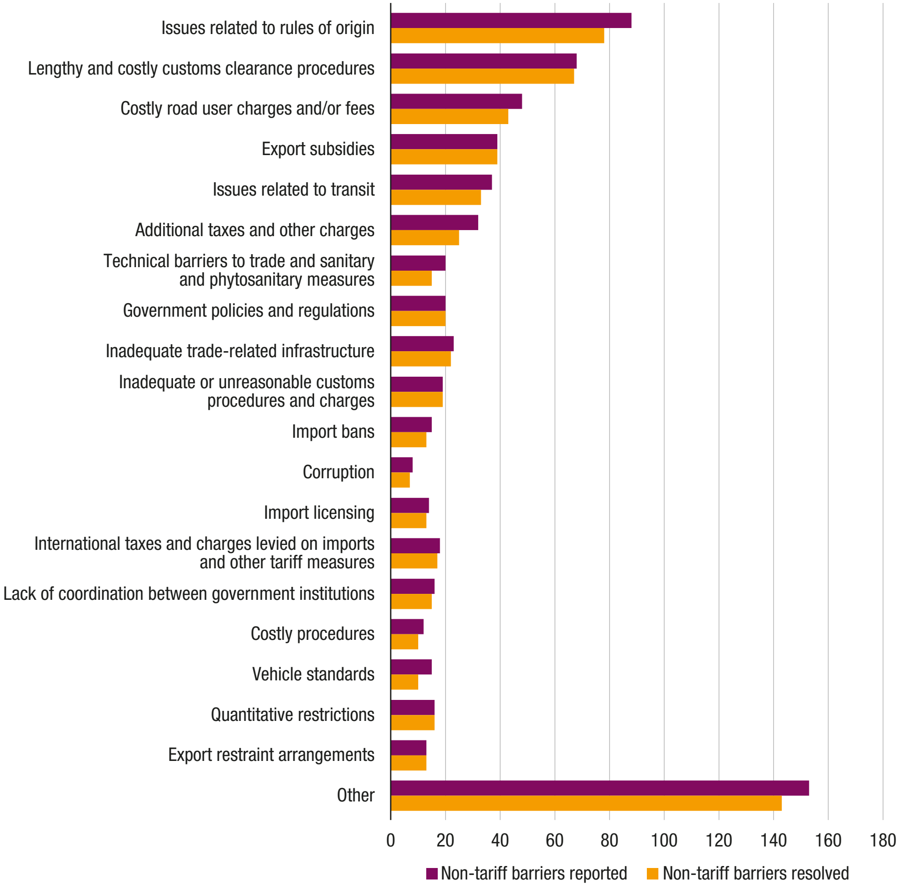
The platform offers an innovative approach to dealing with non-tariff measures that may be perceived (rightly or wrongly) as barriers to trade. The digitalization of the mechanism makes the identification and monitoring of non-tariff barriers transparent and inclusive, providing ease of access for small-scale businesses, including women-owned businesses and informal cross-border traders. The platform serves as the starting point of the process for reporting, monitoring and eliminating non-tariff barriers, allowing for the submission of complaints through the website or through short message services. Once a complaint has been registered by a user from the reporting country or submitted by the national focal points for non-tariff measures on behalf of the complainant, a notification is immediately sent to the national focal points of partner countries, who categorize the reported non-tariff barrier(s). If the complaint is accepted, the case is processed until the non-tariff barrier has been resolved. The resolution of non-tariff barriers can also involve dispute settlement mechanisms (see section 4.4).

Source: UNCTAD.

Such an online mechanism has contributed to addressing challenges related to non-tariff measures under the tripartite free trade area agreement between the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community (figure 26).[46]

Figure 26

Tripartite free trade area online platform on non-tariff barriers, January 2009–January 2021



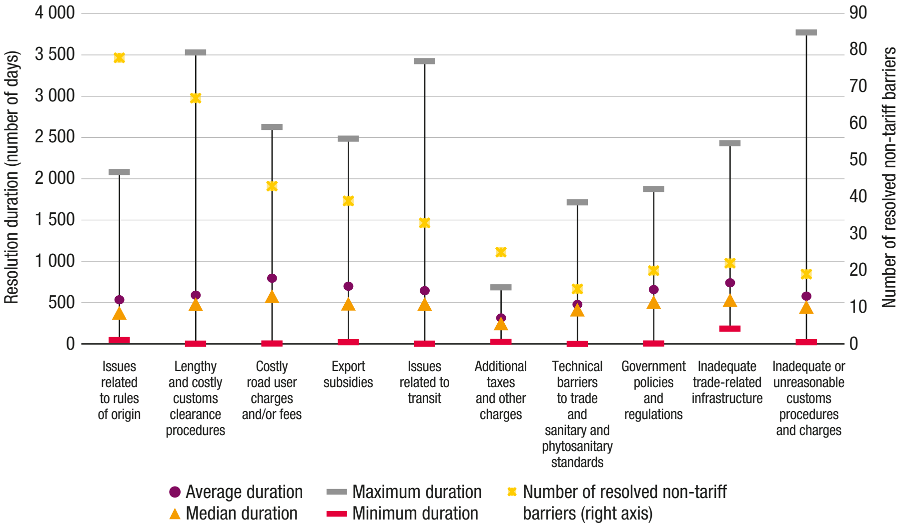
Source: UNCTAD calculations, based on data from the online platform.
Note: "Other" refers to all other types of non-tariff barriers reported on the platform but not separately indicated in the figure.

[46] See https://www.tradebarriers.org.

The resolution of barriers to trade often requires a long period of time. For example, within the tripartite free trade area, the time needed to resolve issues varies between 46 and 2,082 days (figure 27). One of the most-often perceived non-tariff barriers, namely, issues related to rules of origin, takes on average 536 days to be resolved, with half of all issues related to rules of origin only being resolved in about one year. The average time needed to resolve issues related to costly road user charges and/or fees is 796 days (over two years). Similarly, the time needed to resolve issues related to inadequate trade-related infrastructure is 741 days (about two years) and to government policies and regulations is 660 days (nearly two years).

Figure 27

Tripartite free trade area: Most-reported non-tariff barriers and resolution times, January 2009–January 2021



Source: UNCTAD calculations, based on data from the tripartite free trade area online platform on non-tariff barriers.

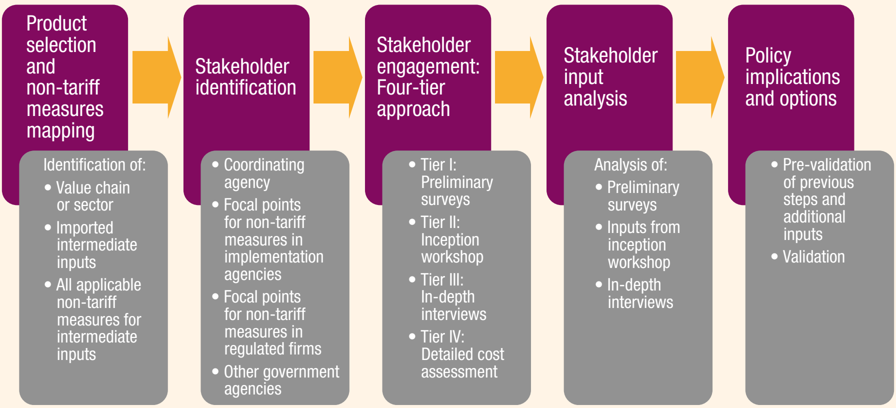
The lengthy resolution times for trade barriers require a proactive review of trade rules and practices, embedded in a strong monitoring mechanism, to assess their effectiveness and reduce cost-burden effects. Periodic reviews of trade rules permit corrective actions to be undertaken while avoiding trade-related disputes. Such reviews may be perceived as a regulatory audit and may imply post-enactment performance evaluations, that is, assessments of the extent to which the trade measures contribute to achieving the intended outcomes. States may also carry out regulatory impact assessments, usually undertaken prior to enactment (Economic and Social Commission for Asia and the Pacific and UNCTAD, 2019). A five-step toolkit proposed by UNCTAD may serve as a valuable tool in reviewing and assessing the effectiveness of non-tariff measures in States Parties to the Agreement, in support of inclusive policymaking (box 10).

Box 10

Assessing the effectiveness of non-tariff measures: UNCTAD toolkit

UNCTAD has proposed a five-step toolkit for assessing the effectiveness of non-tariff measures by understanding their design, how they are being implemented and the compliance challenges they pose to producers and traders, as shown in the figure.

UNCTAD toolkit for assessing the effectiveness of non-tariff measures



Source: UNCTAD.

Applied within the context of the African Continental Free Trade Area, the toolkit can help countries analyse the non-tariff measures applicable to imported goods and services in a specific value chain. For example, in Kenya, the toolkit has been successfully used to assess the cost effectiveness of non-tariff measures associated with the cotton, textiles and apparel value chain in the country.

Sources: UNCTAD, 2020f; UNCTAD, 2020i.

At the continental level, African Continental Free Trade Area subcommittees overseeing the implementation and monitoring of the non-tariff measures of the Agreement deliberate on ways to address persistent barriers to trade while encouraging members to eliminate them. The effective monitoring of implementation also depends on the extent to which transparency is fostered through the dissemination of trade reforms. In addition, transparency can contribute to reducing the costs associated with such measures, making them more accessible to small and medium-sized enterprises, women entrepreneurs and small-scale traders (Economic and Social Commission for Asia and the Pacific and UNCTAD, 2019). UNCTAD supports member States in collecting, classifying and disseminating data related to non-tariff measures through the UNCTAD Trade Analysis and Information System database and this could be complemented by national-level portals to provide up-to-date access to all trade-related laws, regulations and procedures.

Continental structure for implementation and monitoring

At the continental level, the institutional framework for the implementation of the African Continental Free Trade Area consists of the Assembly of the Heads of States and Governments; the Council of the ministers in charge of trade; the committee of senior trade officials; and the secretariat. The governance bodies also include several committees and subcommittees with regard to the protocols and annexes, including the protocols on trade in goods and trade in services, and the negotiations on investment, competition policy, Intellectual property rights and electronic commerce (African Union, 2018b). The protocol on rules and procedures on the settlement of dispute has also been adopted (section 4.4); a formal decision has not yet been made on a committee on electronic commerce. The effectiveness of the governance of the African Continental Free Trade Area at the continental level depends on the human and financial resources provided to these entities in carrying out their mandates. In addition, the enforcement of trade rules and regulations at the national level will be critical. The secretariat aims to promote transparency in trade rules and practices and to ensure that member States domesticate the Agreement by promulgating and notifying of laws, regulations and administrative procedures. Relevant data, including on non-tariff measures and conditions for accessing markets for goods and services under the Agreement, are vital to ensure that the private sector can make timely investment decisions.

Regional structures for implementation and monitoring

At the regional level, the practical responsibility of institutions, particularly RECs, under the African Continental Free Trade Area (beyond serving as building blocks, as recognized in the Agreement) has yet to be fully understood, yet their role cannot be overstated. Institutional mechanisms for facilitating the implementation and monitoring of the Free Trade Area can benefit from the established expertise of RECs. Given the extent of overlapping regional arrangements across the continent, the African Continental Free Trade Area is expected to build on ongoing regional initiatives. The coexistence of regional trade agreements with the African Continental Free Trade Area Agreement places an additional burden on member States. Therefore, the proper governance of the relationship between the African Continental Free Trade Area and RECs needs to be defined, to ensure that synergies are maintained among institutions in order to achieve common objectives. The secretariats of the African Continental Free Trade Area and of RECs need to develop procedures which ensure trade rules and their respective mandates based on constructive collaboration; limit asymmetries; and converge over time. For instance, to ensure coordination of the implementation of the WTO Agreement on Trade Facilitation, among others, the secretariat of the East African Community has had a regional committee on trade facilitation in place since 2015, which has been effective in supporting the member States of the Community in implementing the Agreement at the regional and national levels (UNCTAD, 2020j).

RECs can also support the mapping of opportunities for the development of regional value chains through regional trade and industrialization strategies. Similarities in production and limited complementarities in trade remain an impediment to intra-African integration. Therefore, trade liberalization should be complemented by efforts to build productive capacities in economies in Africa, with a view to developing regional value chains while attracting investment in sectors with significant potential. Appropriate industrial policies could drive such efforts at the regional and national levels. Regional strategies led by RECs and other regional institutions can map priority products for processing and trade in African Continental Free Trade Area markets and identify specific segments of value chains in which member States can (re)position themselves, to reduce or avoid unnecessary regional competition. Such efforts should be complemented by the identification of the key elements of the productive capacities needed to ensure that identified production and trade hubs can play their roles. For example, in 2011, the Common Market for Eastern and Southern Africa developed a strategy for the leather value chain, providing member States with an integrated framework to support interventions and build the capacity of businesses, particularly small and medium-sized enterprises, to position themselves in nodes of the value chain in the region, from downstream to upstream industries (UNCTAD, 2018b). This initiative has contributed to adding value to the processing of leather products in the region (Byiers et al., 2018).

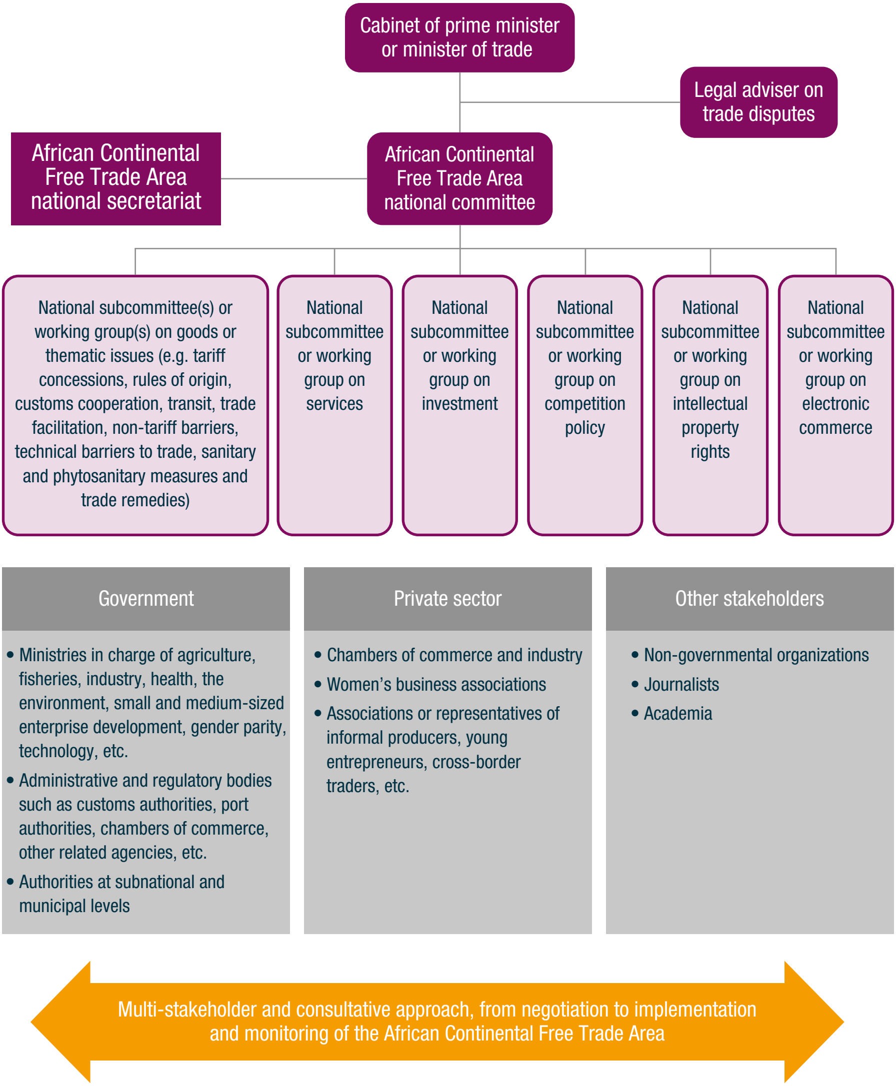
National structures for implementation and monitoring

At the national level, the implementation of the African Continental Free Trade Area Agreement is expected to be overseen by national committees and provisions have been made for establishing different national subcommittees dealing with various thematic issues, such as trade facilitation, and national monitoring committees on non-tariff barriers (African Union, 2018a; African Union, 2018b). Considering both human and financial resource constraints and the sustainability requirements of national institutional mechanisms, national committees will have full oversight over the implementation and monitoring of the Agreement at the national level. National committees can encompass permanent or ad hoc subcommittees or technical working groups dealing with the various thematic issues under the Agreement, rather than several subcommittees being established, a process that can contribute to ensuring that national institutional governance of the African Continental Free Trade Area is effective. A structure for a national committee that can be cost efficient and inclusive, with permanent or ad hoc technical committees or working groups to deal with specific provisions of the Agreement, is proposed in figure 28. Not all countries need to establish new committees; in countries with strongly established trade committees, for example, under the WTO Agreement on Trade Facilitation or REC free trade agreements, mandates can be expanded to include the coordination and implementation of the provisions of the African Continental Free Trade Area Agreement. The proposed national committee structure is inclusive in that it comprises representatives from relevant ministries and public agencies, private sector organizations, women's business associations, youth organizations, academia and civil society organizations.

Lessons learned to date across the continent and among other developing countries is that deliberate efforts are needed to increase inclusiveness in institutional mechanisms to implement and monitor trade reforms. Recent data show that national trade facilitation committees formed in Africa under the WTO Agreement on Trade Facilitation have obtained fair representation of both the public and private sector, yet gender mainstreaming in trade reforms remains limited (UNCTAD, 2020j). National committees therefore need to devote attention to these specific issues and also to ensure that reforms under the African Continental Free Trade Area are designed, implemented and monitored in an inclusive manner. An example of an inclusive institutional set-up is provided in box 11.

Figure 28

Proposed structure of national committee



Source: UNCTAD.

Box 11

Côte d'Ivoire: African Continental Free Trade Area institutional set up

The implementation and monitoring of the African Continental Free Trade Area Agreement in Côte d'Ivoire is coordinated by a national committee established through a presidential decree in May 2018. Financial resources are provided through the national budget and contributions from development partners. The committee is under the oversight of the Prime Minister and its organizational structure comprises three bodies, as follows:

(a) Advisory and decision-making council, with members comprising the Prime Minister, other relevant ministers and the presidents of business chambers and confederations, that oversees the national committee and takes all strategic decisions, providing strategic orientations to negotiations and taking the necessary measures to ensure implementation of the Agreement;

(b) Technical committee under the authority of the minister of trade and industry and comprised of key high-level representatives of the institutions represented on the council and the directors general of different government agencies and ministries, as well as representatives of producer, trader and consumer associations, and which defines strategic interventions, proposes relevant actions to the council, raises awareness and builds consensus on the African Continental Free Trade Area at the national level; its functioning relies on several technical working groups, each in charge of thematic issues under the Agreement;

(c) Executive secretariat, led by an executive secretary, which is the technical, financial and administrative body of the national committee and is tasked with disseminating decisions of the Government in the context of the Agreement, coordinating related activities, including the functioning of technical working groups, and elaborating annual working plans for the national committee, among others.

The structure of the national committee in Côte d'Ivoire is multidimensional and shows a high-level commitment to the Agreement.

Source: UNCTAD, based on information provided by the executive secretariat of the Côte d'Ivoire national committee.

4.3 Cooperation, peace and political stability for an inclusive free trade area

Ensuring a peaceful environment is a precondition for moving goods and services freely across borders and to achieving inclusive growth. Enterprises in countries with non-inclusive growth state, on average, that political instability is the main constraint to doing business (see chapter 3). Conflicts disrupt not only trade flows but also trade-enabling infrastructure, leading to fragile States (African Development Bank, 2019a). Free trade through the fostering of mutual economic interdependence promotes peace (Lee and Pyun, 2016). By maximizing the allocation of resources and reducing inequality, trade can be a powerful tool in improving resilience and promoting peace in fragile States (Calì, 2015). Recurrent conflicts across Africa, driven by poor governance, political tensions, tensions over the control of natural resources and terrorism have weakened the prospect of economic integration. The African Development Bank (2019b) partly attributes limited integration in central Africa to terrorism, border insecurity and political instability, among other factors. For example, the activities of Boko Haram have impeded the Lake Chad trade route vital for the region (Institute for Security Studies, 2021). The high level of prevalence of unemployment and poverty are likely to lead more young people to join terrorist groups in the hope of economic gains (Adelaja et al., 2018; Ayegba, 2015). The African Continental Free Trade Area could promote peace by helping to reduce inequalities, create wealth across communities and disincentivize youth from joining terrorist groups. At the same time, stability and peace among countries are required to achieve the full potential of free trade and this requires that countries place cooperation, to safeguard peace and address insecurity, at the top of the integration agenda.

4.3.1 Navigating between the African Continental Free Trade Area and commitments under multilateral trade systems

The African Continental Free Trade Area is implemented at the same time that countries in Africa also have commitments as part of global trading systems, including multilateral and bilateral agreements. The African Continental Free Trade Area offers a unique framework under which economies can foster cooperation in global trade.

African Continental Free Trade Area to strengthen cooperation among economies within multilateral trading systems

The African Continental Free Trade Area is emerging within a changing trade landscape. The COVID-19 pandemic has undermined trust in multilateralism, with several countries imposing short-term trade-restricting measures throughout 2020 (WTO, 2020). Following the global financial crisis of 2008/09, new protectionist measures such as antidumping, countervailing duties and safeguards, most of which were consistent with WTO rules, were disproportionately imposed by developing countries on other developing countries (Bown and Kee, 2011). Such developments pose challenges to the multilateral trading system, in particular given the limited progress made under the Doha Development Round. In the meantime, in recent years, the rise of emerging market economies has been modifying the external trade structure of economies in Africa, partly shifting trade patterns from traditional partners (e.g. the United States and the European Union) to emerging market economy partners (e.g. Brazil, China, India and Turkey). There has also been a proliferation of mega-regional and regional trade arrangements, such as the Transatlantic Trade and Investment Partnership between the United States and the European Union; the Regional Comprehensive Economic Partnership between the Association of Southeast Asian Nations and Australia, China, Japan, the Republic of Korea and New Zealand; and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. A key implication for Africa is with regard to greater competition in global systems and the erosion of preferences in global markets that results in significant trade diversion (Economic Commission for Africa et al., 2017). However, extracontinental trade arrangements can provide expertise and technical and financial support to advance the behind-the-border agenda of Africa. The African Continental Free Trade Area, by rationalizing and harmonizing trade rules and practices, provides economies in Africa with a unique opportunity to strengthen cooperation and negotiate trade arrangements as a consolidated group. This, in turn, can lead to better negotiations with extracontinental trade groups, help to penetrate higher value added segments of global and regional value chains and ultimately help to retain more value locally.

The African Continental Free Trade Area Agreement does not prevent States from entering into regional and bilateral trade agreements with extracontinental partners. If rules and measures are well aligned with the Agreement, trade agreements with third parties could contribute to the greater integration of economies in Africa with global markets, leveraging value added opportunities brought about by the African Continental Free Trade Area. World Bank (2020e) states that the African Continental Free Trade Area can contribute to increasing extracontinental exports by 19 per cent by 2035 and that the removal of non-tariff barriers, not only under the African Continental Free Trade Area but also under global commitments such as the WTO Agreement on Trade Facilitation, can act as a catalyst for gains. Emerging trade issues at WTO include, among others, electronic commerce, intellectual property rights, in particular of small and medium-sized enterprises, investment facilitation and the domestic regulation of services. The lack of harmonized positions and common regulations across member States of the African Union has lessened the weight of Africa in WTO discussions to date (Economic Commission for Africa et al., 2017). The African Continental Free Trade Area, by helping to address some of these issues through dedicated protocols, can strengthen the common position of Africa in discussions, particularly with regard to implications in developing countries. For example, electronic commerce is shaping the future of trade, particularly during the pandemic. The electronic commerce agenda aims to harmonize national-level policy space while promoting more openness, to ensure greater access to regional and national markets for actors in the sector. Proposed new rules include rules on greater transparency, the prohibition of customs duties and safeguards for network competition and non-discrimination (International Trade Union Confederation, 2019). The global electronic commerce market is currently dominated by well-established international companies and Africa is a marginal actor, yet electronic commerce in Africa is expected to expand significantly in the coming years, boosted by the upward pressure on online marketing during the pandemic, as well as African Continental Free Trade Area negotiations on electronic commerce and digital trade (Oxford Business Group, 2021). A key concern in Africa is that continental actors in this area, most of which are start-ups and small and medium-sized enterprises, require specific measures to enable them to grow and compete on a level playing field (WTO, 2017). A common position for member States of the African Union, under a protocol on electronic commerce, can help economies in Africa establish a harmonized framework for regulatory settings, to support digital development and the positioning of Africa in the global trade arena. This is essential in order to build vibrant digital economies across the continent, considering the significant potential of electronic commerce to generate jobs and benefit small and medium-sized enterprises, particularly women entrepreneurs, as social norms and family duties may have kept them out of the workforce (International Trade Centre and World Economic Forum, 2019).

Potential challenges in connection with commitments under multilateral trading systems

Trade arrangements with external partners pose the risk of the diversion or trans-shipment of trade flows from extracontinental markets for both the inputs and outputs of goods and services. The African Continental Free Trade Area is not a customs union and therefore cannot apply common external duties on trade flows, meaning that each State Party or existing customs union at the REC and subcommunity levels has room to define applied duties to trade partners outside the Agreement. Countries with regional competitive advantages may be incentivized to negotiate more multilateral or bilateral trade arrangements in an effort to become trade and production hubs for markets under the African Continental Free Trade Area. This could undermine regional efforts and cooperation pursued under the Agreement. The risk of trans-shipment is associated with goods sourced from a third party at preferential costs shipped as originating goods to markets under the African Continental Free Trade Area. For example, the smuggling of goods and the trans-shipment of non-originating merchandise from the Economic Community of West African States as originating items, among other factors, results in recurrent border closures between Benin and Nigeria (Omale et al., 2020).

There is evidence across the continent of members of custom unions, among which goods can circulate freely, that have decided to unilaterally pursue trade arrangements with other countries not members of the customs union. For example, Cameroon (member of the Economic and Monetary Community of Central Africa) and Côte d'Ivoire and Ghana (members of the Economic Community of West African States) have signed interim economic partnership agreements that grant duty-free access to European union products in their markets and, by extension, other countries in the customs unions. This can potentially undermine mutual trust and regional cooperation and result in trade deflections. Contentious issues in trade arrangements between countries or groups of countries in Africa and trade partners are also common. For example, most-favoured nation clauses in interim economic partnership agreements require members of the East African Community and the Economic Community of West African States to grant European Union partners any more favourable treatment applicable to any major trading country, meaning that any favourable treatment given by RECs to a third party (e.g. a developing country such as Brazil, China and India) shall be automatically granted to member States of the European Union. The article can potentially undermine South–South cooperation and is not consistent with WTO rules. Some of the impediments emanate from the weaker bargaining position of countries in Africa, as they tend to be disunified (Krapohl and Van Huut, 2020). Challenges could also emerge whenever preferential treatment under the African Continental Free Trade Area Agreement does not match the other treatment accorded under trade schemes between countries in Africa and partner countries not members of the Agreement. The Agreement establishes different levels and scopes of liberalization commitments (e.g. lists of products and services excluded from the liberalization scheme) and this can undermine the achievement of an inclusive free trade area that primarily aims to foster intra-African trade and the creation of local value added. Rules of origin would imply that producers and traders might have to choose between markets within or beyond the African Continental Free Trade Area, leading them to miss out on alternative business opportunities.

4.3.2 Maximizing synergies through integrated partnerships

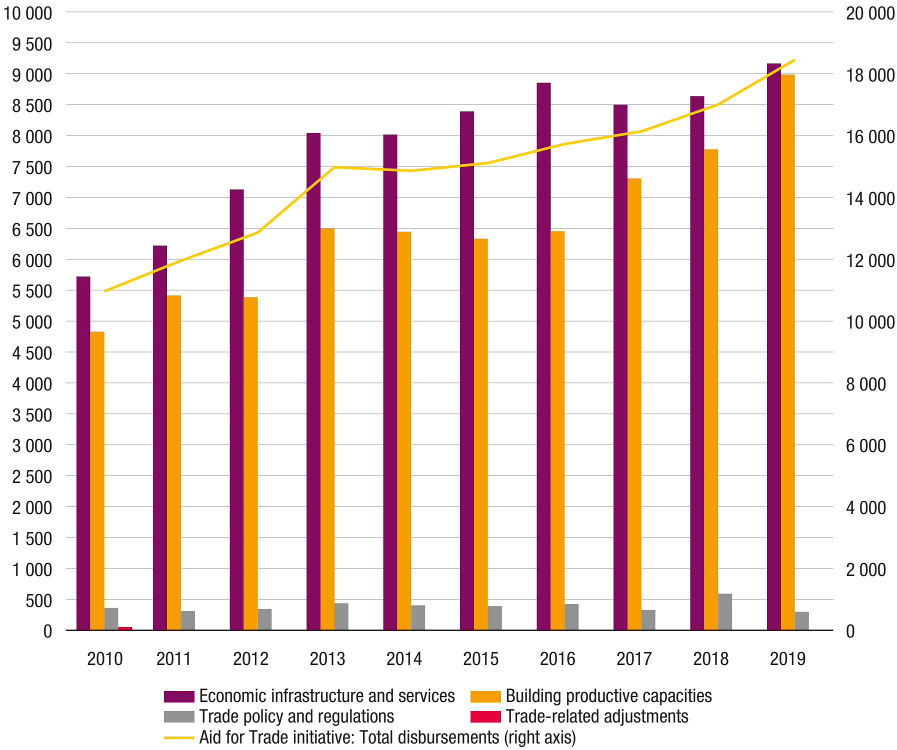
One way to maximize synergies between member States and non-member States of the Agreement is to ensure cooperation among countries in Africa and coherence between commitments to rules under the Agreement and beyond the Agreement (Krapohl and Van Huut, 2020). The African Continental Free Trade Area is not yet a customs union and does not prevent States Parties from entering into bilateral agreements, yet coherence and alignment remain critical. In the medium to long term, as almost all member States of the African Union adhere to the Agreement (and rules of origin not extended to trade partners that are non-member States of the Agreement), with many economies in Africa also negotiating other agreements (e.g. that between Kenya and the United States), the optimal strategy is for States Parties to negotiate as a group, to ensure alignment. The decision by the United Kingdom of Great Britain and Northern Ireland to leave the European Union, for example, provides economies in Africa with opportunities to renegotiate trade agreements with the United Kingdom at a time when emerging market economies such as China, India and Turkey are also seeking to conclude partnerships with countries on the continent. The African Continental Free Trade Area framework can be used, in addition to other arrangements at the REC level, as economies in Africa enter into such arrangements. In addition, bilateral agreements between economies in Africa and trade partners, most of which are donors and development partners of these economies, can support regional initiatives, including the African Continental Free Trade Area.

Significant support has been provided to African Continental Free Trade Area Agreement negotiations and implementation by, among others, the European Union. Donors through the Aid for Trade initiative contribute to supporting economies in Africa in addressing supply-side capacity and trade-related infrastructure constraints that are of particular importance for small and medium-sized enterprises; in 2010–2019, total disbursement increased from nearly $11.95 billion to $18.50 billion, with the majority channelled to economic infrastructure and services and programmes aimed at building productive capacities (figure 29). Aid for Trade has supported inclusiveness through the participation of women and youth in sectors such as agriculture, financial services and business support services (Economic Commission for Africa and WTO, 2019). Active support to the integration agenda in Africa also entails that partners not members of the Agreement deal with regional entities across the continent in strong win-win partnerships and such partners can also incentivize economies in Africa to achieve an appropriate balance between regional and national interests.

Figure 29

Africa: Aid for Trade initiative disbursements by sector

(Millions of constant 2018 dollars)



Source: UNCTAD calculations, based on data from OECD.

Complementary and targeted actions are needed to support vulnerable industries in navigating global and regional markets. To support local industries, economies in Africa can use trade and industrial policies within the framework of international and regional commitments. It is important to note that the competitiveness of national economies is critical in production and trade within the continent. As demonstrated throughout this report, tariff removal is not enough; addressing non-tariff barriers and devising complementary actions and policies are additional layers in ensuring an inclusive free trade area.

4.4 Well-functioning dispute settlement mechanisms to ensure an inclusive free trade area

A practicable and effective dispute settlement mechanism needs to be in place if Africa is to successfully achieve the behind-the-border agenda and is essential in order to foster mutual trust, accountability and the rule of law in operationalizing the Agreement and addressing any disputes that may arise. Experiences in RECs may be learned from and built upon to ensure the successful establishment of such a mechanism.

A practicable and effective dispute settlement mechanism must be in place to foster **mutual trust, accountability and rule of law**

4.4.1 Existing dispute settlement mechanisms

Dispute settlement mechanisms established by RECs with free trade agreements ensure that any challenges that may arise may be settled by following clear rules. REC treaties prescribe a dispute settlement process to be followed in the event that a member is believed to be in non-compliance with treaty obligations. For example, the treaty of the Economic Community of Central African States provides for the amicable resolution of trade disputes by direct agreement between the concerned parties. If this fails, parties may refer the matter to the court of justice for a binding decision. Despite the existence of such procedures at the REC level, members have been disinclined to initiate disputes against partner States (Bore, 2020). This may be for many reasons, including the fact that litigation has the negative connotation of being antagonistic and damaging to inter-State relations (Kessie and Addo, 2007). In addition, States in Africa may not be in favour of relinquishing sovereignty to regional institutions that would effectively relieve them of legal authority and decision-making power (Nathan, 2013). The absence of State-to-State litigation in RECs does not mean the absence of trade-related disputes; rather, intra-African State-to-State disputes occur in RECs. In 2019–2020, for example, several border closures were in direct contravention of the respective REC treaties and the disputes had direct negative impacts on intraregional trade, affecting in particular small-scale producers and traders (box 12).

Box 12

Recent trade disruptions within regional economic communities

In 2019, tensions between Kenya and Somalia (members of the Common Market for Eastern and Southern Africa) led Kenya to ban all cross-border trade with Somalia and, in December 2020, Somalia severed diplomatic ties with Kenya. The trade ban affected in particular khat farming in Kenya, which generally earned exporters to Somalia upwards of $400,000 per day. In January 2021, Somalia lifted the ban on khat imports. The dispute settlement mechanism of the Common Market for Eastern and Southern Africa allows for the Court of Justice to intervene, yet neither State approached the Court.

In 2019–2020, the customs service of Nigeria announced the closure of land borders, effectively halting the free movement of goods, aimed at reducing the smuggling of rice and arms. The closure affected the cross-border trade of several basic food items, including poultry, rice, sugar and tomatoes, and constrained informal traders from Benin and Togo, whose livelihoods depend on selling food items across the border and who obtain trade benefits through the treaty of the Economic Community of West African States.

In 2019, political tensions between Rwanda and Uganda (members of the East African Community and the Common Market for Eastern and Southern Africa) resulted in recurrent border closures. Rwanda is the fifth greatest export market of Uganda and the disruption in trade resulted in losses of more than $400 million for exporters in Uganda; the direct impacts of border closures were felt by manufacturers of cement, roofing materials and steel. In February 2020, the Heads of State agreed to the reopening of borders and the stabilization of relations.

Sources: Africa News, 2019; BBC News, 2016; *Foreign Policy*, 2016; Kenyan Tribune, 2019; Nantulya, 2019; *The East African*, 2021; Voice of America News, 2019.

At the global level, the dispute settlement understanding of WTO, comprising a set of rules and procedures to address disputes, is the central element in providing security and predictability in the multilateral trading system (Ranjan, 2009). Developing country member States in Asia and South America actively and regularly use this dispute settlement mechanism. Despite some shortcomings, the dispute resolution process under WTO has been relatively effective, with on average 19 disputes brought annually in 2010–2020 (WTO, 2021). States in Africa have had minimal interaction with dispute settlement at the WTO level, indicating that this is partly due to a lack of expertise in litigation under WTO and the extensive legal fees associated with dispute resolution (WTO, 2002).

The majority of the ministries of trade in Africa are inadequately staffed and many do not have lawyers trained in international trade law, meaning that they require the services of international law firms (Kessie and Addo, 2007). Capacity-building and technical assistance are therefore important for countries in Africa to be able to effectively engage in dispute settlement and ensure the implementation of rulings and recommendations. The Advisory Centre on WTO Law is an intergovernmental organization that provides advice on WTO law and supports developing countries and the least developed countries in dispute settlement proceedings at subsidized costs (Advisory Centre on WTO Law, 2015). However, the low level of participation of countries in Africa at WTO shows that they are not yet taking full advantage of this resource. In addition, engaging a law firm to represent a State is prohibitively expensive; for example, the legal fees charged to private sector companies exceeded $10 million in a case in which Japan was alleged to have violated the General Agreement on Tariffs and Trade (Kessie and Addo, 2007; WTO, 1998).

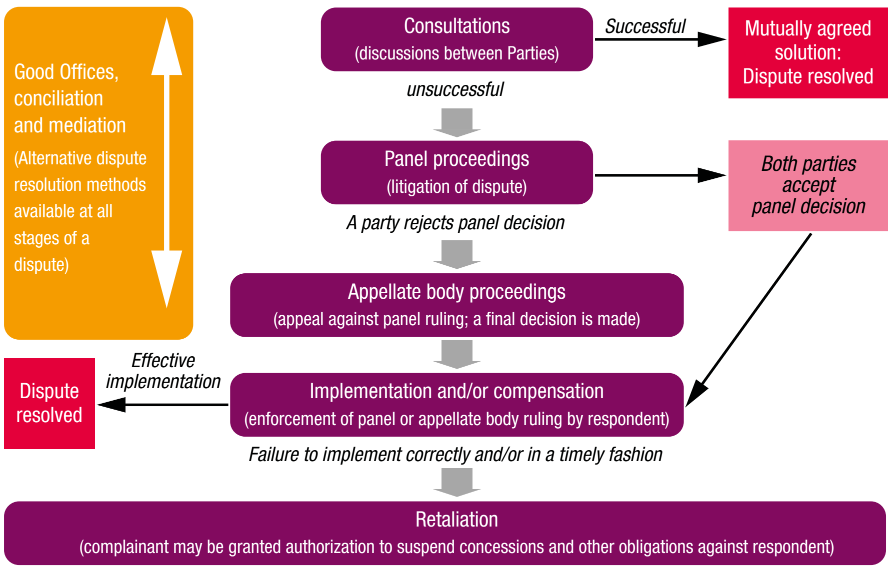
4.4.2 Dispute settlement under the Agreement: An overview

The African Continental Free Trade Area Agreement establishes the dispute settlement mechanism to be administered in accordance with the protocol on rules and procedures on the settlement of disputes (article 20). The mechanism is modelled on the dispute settlement understanding of WTO (Kigwiru, 2020). It combines adversarial procedures, that is, arbitration and a panel process, and diplomatic approaches, that is, good offices, conciliation and mediation. The protocol only applies to disputes arising under the African Continental Free Trade Area, including disputes on trade in goods and services. Negotiations are currently ongoing with regard to issues under phase II (investment, intellectual property rights and competition) and phase III (electronic commerce) and it is therefore unclear whether and how the mechanism will be used to deal with these issues. In addition, the Agreement (article 20 (1)) and the protocol (article 3 (1)) provide legal standing exclusively to member States, meaning that the private sector and individuals do not have recourse to bring a matter before a panel and non-State actors must therefore rely almost entirely on the Government to initiate trade dispute settlement proceedings on their behalf. There are three stages in the formal dispute settlement process under the African Continental Free Trade Area, as follows (figure 30): consultations between parties, providing an opportunity to negotiate and attempt to find a mutual solution without resorting to litigation; panel adjudication, if consultations are not successful, which is litigation similar to a court hearing at which parties are represented by lawyers and the panel gives a ruling, yet if either party is unsatisfied with the ruling, it may appeal to the appellate body, which reassesses the case and gives a final ruling;

and implementation of the ruling, which includes the possibility of countermeasures such as the suspension of trade benefits under the treaty in the event that the losing party fails to implement the ruling. At each stage, the parties may, by mutual agreement, resort to alternative dispute resolutions, such as good offices, conciliation and mediation. The time frames prescribed in the protocol envisage that a dispute settlement may take one year, from the request for consultations to the circulation of the review of the appellate body. Disputing parties may also agree to refer the case to a third party designated as an arbitrator. Such a decision must be notified to the secretariat of the African Continental Free Trade Area and the ruling must be implemented in the same manner as a ruling by a panel or appellate body (African Union, 2018b).

Figure 30

African Continental Free Trade Area dispute settlement mechanism



Source: UNCTAD, based on African Union, 2018b.

The dispute settlement mechanism under the Agreement mirrors the dispute settlement understanding of WTO, yet a key improvement is in the set up of the appellate body under the former. The structure of the appellate body of WTO, which considers State appeals of panel findings, has posed impediments to dispute settlement processes, as it is possible for States to block new appointments (Hoekman and Mavroidis, 2019). This has resulted in the appellate body being inadequately staffed to hear appeals and has therefore immobilized dispute settlement (Kugler and Nyaga, 2020). The protocol under the Agreement establishes a mechanism to avoid such a scenario by empowering the secretariat and the chair of the dispute settlement body to fill a vacancy in the appellate body if States cannot reach consensus regarding appointments (article 20 (6)). This innovative safeguard is an improvement on the WTO process as it guarantees the continuous availability of designated persons to address appeals and deliver definitive outcomes on disputes. A potential challenge, however, is related to the fact that the protocol does not clarify the type of consensus (positive or negative) required for the establishment of the panel and this could complicate the process, for example by prompting a respondent to a dispute to block it. In addition, the protocol does not provide for private sector actors to institute a trade dispute against a State and this has implications for both large businesses and small and medium-sized enterprises. Usually, financially robust business actors can lobby Governments to take action. For example, a key reason Brazil has been able to successfully navigate WTO litigation is due to strong partnerships with the private sector, which is engaged as a key pillar in advancing and defending national trade interests (Bahri, 2016). States in Africa may not currently have such an enhanced level of partnership with the private sector, yet can aim to resourcefully leverage the latter to strengthen participation in dispute settlement. Small-scale actors in particular may be empowered through representation in the institutional set up (e.g. national committees) or interest groups that can engage Governments through public and private consultation platforms.

4.4.3 Ensuring an effective and efficient dispute settlement mechanism

Countries in Africa have not yet reaped the benefits of existing dispute settlement mechanisms under current trade arrangements. This has been underpinned by several factors, ranging from high political and financial costs to capacity constraints and a reluctance to litigate. Addressing such issues is critical to ensuring that the mechanism under the African Continental Free Trade Area Agreement achieves its objectives.

Addressing political and financial costs

The African Group has noted that the WTO dispute settlement process presents major challenges, including both political and financial costs (WTO, 2002). The latter are also implied in the requirement in the protocol that each State must pay for its legal representation and also cover other costs associated with a dispute, such as the travel and lodging expenses of panellists, arbitrators and experts (article 26 (2)). Such costs make it expensive for parties to assert their rights under the African Continental Free Trade Area Agreement. Legal fees for trade disputes can amount to millions of dollars (Kessie and Addo, 2007). In addition, litigating a trade dispute is no quick feat. For example, the protocol under the Agreement stipulates that a trade dispute process should take around 14 months, from the request for consultations to the adoption of the report of the panel by the dispute settlement body. In contrast, in 2019, the duration of dispute processes at WTO ranged from 15 to over 40 months (Cato Institute, 2019). The lengthy process of dispute settlement can further impede trade while businesses are unable to exercise their rights under free trade agreements. The adversarial system of dispute resolution can result in significant political costs as litigation has the negative connotation of being antagonistic and damaging to inter-State relations. Entering into consultations is not done by mutual agreement of the parties to the dispute, rather, such a request must be responded to within a few days or the party may be brought before a hearing that will have binding consequences. In the event that an economically smaller State is the winner in a trade dispute against a State that does not enforce the recommendation and ruling of the dispute settlement body, the former may request that concessions against the losing party be suspended (article 25). Yet suspending trade concessions against a large economy may prove more damaging for the economically smaller State and amount to "economic self-harm" (Olayiwola, 2020). This is one of the deterrents to engaging with the WTO system, as States in Africa find that it is skewed against economically weaker States (WTO, 2002). Diplomatic approaches to dispute resolution, namely, good offices, conciliation and mediation, unlike arbitration, may not be accessed in isolation. In addition, arbitration limits sovereignty as States need to abide by prescribed decisions. By contrast, isolating alternative dispute resolution from the adversarial process makes it approachable and accessible. In addition, States are familiar with this form of dispute settlement as it is mandated in several REC treaties. For example, the treaties of the Economic Community of Central African States, the Economic Community of West African States and the Southern African Development Community refer to diplomatic dispute settlement as the first recourse for inter-State disputes. Accessing and notifying of diplomatic dispute resolution in the same manner as arbitration and independently of adversarial processes can reduce the political costs. If diplomatic approaches are unsuccessful, States can proceed to arbitration or directly to litigation by a panel.

Making the dispute settlement process cost effective

Prior to escalating to a dispute, member States can use the platform provided by the technical committees (e.g. on trade in goods and on trade in services) that meet periodically to provide peer reviews of trade policies to ensure compliance with the African Continental Free Trade Area Agreement and raise any trade-related concerns. The WTO trade policy review mechanism, for example, is a platform for non-confrontational discussions, under which parties can openly discuss trade and trade-related policies and raise complaints (Grollier, 2017). Such a peer review mechanism encourages transparency and benefits States by providing for an objective assessment of trade policies to ensure a smoothly functioning multilateral trading system. Implementing a similar monitoring platform among the committees of the African Continental Free Trade Area could serve as a means of dispute avoidance and encourage States to enact trade policies that comply with obligations under the Agreement.

The use of online mechanisms for dispute settlement also has significant potential to reduce financial costs as it is less expensive than the traditional method requiring all participants to travel to a central, usually extracontinental, location. Online dispute resolution is a digitalized form of dispute resolution and is compatible with the panel process, arbitration and the recommended good offices, conciliation and mediation model. Domestic courts worldwide have incorporated online dispute resolution into judicial procedures, and this has accelerated during the pandemic; for example, courts in South Africa adopted video conferencing technology to ensure that the legal system was not disrupted during the pandemic and European Union member States have adopted online dispute resolution for certain civil matters (Lexis Nexis, 2020; Lexis Nexis, 2021). Affordable access to dispute resolution through online systems, in particular for the least developed countries and economies with limited resources, can make the dispute settlement mechanism of the African Continental Free Trade Area more inclusive.

A culture that is conducive to rules-based dispute settlement and that results in legal certainty should be encouraged (Olayiwola, 2020). States may be accustomed to proceeding directly to the retaliation stage without engaging in lengthy and expensive processes, even at the REC level. Instead, States should be encouraged to use rules-based good offices, conciliation and mediation or arbitration until challenges with regard to capacity have been overcome. The political costs of dispute settlement can be circumvented by allowing States to access the non-adversarial dispute settlement methods of good offices, conciliation and mediation independently of adversarial mechanisms. In contrast to the consultation process, diplomatic methods of dispute settlement should be initiated by mutual agreement between States. Diplomatic approaches allow the parties to accept or reject the proposed outcomes, thereby preserving decision-making power. Access to a dispute settlement process that protects sovereignty and is based on mutual understanding better encourages States to resolve differences. If diplomatic approaches are unsuccessful, States can proceed to arbitration or directly to litigation by a panel. The more opportunities there are for resolution, the more inclusive the process will be. Formalizing alternative dispute resolution mechanisms would increase the certainty and transparency of the system. This entails the notification of diplomatic dispute resolution in the same manner as that of the notification of arbitration and agreed outcomes of settlements to the secretariat. This is the same format as detailed for arbitration under the protocol; it can help achieve the diplomatic resolution of disputes in a formal and quicker manner, which is familiar but less affected by capacity limitations. Finally, digitalizing such processes would make them faster, less expensive and more accessible by States.

Building the capacity of relevant actors to engage in trade disputes

Lawyers and other stakeholders in Africa, including those supporting policymaking, should be well acquainted with the dispute settlement mechanism, as there will be a demand for dispute settlement lawyers specializing in international trade law (East Africa International Arbitration Conference, 2021). An institution similar to the Advisory Centre on WTO Law could be fundamental for capacity-building among legal practitioners under the African Continental Free Trade Area Agreement and could assist States that do not have adequate resources to engage in dispute settlement under the Agreement. Trade facilitation committees can be useful in emphasizing the need for international trade law practitioners, domestic commercial law firms and universities that offer international trade law-related subjects to market this legal specialization more strongly. Empowering more lawyers and policymakers in Africa with skills in international trade law is in line with the endeavour to achieve a deeper level of integration and expand intra-African trade in services.

Empowering small-scale businesses to raise their voices in the dispute settlement process

It is essential to empower small and medium-sized enterprises, women and young entrepreneurs and informal cross-border traders through regional and national platforms that allow them to collectively bring attention to trade practices that violate the Agreement and are detrimental to their businesses. Traders of all sizes should be given an opportunity to voice their experiences in order for the African Continental Free Trade Area to have an impact in alleviating and eradicating poverty on the continent. Such regional and national platforms can take the form of business associations and trade unions, the members of which should also be trained to understand the African Continental Free Trade Area. Trade experts can lead in overseeing implementation of the Free Trade Area and compliance with the Agreement and can encourage States to engage in dispute settlement processes instead of resorting to retaliatory means of trade dispute resolution (East Africa International Arbitration Conference, 2021). For example, the Nigerian Union of Traders Association Ghana petitioned the Government of Nigeria to intervene on behalf of informal traders whose businesses had been closed in Ghana and this action by the Union was cited as a key component in restoring the trade environment between the two members of the Economic Community of West African States (This Day, 2020).

4.5 Concluding remarks

The effective implementation of coherent policies and strategies and the harmonization of trade rules are important, along with policy sequencing, and will be key to delivering on the potential of the African Continental Free Trade Area Agreement to support inclusive growth and prosperity in Africa, in line with the 2030 Agenda for Sustainable Development and Agenda 2063 of the African Union. The multidimensional feature of the African Continental Free Trade Area makes integrated frameworks and cooperation essential to its achievement and this can support effective policymaking, as well as a strong regulatory and institutional environment, from the design of actions to their implementation and monitoring, and strong partnerships and cooperation at all levels, whether global, continental, regional or national. Another critical element is political leadership and the ability to articulate visions that incorporate the interests and needs of all stakeholders. At the global level, the operationalization of the African Continental Free Trade Area is anchored within multilateral trade systems, stemming from the fact that most economies in Africa have adhered to many multilateral and/or bilateral trade arrangements, which can provide economies in Africa with opportunities to build the trade capacities and boost the trade facilitation needed to achieve the benefits of the Free Trade Area. The importance of aligning multilateral and bilateral agreements with the framework of the African Continental Free Trade Area, to build synergies with the aim of achieving common continental objectives, cannot be overstated. Conversely, misalignment is likely to undermine the ambition in the Agreement for Africa to produce more of what it consumes. Finally, the African Continental Free Trade Area provides for a dispute settlement mechanism with a view to fostering mutual trust, accountability, the rule of law and the peaceful settlement of trade disputes that may arise. Challenges in this regard, including both political and financial costs and capacity constraints, need to be addressed, along with the need to empower small-scale businesses to raise their voices and protect their rights.