

What to expect from the AfCFTA Dispute Settlement Mechanism?

Factsheet

How will disputes involving the legal instruments of the African Continental Free Trade Area (AfCFTA) be settled? It will be done in terms of the procedures in the AfCFTA *Protocol on Rules and Procedures on the Settlement of Disputes* (the “Dispute Settlement Protocol”), which deals with **inter-State dispute settlement**. Only the AfCFTA State Parties may declare disputes against each other thereunder; private parties will not have locus standi under this mechanism.

The likelihood of such disputes being formally declared is a different matter. This tralac Factsheet explains what the AfCFTA Dispute Settlement Protocol provides for and speculates about whether disputes will be declared. The position of private parties regarding dispute settlement is dealt with in a separate [Factsheet](#).

During Phase I of the AfCFTA negotiations the participating Member States of the African Union (AU) soon agreed on the content of the Dispute Settlement Protocol of this new trade regime. It was decided to copy the World Trade Organisation (WTO) model. The AfCFTA Dispute Settlement Protocol provides, like the WTO’s Dispute Settlement Understanding (DSU), for Panels and an Appellate Body. The DSU approach regarding procedures, timeframes, and substantive provisions have been replicated.

How significant is the decision to follow the WTO example and what lessons can be learned from the WTO’s practice under the DSU? When the WTO was established in 1995, the settlement of inter-state disputes became a more effective and central aspect of the regulation of multilateral trade. Its dedicated dispute settlement regime (the DSU) has been described as one of the most important innovations of the Uruguay Round. It was followed

by the active use thereof by the WTO Members, resulting in a rich jurisprudential legacy. (The fact that the WTO system is now in a crisis, is discussed below.)

The DSU became part of the **single undertaking** of the WTO regime according to which each Member State was expected to take on all obligations. Initially the “single undertaking” required that the Members voted on all parts of the results of a negotiating Round; its results had to be accepted as a package. The outcome of tariff negotiations would not, for example, be put up for approval separately from other matters addressed as part of such negotiations. Over time the meaning of “single undertaking” expanded to include that “no country can opt out of any part” of the Agreement.¹

There was a dispute settlement system under GATT 1947 too. It evolved over nearly 50 years on the basis of Articles XXII and XXIII of GATT 1947. The subsequent WTO system built on the principles for the management of disputes applied under GATT 1947.²

The Uruguay Round brought important modifications to the previous system, and there were sound reasons for doing so. The later years of GATT 1947 saw a decreasing confidence in the ability of the GATT dispute settlement system to resolve the difficult cases. This resulted in more unilateral action by individual contracting parties, who, instead of invoking the GATT dispute settlement system, would take direct action against other parties in order to enforce their rights.³

Under the subsequent WTO regime, the task of adjudicating disputes is delegated to the Dispute Settlement Body (DSB)⁴, a special assembly of the WTO’s General Council, which includes all WTO members. The DSB appoints the seven members of the WTO’s Appellate Body (AB)⁵. The multi-stage process of dispute settlement begins with a request for consultations between the parties. If the consultations fail to resolve the dispute, the complaining party may request the appointment of a three-member investigative panel. After receiving oral and written submissions from the parties, the panel issues its report and recommendations. A party may seek appellate review of a panel report, but only with respect to issues of law and legal interpretations. Appeals are heard by three of the seven members of the AB. It may uphold, modify, or reverse the panel’s report.

¹ <https://www.lawinsider.com/dictionary/single-undertaking>

² [Art 3.1](#) of the [DSU](#).

³ [WTO | Disputes - Dispute Settlement CBT - Historic development of the WTO dispute settlement system - The system under GATT 1947 and its evolution over the years](#)

⁴ https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm

⁵ https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm

A panel or AB report must be adopted by the DSB without amendment unless the DSB decides by a consensus of all its members to reject the report. The respondent may request a reasonable time to comply with the recommendations of a report. If the respondent fails to comply, the complainant may seek compensation or request authorisation from the DSB to engage in retaliation.

It should be noted that many of the covered agreements annexed to the Marrakesh Agreement, such as the Anti-Dumping Agreement or the Customs Valuation Agreement, include specialised dispute settlement procedures that are only applicable to certain types of disputes.⁶

One of the most important innovations in the WTO system came in respect of the procedure to adopt decisions in the DSU. When the DSB establishes panels, when it adopts panel and AB reports and when it authorises retaliation, the DSB must approve the decision unless there is a consensus against it.⁷ This special decision-making procedure is commonly referred to as “negative” or “reverse” consensus. At the three mentioned important stages of the dispute settlement process (establishment, adoption, and retaliation), the DSB adopts decisions to proceed unless there is a consensus not to do so. This means that the Member requesting the establishment of a panel, the adoption of the report or the authorisation of the suspension of concessions can ensure that its request is approved by merely placing it on the agenda of the DSB.

This contrasts sharply with the situation that prevailed under GATT 1947 when panels could be established, their reports were adopted, and retaliation was authorised on the basis of a “positive consensus”. All members had to agree. Unlike under GATT 1947, the DSU thus provides no opportunity for blockage by individual Members on these important matters. Negative consensus applies nowhere else in the WTO decision-making framework.⁸

Over the last two years the WTO dispute settlement system has changed; it is not any more functioning as designed. The American administration under President Trump refused to cooperate in the appointment of new AB members. It complained about the AB’s rulings and the reasoning behind them, claiming that Members’ rights have been diluted and that new obligations have been added, in ways that was never intended. The Obama administration has also lodged complaints and demands that the WTO should be reformed, in particular to deal with Chinese practices. The Biden administration has maintained the same policy.

⁶ [WTO & GATT Dispute Settlement - International Trade Law Research Guide - Guides at Georgetown Law Library](#)

⁷ [Arts 6.1, 16.4, 17.14](#) and [22.6](#) of the DSU.

⁸ https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c3s1p1_e.htm

The AB is presently not operational but disputes about alleged violations of WTO Agreements are still being filed. The EU and Canada have launched an initiative for an interim solution to the impasse around the AB in the form of an interim appeal arbitration arrangement.⁹ There are also other concerns about the WTO, such as the effect of the consensus rule on the ability of the Organisation to adopt new agreements.

The background to this crisis shows that the adjudication of disputes between the State Parties of a member-driven trade regime often involves sensitive national policy issues. Some commentators have written that the American antagonism against the more recent DSU developments is essentially about the use of tariffs to protect domestic industries, and that the space for doing so has been curtailed by AB rulings.¹⁰

As in the WTO, the AfCFTA Dispute Settlement Protocol shall apply only to disputes arising between the State Parties.¹¹ Disputes of this kind will be about the rights and obligations of the State Parties under the provisions of the AfCFTA Agreement.¹² The AfCFTA Agreement includes the founding Agreement establishing the AfCFTA as well as its Protocols, Annexes and Appendices, which form an integral part thereof.¹³ A “dispute” is defined to mean “a disagreement between State Parties regarding the interpretation and/or application of the Agreement in relation to their rights and obligations”.¹⁴ But the AfCFTA dispute settlement mechanism “shall preserve the rights and obligations of State Parties under the AfCFTA Agreement and clarify the existing provisions of the Agreement in accordance with customary rules of interpretation of public international law”.¹⁵

The content of Article 3(2) of the Dispute Settlement Protocol has to be noted. It provides as follows: This Protocol shall apply subject to such special and additional rules and procedures on dispute settlement contained in the Agreement. To the extent that there is a difference between the rules and procedures of this Protocol and the special or additional rules and procedures in the Agreement, the special or additional rules and procedures shall prevail. (Emphasis added.) Such other dispute settlement procedures could include those arising under Annex 9 of the Protocol on Trade in Goods, which deals with

⁹ <https://www.ustrademonitor.com/2019/07/the-eu-and-canada-blueprint-for-interim-wto-dispute-settlement/>

¹⁰ Chad P. Bown and Soumaya Keynes, [Why did Trump end the WTO’s Appellate Body? Tariffs.](#) | PIIIE

¹¹ Those AU Member States that have ratified this Agreement or have acceded to it and for whom the Agreement has entered into force. See Art 1(v) AfCFTA Agreement.

¹² Art 3(1) AfCFTA Dispute Settlement Protocol.

¹³ Art 1(b) AfCFTA Agreement.

¹⁴ Art 1 (e) AfCFTA Dispute Settlement Protocol.

¹⁵ Art 4(1) AfCFTA Dispute Settlement Protocol.

Trade Remedies and Safeguards. This Annex includes the AfCFTA Guidelines on the Implementation of Trade Remedies.

Article 30 of the Protocol on Trade in Goods also provides that, except as otherwise provided, the relevant provisions of the Protocol on Rules and Procedures on the Settlement of Disputes shall apply to consultations and the settlement of disputes under this Protocol. The equivalent provision in the Protocol on Trade in Services (Article 25) is differently worded and contains no proviso. It simply states: The provisions of the Protocol on the Rules and Procedures on the Settlement of Disputes shall apply to consultations and the settlement of disputes under this Protocol.

Not all 'differences' between State Parties will result in formal disputes. Article 24 of the Protocol on Trade in Services for example provides for sui generis consultations:

Subject to prior notification and consultation, a State Party may deny the benefits of this Protocol to service suppliers of another State Party where the service is being supplied by a juridical person of a non-State Party, without real and continuous link with the economy of the State Party or with negligible or no business operations in the territory of the other State Party or any other State Party. The effect of this provision is that if the special consultations mentioned here do not result in an agreement, that is the end of the matter. There is no right to be enforced with respect to benefits for service suppliers falling in the category mentioned here.

Further liberalisation and deeper continental integration are likely to have implications for dispute settlement on the African continent. The AfCFTA is designed to be a flexible arrangement in which additional commitments may be agreed among specific Parties, almost like the plurilaterals of the WTO. The AfCFTA regime will co-exist alongside the FTAs of the RECs,¹⁶ and it allows for ad hoc deals to advance liberalisation of trade in goods and services. Article 21 of the Protocol on Trade in Services, for example, provides for Additional Commitments: "The State Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles 19 or 20 of this Protocol, including but not limited to those regarding qualification, standards or licensing matters. Such commitments shall be inscribed in a State Party's Schedule of Specific Commitments. (Emphasis added.) Article 4(3) of the Protocol on Trade in Services also allows the State Parties to "conduct negotiations and agree to liberalise trade in services for specific sectors or sub-sectors in accordance with the objectives in

¹⁶ See Art 19(2) AfCFTA Agreement and Art 8(2) AfCFTA Protocol on Trade in Goods.

this Protocol. Other State Parties shall be afforded opportunity to negotiate the preferences granted therein on a reciprocal basis.

If these developments do occur, a range of ad hoc deals will follow. The obligations in this category will be specific, although Article 4(3) of the Protocol on Trade in Services includes a regional MFN obligation. The latter may result in more Parties joining such ad hoc dispensations.

How will disputes arising such subsequent deals be settled? Since Additional Agreements under Article 21 of the Protocol on Trade in Services shall be inscribed in a State Party's Schedule of Specific Commitments, the AfCFTA Dispute Settlement Protocol should apply. Regarding other ad hoc arrangements the Parties will apparently have a choice; to opt for the AfCFTA dispute settlement mechanism or to design their own procedures, such as arbitration. Clarity about dispute settlement is required and should be included in these "AfCFTA plurilaterals". Such ad hoc arrangements will apply to the relevant Parties only.

Is a formal dispute settlement mechanism important for the implementation of the AfCFTA? How likely is it that such disputes will be declared? The generation of a formal jurisprudence would, in principle, enhance the rules-based quality of this initiative but this has not been a central theme in the deliberations prior to the launch of the AfCFTA negotiations. Practice shows that judicial control over State actions is not the primary concern of Governments and apparently not major issue in African economic integration. For now, there are other more [pressing issues, such as boosting employment, securing borders, industrialisation and improving infrastructures. And in weak states the political and domestic agendas will be dominant.

An upsurge in inter-State litigation under the AfCFTA is unlikely. The AfCFTA is a member-driven arrangement and "solutions" are worked out at Ministerial meetings and Summits. There is no history of active litigation among African States over trade issues and no examples of such litigation between the Member States of the RECs, despite the fact that several of them have Courts of Justice.¹⁷ In 2021 the SADC Tribunal was abolished when it ruled against Zimbabwe for expropriating private land without compensation.¹⁸ That decision was supported by all the SADEC Member States at an extraordinary Summit. African Governments keep their integration initiatives firmly under control.

¹⁷ The EAC, COMESA and ECOWAS.

¹⁸ Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008)

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