



POLICY BRIEF

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KEY POINTS

- States in Africa should digitalize trade dispute resolution by using online dispute settlement mechanisms when possible and practicable. Affordable dispute settlement entails lower costs and makes the process more accessible to States with financial constraints
- Reducing the political costs associated with State–State dispute resolution and adhering to rules-based dispute settlement strengthens the applicability of the Protocol on Rules and Procedures on the Settlement of Disputes. Access to good offices, conciliation and mediation as a first-instance rules-based dispute settlement tool allows member States to mutually seek resolution, uphold commitments under the African Continental Free Trade Area and preserve inter-State relations
- States should establish a capacity-building institution to provide advisory and legal services under the African Continental Free Trade Area. An advisory centre on African Continental Free Trade Area law, similar to the Advisory Centre on World Trade Organization Law, would play an essential role in providing training and policy guidance for States parties
- States should build the capacity of both State and non-State actors in understanding the African Continental Free Trade Area and the rules governing the dispute settlement mechanism, and reinforce capacity in international trade law on the continent, thereby reducing the costs of international dispute settlement
- Strong public and private sector platforms should be promoted, to enable businesses to engage Governments with regard to trade frictions

African Continental Free Trade Area: Design of dispute settlement mechanism should reflect preferences and realities of all its member States

The African Continental Free Trade Area is set to promote structural transformation in States parties, in addition to strengthening sustainable and inclusive socioeconomic development and improving gender equality. However, to achieve the desired outcomes and maximize benefits, it is imperative for implementation to be undertaken carefully, with strong and appropriate institutions underpinning the process. A key aspect of any trade agreement involving different parties is the dispute settlement mechanism, aimed at fostering trust, accountability and the rule of law in operationalizing the agreement. UNCTAD, in this policy brief, analyses the framework of the dispute settlement mechanism under the African Continental Free Trade Area Agreement by comparing it with other dispute settlement mechanisms under regional economic communities and the World Trade Organization, with a focus on challenges. In addition, recommendations are made for enhancing the dispute settlement mechanism, to ensure that it is more accessible and aligned with the preferences of member States of the African Continental Free Trade Area.¹

¹ This policy brief is based on UNCTAD, 2021, *Economic Development in Africa Report 2021: Reaping the Potential Benefits of the African Continental Free Trade Area for Inclusive Growth* (United Nations publication, sales No. E.21.II.D.3, Geneva), available at <https://unctad.org/webflyer/economic-development-africa-report-2021> (accessed 3 January 2023).



Introduction

The African Continental Free Trade Area is projected to provide a major boost to intra-African production and trade that, given additional support measures, can lead to sustainable and inclusive growth on the continent. The scope of the Agreement covers a wide range of issues, from trade in goods and services to competition policy, intellectual property rights, investment and electronic commerce. In addition, the Agreement includes a dispute settlement mechanism in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes, with a view to fostering mutual trust, accountability, the rule of law and the peaceful settlement of disputes arising from its implementation.

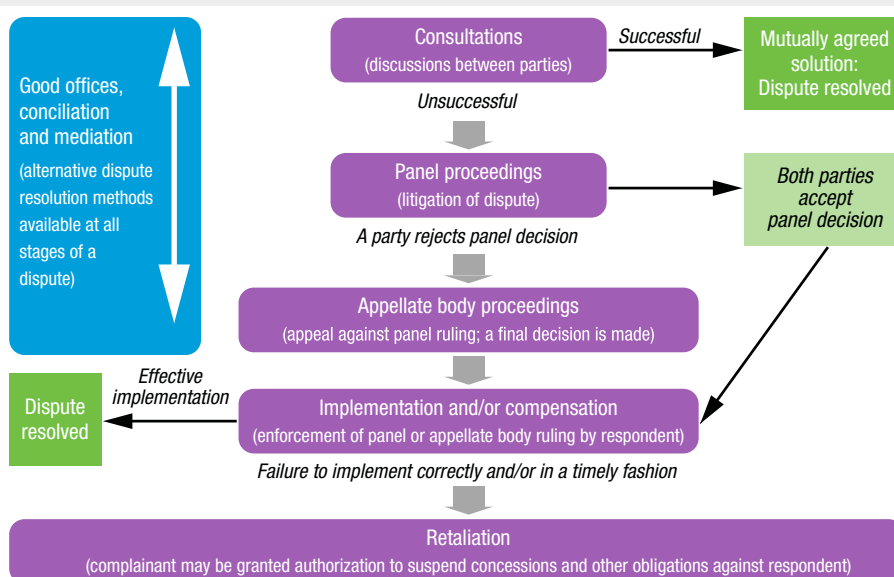
Existing trade dispute settlement mechanisms among States in Africa, at the international and regional levels, are examined in this policy brief, along with the current modalities of the dispute settlement mechanism under the African Continental Free Trade Area and the challenges, and recommendations are made for ensuring the efficient, accessible and predictable resolution of trade disputes, reflecting the preferences and realities of States parties.

Dispute settlement mechanism: Overview

The dispute settlement mechanism under the African Continental Free Trade Area is modelled on the Dispute Settlement Understanding of the World Trade Organization. It combines adversarial procedures, that is, arbitration and a panel process, and diplomatic approaches, that is, good offices, conciliation and mediation. At present, the Protocol on Rules and Procedures on the Settlement of Disputes applies to disputes linked to goods and services trade. Discussions on dispute resolution linked to competition policy, intellectual property rights, investment and electronic commerce issues are ongoing. In addition, the current system applies only to member States, excluding the private sector, individuals and other non-State actors from initiating trade disputes directly, and they therefore rely on Governments to act on their behalf.²

There are four stages of the formal dispute settlement process under the Protocol on Rules and Procedures on the Settlement of Disputes (see figure). First, consultations are held between parties, allowing them to negotiate an amicable solution; second, if the first stage fails, the parties proceed to the panel stage of formal litigation, which is similar to a court hearing at which parties are represented by lawyers and the panel gives a ruling; third, there is an opportunity to appeal the panel ruling to the appellate body, whose decision is final; and fourth, the ruling is implemented, including the possibility of countermeasures, such as the suspension of trade benefits under the African Continental Free Trade Area by the aggrieved State, if the other party fails to implement the ruling. At each stage, the parties may, by mutual agreement, resort to alternative diplomatic dispute resolution, such as good offices, conciliation and mediation. Alternatively, the parties may agree to refer the case to a third party designated as an arbitrator, that is, third-party arbitration. Such a decision and the resulting arbitral ruling must be reported to the African Continental Free Trade Area secretariat and an arbitral ruling must be implemented in the same manner as a panel ruling.

African Continental Free Trade Area dispute settlement mechanism



Source: UNCTAD, 2021.

² As at August 2022, member States are in the process of nominating officials for the panels, and recruitment for the appellate body is ongoing. Article 20 (1) of the African Continental Free Trade Area Agreement and article 3 (1) of the Protocol on Rules and Procedures on the Settlement of Disputes provide legal standing exclusively to States parties.

Limited use of formal dispute settlement mechanisms by States to date

Formal dispute settlement under the World Trade Organization mechanism and regional economic communities with free trade agreements are available to States in Africa. To date, none of the members of regional economic communities have initiated a trade-related dispute against another member through existing dispute settlement mechanisms. This situation does not denote the absence of trade-related conflicts within the regional economic communities, but instead indicates the preference for diplomatic rather than formal dispute settlement. For example, in 2019 and 2020, 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; these tensions caused significant disruptions to cross-border trade. In February 2020, the Heads of State agreed to the reopening of borders through diplomatic discussions.³

Another important alternative to formal dispute settlement is the use of online mechanisms for reporting, monitoring and eliminating non-tariff barriers. Available at the level of the African Continental Free Trade Area⁴ and in certain regional economic communities (e.g. Tripartite Free Trade Area), such mechanisms allow businesses in Africa to report any non-tariff barriers faced when trading across borders. Reported non-tariff barriers are resolved through a secure online portal by the relevant national authorities, with possible support from regional economic communities or the African Continental Free Trade Area secretariat. To date, over 700 trade complaints have been resolved through such channels.

Despite some shortcomings, the dispute resolution process under the World Trade Organization has been relatively effective, with, on average, 19 disputes brought annually in 2010–2020.⁵ States in Africa have had minimal interaction with dispute settlement at the World Trade Organization level, partly due to a lack of expertise in litigation under the World Trade Organization and the extensive legal fees associated with dispute resolution.⁶

Barriers to formal dispute settlement under the current system

Limited recourse among States in Africa to formal dispute settlement has been underpinned by several factors, ranging from high political and financial costs to capacity constraints and a reluctance to litigate. Trade disputes entail significant financial implications for States parties; legal representation by a private law firm can range from \$250,000 to \$750,000 for an uncomplicated dispute.⁷ The Protocol requires each State to 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)). The litigation process entails several steps that take at least one year to conclude.

Further, capacity challenges impact the ability of States in Africa to access formal dispute settlement. Limited expertise in World Trade Organization litigation or limited knowledge of new trade agreements such as the African Continental Free Trade Area Agreement require capacity constraints to be addressed. In Africa, there is an immediate high level of demand and not enough supply of dispute settlement lawyers that are also international trade law specialists, as well as of support for the panellists and arbitrators in dispute settlement processes.⁸ Ministries of trade in Africa are often inadequately staffed and many do not have lawyers trained in international trade law, meaning that they require the services of international law firms.⁹

Dispute settlement challenges and how to address them

The dispute settlement mechanism under the African Continental Free Trade Area should address current challenges, to make dispute settlement more accessible through the reduction of related costs by decoupling diplomatic dispute resolution from the adversarial process, allowing for online dispute settlement procedures and reinforcing trade law capacity-building on the continent.

³ See UNCTAD, 2021, box 12.

⁴ 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.

⁵ World Trade Organization, 2021, Disputes by member, available at https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (accessed 3 January 2023).

⁶ World Trade Organization, 2002, Negotiations on the dispute settlement understanding, Proposal by the African Group, TN/DS/W/15, Geneva, 25 September.

⁷ See <https://cepr.org/voxeu/columns/wto-trade-disputes-big-and-small#fn> (accessed 3 January 2023).

⁸ See East Africa International Arbitration Conference, 2021, The African Continental Free Trade Area: Implementation and dispute resolution, 4 March, available at <https://www.youtube.com/watch?v=A-Ja7aTfiWs> (accessed 3 January 2023).

⁹ E Kessie and K Addo, 2007, African countries and the World Trade Organization negotiations on the dispute settlement understanding, Centre for Trade and Sustainable Development.



States are familiar with diplomatic dispute settlement as it is mandated in several regional economic community treaties.¹⁰ Accessing and notifying of diplomatic dispute resolution in the same manner as arbitration, and independently of the adversarial processes, helps reduce political costs; if a diplomatic resolution is unsuccessful, States should be able to resort to arbitration or to proceed directly to a litigation panel.

States in Africa can utilize online mechanisms to resolve disputes, which would eliminate travel and lodging expenses. For example, online dispute resolution is used by the European Commission to resolve cross-border consumer–trader disputes expediently and economically.¹¹ Further, due to pandemic-related restrictions, court hearings in South Africa were conducted online through the use of video conferencing technology without compromising the quality of hearings or outcomes.¹² Such adaptations can be applied to State–State disputes under the African Continental Free Trade Area.

Trade experts on the continent, including trade lawyers, need to strengthen capacity to deal with trade disputes and have a good understanding of the African Continental Free Trade Area. This is important, to enable such experts to advise policymakers and businesses and defend their interests during trade disputes. At the World Trade Organization level, the Advisory Centre on World Trade Organization Law is an effective institution for advisory and capacity-building support, and a similar institution is fundamental under the African Continental Free Trade Area.

To make the dispute settlement mechanism under the African Continental Free Trade Area more inclusive, options to increase private sector participation in identified areas of concern may be considered. For example, States parties can create domestic procedures that allow the private sector, including small and medium-sized enterprises, to request Governments to bring a State–State complaint under the African Continental Free Trade Area. Such processes could help bridge the access gap between large businesses and small and medium-sized enterprises.

¹⁰ 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.

¹¹ See <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register> (accessed 3 January 2023).

¹² See <https://juta.co.za/press-room/2020/05/22/covid-19-courts-and-access-justice/> (accessed 3 January 2023).

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