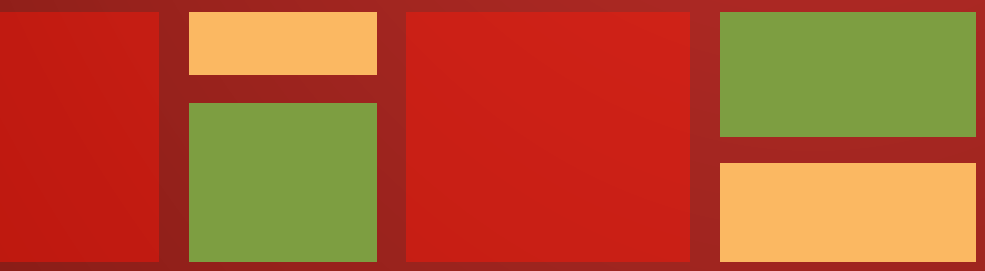




# TRAINING MODULE ON DISPUTE SETTLEMENT MECHANISMS FOR TRADE AGREEMENTS



## NOTE

This Training Module is published under the auspices of TradeMark Southern Africa and addresses dispute settlement mechanisms in the context of the negotiating process leading to the establishment of the Tripartite Free Trade Area (TFTA) between the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC).

This Module is designed for educational and divulgation purposes only. As such, no claim can be made to the publisher in relation to its legal contents, which in no instance replaces or substitutes the reviewed official texts.

The training exercise is intended to contribute to the negotiating capacity of TFTA actors, including government officials, the private sector and civil society representatives.

## PREFACE

This module concerns the dispute settlement mechanisms contained in the respective texts of the treaties of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and Southern African Development Community (SADC), as well as in the Draft Tripartite Free Trade Area (TFTA) Text.

While examining the different disciplines adopted by COMESA, EAC, SADC and in the Draft TFTA Text, the Module also includes aspects on how dispute settlement is conducted in the World Trade Organization (WTO). Additionally, the Module analyses dispute settlement mechanisms contained in the above-mentioned Free Trade Areas (FTAs), taking into account the TFTA configuration and the overlapping obligations for identical Member States of the WTO and the mentioned FTAs.

Throughout this Module selected additional content, drawn from the WTO and other FTAs, is provided where relevant, especially where such dispute settlement mechanisms could be instrumental in the better functioning of the selected FTA and/or WTO.

This Module has been drafted by Dr Edna Ramirez-Robles under the supervision of Mr Stefano Inama, Senior Trade Lawyer, United Nations Conference on Trade and Development (UNCTAD). Special thanks are extended to Mwansa Musonda of the COMESA Secretariat, Geoffrey Osoro of the EAC Secretariat and Paul Kalenga of the SADC Secretariat for providing the relevant legal texts and advice during the drafting. The Module is based on an existing training module of the UNCTAD Dispute Settlements series. It has been adapted and updated to fit the particular needs of TFTA Member States.

### *What you will learn*

As a result of the training exercise, you will be knowledgeable on the following subjects:

- > The dispute settlement mechanisms of the WTO, COMESA, the EAC, SADC as well as those in the current formulation of the TFTA;
- > The preparations that negotiating teams have to undertake in the formulation of a dispute settlement mechanism;
- > Measuring and assessing the parameters of starting a case and its resolution, plus the issues regarding its use;
- > Options for TFTA Member States considering the formulation of a dispute settlement mechanism;
- > Measuring the potential impact of launching disputes in different dispute settlement mechanisms; and
- > Reference tools and reference websites enabling the deepening of knowledge and analysis of dispute settlement mechanisms.

## TABLE OF CONTENTS

<b>PART I. DISPUTE SETTLEMENT IN TFTA MEMBER AGREEMENTS &amp; THE DRAFT TFTA TEXT</b> .....	6
<b>1. Dispute Settlement in the TFTA Member Agreements</b> .....	6
1.1 COMESA .....	6
1.1.1 Member States of COMESA.....	6
1.1.2 Institutions Involved in the Settlement of Disputes .....	6
1.1.3 Scope of the Dispute Settlement Mechanism.....	7
1.1.4 Mechanism to settle disputes of COMESA.....	8
1.1.5 Case Law .....	8
1.2 East African Community (EAC) .....	9
1.2.1 Member States of the EAC.....	9
1.2.2 Mechanism to Settle Disputes .....	9
1.2.3 Organs and Institutions Involved in the Settlement of Disputes .....	12
1.2.4 Principles Involved in the Settlement of Disputes of Common Market Issues.....	13
1.2.5 Case Law .....	13
1.3 SADC Consolidated Protocol on Trade .....	13
1.3.1 Member States of SADC .....	13
1.3.2 Institutions Involved in the Settlement of Disputes .....	14
1.3.3 Mechanism to Settle Disputes .....	14
1.3.4 Case Law .....	16
<b>2. Draft TFTA Text 2010</b> .....	17
2.1 TFTA Member States .....	17
2.2 Institutions Involved in the Settlement of Disputes.....	17
2.3 Mechanisms to Settle Disputes.....	17
<b>PART II. DISPUTE SETTLEMENT MECHANISMS OF THE WTO AND FTAS</b> .....	19
<b>3. Dispute Settlement in the GATT Times and in the WTO</b> .....	19
3.1 Dispute Settlement in GATT Law (1947 to 1994).....	19
3.1.1 Institutions Involved in the Settlement of Disputes .....	19
3.1.2 Main Features of Political GATT Model .....	19
3.1.3 Participation of GATT Contracting Parties in the Dispute Settlement System .....	22
3.2 WTO DSU procedure.....	23
3.2.1 Main Features of Quasi-adjudicative WTO/DSU Model .....	23
3.2.2 Institutions Involved in the Settlement of Disputes .....	23
3.2.3 Scope of the DS Mechanism.....	23
3.2.4 Political and Adjudicative Features in the DS Mechanism.....	23
3.2.5 Other Key Aspects .....	26
3.2.6 Participation by DS Members in the WTO DS System .....	27
<b>4. Dispute Settlement in Other FTAs</b> .....	34
4.1 North American Free Trade Agreement.....	34
4.1.1 Member States of NAFTA.....	34
4.1.2 Institutions Involved in the Settlement of Disputes .....	34
4.1.3 Political and Adjudicative Features in the Mechanism to Settle Disputes .....	34
4.2 EU–Mexico FTA .....	37
4.2.1 Institutions Involved in the Settlement of Disputes .....	37
4.2.2 Political and Adjudicative Features of the Mechanism to Settle Disputes.....	38

**PART III. CONFIGURATION OF AD HOC DISPUTE SETTLEMENT MECHANISMS FOR THE TFTA.....40**

**5. Suggestions to Make the Existing Draft TFTA Dispute Settlement Mechanism Effective.....40**

5.1 Political Elements for the TFTA Dispute Settlement Mechanism.....40

5.2 Adjudicative Elements for the TFTA Dispute Settlement Mechanism .....40

5.3 Horizontal Elements for the Dispute Settlement Mechanism of the TFTA .....42

**6. Options for a New Quasi-Adjudicative Dispute Settlement Mechanism.....43**

6.1 Political features for the TFTA dispute settlement mechanism.....43

6.2 Adjudicative Features for the TFTA Dispute Settlement Mechanism.....43

6.3 Horizontal Features for the TFTA Dispute Settlement Mechanism.....45

6.4 Quasi-adjudicative Options for TFTA Dispute Settlement Mechanisms .....46

6.4.1 Option 1: Highly Political and Less Adjudicative (Co-operation Agreement Shape) .....46

6.4.2 Option 2: Less Political and Highly Adjudicative (DSU Shape).....47

6.4.3 Option 3: Less Political and Less Adjudicative (NAFTA Shape).....48

6.4.4 Option 4: Highly Political and Highly Adjudicative Option (New Shape Adapted for African Countries) .....48

## LIST OF TABLES

Table 1: Comparison of dispute settlement mechanisms TFTA Member States and Draft TFTA Text.....	18
Table 2: Political model of dispute settlement in GATT (from 1947 to 1994) .....	22
Table 3: Requests for consultations and reports in the GATT DS system (1948/1981–1995) .....	22
Table 4: Quasi-adjudicative model of dispute settlement in the WTO .....	26
Table 5: Requests for consultations, reports and awards in the DSU of the WTO (1995–2012).....	27
Table 6: Most frequent complainants and respondents .....	30
Table 7: Regional overview of Members of the Appellate Body (1995–2012) .....	33
Table 8: Dispute settlement mechanisms of NAFTA, EU–Mexico and TFTA.....	39
Table 9: Importance of establishing a more adjudicative dispute settlement mechanism in the TFTA.....	41

## LIST OF FIGURES

Figure 1 & 2: Participation by developed and developing Members in the WTO DS System.....	28
Figure 3: Specific developed and developing Members as complainants .....	29
Figure 4: Developed and developing Members as respondents .....	29
Figure 5: Complainant participation .....	30
Figure 6: Respondent participation.....	31
Figure 7: Third party participation .....	32
Figure 8: Panellist participation by region .....	32

## INTRODUCTION

The main elements of a political model of dispute settlement in Public International Law are derived from the peaceful dispute settlement means stated in the United Nations Charter, Article 33. The following means are considered political: negotiation, inquiry, mediation and conciliation.<sup>1</sup> Additionally, good offices<sup>2</sup> and consultations<sup>3</sup> are also considered as part of this group.<sup>4</sup> These dispute settlement means have their own particular elements (i.e. negotiation is undertaken directly between the parties, while in the case of inquiry, mediation and conciliation a third authority intervenes). With regards to the last three, a third authority proposes a solution, whereas, in negotiation this is not possible. Also, while in negotiation and mediation there are no rules of procedure, in inquiry and conciliation there are pre-established rules of procedure, etc.

Furthermore, Public International Law also considers adjudicative dispute means, such as arbitration and an International Court of Justice. Here, a third person recommends a possible solution to the dispute, based on legal grounds.

This Module stresses the political and adjudicative elements included in most of the modern Free Trade Area Agreements, including those signed by COMESA, the EAC, and SADC. The first element aims to solve their disputes without a legal basis, through political opportunity. The second option refers to the fact that the dispute is solved on a legal basis and the report becomes compulsory to the parties.<sup>5</sup> When these two elements are included in different shapes, forms and degrees, the dispute settlement mechanisms are called quasi-adjudicative.

This Training Module aims to configure different *ad hoc* dispute settlement mechanisms between COMESA, the EAC and SADC for the interpretation and application of TFTA Member States. In order to achieve this goal, the Module is divided into three parts.

It first examines the mechanisms to solve disputes contained in the Treaties of each of the signatory parties of the TFTA, as well as the draft dispute settlement mechanism included in the Draft TFTA Text dated December 2010.

Thereafter, it analyses the dispute settlement mechanisms of the General Agreement for Tariffs and Trade (GATT), which was the predecessor to the World Trade Organization (WTO). It also reviews those dispute settlement mechanisms that were included in the first FTAs of the United States (US) and the European Union (EU) with developing countries.

The last section of this Module complements, with some adjudicative and horizontal elements, the existing Draft TFTA Text regarding the dispute settlement mechanism. Secondly, it propounds four new possible options for dispute settlement mechanisms for the TFTA.

<sup>1</sup> For a deeper knowledge of each of these means, see *Handbook on the Peaceful Settlement of Disputes between States* (New York, United Nations, 1992), pp. 9–55; J.G. Merrills, *International Dispute Settlement*, supra (Note 2), pp. 1–87; Remiro Brotons, A., Riquelme Cortado, R.M., Diez-Hochleitner, J., Orihuela Calatayud, E. and Pérez-Prat Durbán, L. *Derecho Internacional*, supra (Note 2), p. 864.

<sup>2</sup> In the Manila Chart, good offices are added to the group of peaceful dispute settlement means, see *Handbook on the Peaceful Settlement of Disputes between States* (New York, United Nations, 1992), supra (Note 9), p. 7.

<sup>3</sup> Consultation is considered a type of negotiation which has the added value of giving parties the possibility of gathering information before the dispute starts. See Merrills, J.G. *International Dispute Settlement*, supra (Note 2), pp. 3–8.

<sup>4</sup> See *Handbook on the Peaceful Settlement of Disputes between States*, supra (Note 9), p. 10.

<sup>5</sup> See supra (Note 2).

## PART I. DISPUTE SETTLEMENT IN TFTA MEMBER AGREEMENTS & THE DRAFT TFTA TEXT

### 1. Dispute Settlement in the TFTA Member Agreements

#### 1.1 COMESA

The Common Market of Eastern and Southern Africa (COMESA) Treaty entered into force on 8 December 1994, with full implementation in 2010.<sup>6</sup> The COMESA Treaty mainly focuses on the trade liberalisation of goods. As in the WTO, COMESA included principles of non-discrimination (Article 57) and of most favoured nation (MFN) (Article 56.1).

COMESA also aims to strengthen the co-operation between signatory parties in different fields of trade. This is the case of: Co-operation in the Development of Transport and Communications<sup>7</sup>, Co-operation in Industrial Development<sup>8</sup>, Co-operation in the Development of Energy<sup>9</sup>, Co-operation in the Development of Science and Technology<sup>10</sup>, Co-operation in Agriculture and Rural Development<sup>11</sup>, Co-operation in Tourism<sup>12</sup>, and Development of the Private Sector<sup>13</sup>. There is also a protocol that deals with Transit Trade and Transit Facilities<sup>14</sup>.

##### 1.1.1 Member States of COMESA

The Member States that form COMESA are: Burundi, Democratic Republic of the Congo, Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

##### 1.1.2 Institutions Involved in the Settlement of Disputes

Institutional provisions are contained in Chapter Four of the COMESA Treaty. This chapter establishes the following institutions: the Authority, the Council, the Court of Justice, the Committee of Governors of Central Banks, the Intergovernmental Committee, the Technical Committees, the Secretariat and the Consultative Committee. In the different provisions of this Treaty, the composition and function of each of these bodies is described.

The main institution involved in the binding settlement of, *inter alia*<sup>15</sup> trade disputes, is the Court of Justice (COJ), as established in Article 31.1 of the COMESA Agreement:

*“The Court shall consider and determine every reference made to it pursuant to this Treaty in accordance with the Rules of Court, and shall deliver in public session a reasoned judgement which, subject to the provisions of the said Rules as to review, shall be final and conclusive and not open to appeal.”*

<sup>6</sup> See Fact Sheet [http://www.wto.org/english/tratop\\_e/region\\_e/rta\\_plurilateral\\_map\\_e.htm?group\\_selected=1](http://www.wto.org/english/tratop_e/region_e/rta_plurilateral_map_e.htm?group_selected=1).

<sup>7</sup> Chapter Eleven.

<sup>8</sup> Chapter Twelve.

<sup>9</sup> Chapter Thirteen.

<sup>10</sup> Chapter Seventeen.

<sup>11</sup> Chapter Eighteen.

<sup>12</sup> Chapter Nineteen.

<sup>13</sup> Chapter Twenty-three.

<sup>14</sup> Annex I.

<sup>15</sup> The COMESA Court of Justice was established in 1994 and, in addition to other jurisdiction, took over the jurisdiction of previous judicial bodies such as the Preferential Trade Area (PTA) Tribunal (which adjudicated disputes between Member States); the PTA Administrative Appeals Board (an *ad hoc* body that dealt with disputes between the PTA and its staff); and the PTA Centre for Commercial Arbitration (which was responsible for facilitating international arbitration and the conciliation of private commercial disputes). See *About COMESA Court of Justice*:

[http://about.comesa.int/index.php?option=com\\_content&view=article&id=83&Itemid=133](http://about.comesa.int/index.php?option=com_content&view=article&id=83&Itemid=133), Accessed: August 15 2012.

It is not specified in the text of the COMESA Agreement that, in addition to the COJ, there are other instances that deal with trade disputes before they arrive at the COJ. However, the important role that the Technical Committees<sup>16</sup> (in the first instance) and the Council of Ministers<sup>17</sup> (in the second instance) play in settling trade disputes has been evidenced.

### 1.1.3 Scope of the Dispute Settlement Mechanism

As mentioned above, COMESA seeks to eliminate the import duties and other charges<sup>18</sup> and the non-tariff barriers to trade on common market goods.<sup>19</sup> Therefore, some general trade provisions are included, such as rules of origin, which clarifies which goods are considered to have originated in a given state; whether they have been wholly produced in that state; or whether a process of substantial transformation of materials, imported from outside that state, has been undertaken.<sup>20</sup>

In terms of standards, the parties undertake to apply uniform rules and procedures for the formulation of their national standards and, when possible, to adopt African regional standards. The Chapter also describes the role of standardisation and quality assurance, certification and laboratory accreditation, co-operation in testing, training in standardisation and quality assurance, etc.<sup>21</sup> With regards to sanitary and phyto-sanitary (SPS) measures, the Member States shall harmonise their policies and regulations.<sup>22</sup>

The Treaty also includes the possibility of imposing safeguards measures intra-trade, which means that, in the event of serious disturbances in the economy of a Member State following the application of the Agreement, the State can take the necessary safeguard measures, which can remain in force for one year and may be extended by a Council decision. The Council shall, on the recommendation of the Intergovernmental Committee, determine the remedial steps to be taken with respect to a Member State which has suffered substantial loss of revenue from import duties. In the case of balance-of-payment difficulties, a Member State may, for the purpose of only overcoming such difficulties and for a specified period to be determined by the Council, impose quantitative or similar restrictions or prohibitions on goods originating from the other Member States, provided that the Member State in question has taken all reasonable steps to overcome the difficulties.<sup>23</sup>

Subsidies are also forbidden. Any subsidy granted by a Member State which distorts competition by favouring certain undertakings or the production of certain goods, is prohibited. Members may offset the effect of subsidies by levying countervailing duties.<sup>24</sup>

Furthermore, it is possible to impose anti-dumping and countervailing duties. Some provisions consider that no Member State shall levy an anti-dumping duty (or countervailing duty) on imports from another Member State, unless it is determined that the effect of the alleged dumping (or subsidy) is such as to cause or threaten material injury to an established domestic industry or it could retard materially the establishment of a domestic industry. Any affected Member State may levy an anti-dumping duty on any dumped products from a third country in a Member State's market. Member States shall co-operate in the detection and investigation of dumping and subsidy practices and in imposing agreed measures to curb such practises.<sup>25</sup>

Customs-related procedures are considered, establishing that: "The parties will simplify, harmonise and standardise their customs regulations, procedures and documents to ensure the effective application of the Agreement".<sup>26</sup>

<sup>16</sup> Article 16, COMESA Treaty. Functions of the Technical Committees.

<sup>17</sup> Article 9, COMESA Treaty. The Council of Ministers Composition and Functions.

<sup>18</sup> Article 46, COMESA Treaty.

<sup>19</sup> Article 49, COMESA Treaty.

<sup>20</sup> Article 48, Protocol on Rules of Origin.

<sup>21</sup> Chapter 15, Standards-related Measures.

<sup>22</sup> Article 132.

<sup>23</sup> Articles 49, 5, 60 and 61.

<sup>24</sup> Article 52.

<sup>25</sup> Articles 51, 53 and 54.

<sup>26</sup> Chapter 7, Article 57.



Lastly, general exceptions are contemplated for specific circumstances. Article 50 and Annex III establish that a State may, after having given notice to the Secretary-General of its intention to do so, introduce or continue or execute restrictions or prohibitions affecting the application of security laws and regulations, the control of arms and ammunition, the protection of human, animal or plant health or life, the protection of public morality, the transfer of gold, silver and semi-precious stones, the protection of any item of national importance, or the maintenance of food security in the event of war and famine. Annex III also contains exceptions for Lesotho, Namibia and Swaziland.

A wave of trade disputes has taken place in the last years within COMESA Member States, which are mentioned in the following section.<sup>27</sup>

#### 1.1.4 Mechanism to settle disputes of COMESA

Chapter five makes reference to the means of solving disputes within COMESA Member States. Specifically it mentions that: "The Court of Justice shall ensure the adherence to law in the interpretation and application of the Treaty". The Court of Justice has compulsory jurisdiction<sup>28</sup>:

*"The Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty."*

Furthermore, it has forum exclusion, as established in Article 34.1 of the COMESA Agreement:

*"Any dispute concerning the interpretation or application of this Treaty or any of the matters referred to the [COJ] ... shall not be subjected to any method of settlement other than those provided for in th[e] Treaty."*

As mentioned above, Article 31.1 of the COMESA Treaty establishes that its judgements are final, and no appeal is possible, therefore they are binding to the parties. Moreover, the Court may impose sanctions if a party does not implement its decision.<sup>29</sup> It is also specified that proceedings "should be either written or oral"<sup>30</sup>

#### 1.1.5 Case Law

Although not at the Court of Justice level, some trade cases have been brought to political instances such as the Technical Committees and at the Council of Ministers. Some examples of these trade cases are mentioned below<sup>31</sup>:

- Kenya – rules of origin of palm oil-based cooking fat (Zambia);
- Kenya – unwarranted technical specifications on its exports (Mauritius);
- Malawi – duties on cooking oils (Kenya, discriminatory excise duties);
- Zambia – imposition of duties on palm oil-based cooking (Kenya); and
- Zambia – ban long-life milk (Kenya).

Moreover, it seems that the settlement of the above-mentioned cases is still pending as a result of a lack of financial resources.

<sup>27</sup> See: TradeMark Southern Africa, trade@work, News 6 December 2010 <http://www.trademarksa.org/news/comesa-ministers-rule-kenya-s-export-disputes>, and News 18 October 2010: <http://www.trademarksa.org/news/trade-disputes-between-comesa-countries-and-overlapping-membership-spell-double-trouble>. Accessed: August 15, 2012.

<sup>28</sup> Article 23, COMESA Treaty.

<sup>29</sup> Article 34.4, COMESA Treaty.

<sup>30</sup> Article 37.1, COMESA Treaty.

<sup>31</sup> See: TradeMark Southern Africa, trade@work, News 6 December 2010 <http://www.trademarksa.org/news/comesa-ministers-rule-kenya-s-export-disputes>, and News 18 October 2010: <http://www.trademarksa.org/news/trade-disputes-between-comesa-countries-and-overlapping-membership-spell-double-trouble>. Accessed: August 15, 2012.

## 1.2 East African Community (EAC)

The East African Community (EAC) possesses the legal capacity<sup>32</sup> to perform its functions and is represented by its Secretary-General.

Several issues in relation to a dispute settlement mechanism are considered in the Treaty that establishes the East African Community.<sup>33</sup> This is the case of the institutions involved in the settlement of disputes.

### 1.2.1 Member States of the EAC

The Member States of the East African Community (EAC) are: the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania. The Tripartite Commission and the Secretariat of the Tripartite Commission were respectively established on 30 November 1993, in terms of the Agreement for the Establishment of a Permanent Tripartite Commission for Co-operation between the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania.

### 1.2.2 Mechanism to Settle Disputes

Members of the EAC have established two mechanisms for solving trade disputes. The first relates to the settlement of disputes on common market issues, and the second to the settlement of disputes relating to customs union issues, which are explained in detail below:

#### Settlement of disputes relating to common market issues

Partner States have progressively established a Common Market.<sup>34</sup> Within the Common Market, and subject to the protocol provided for in paragraph 4 of Article 76, there shall be free movement of labour, goods, services, capital and the right of establishment. The Council may establish and confer powers and authority upon such institutions, as it may deem necessary, to administer the Common Market. Because no dispute settlement body was established to deal with issues that may arise, the East African Court of Justice is the body which by default rules on such issues.

The Court of Justice of the EAC has jurisdiction over the interpretation and application of the EAC Treaty.<sup>35</sup> In the first instance it hears and determines, but its judgements are subject to a right of appeal to the Appellate Division.<sup>36</sup> Article 23 regulates the role of the Court of Justice of the EAC, which specifically establishes that:

*"The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty. The Court shall consist of a First Instance Division and an Appellate Division."*

The role of the judges of the Court is considered in Article 24 of the Treaty.

*"Judges of the Court shall be appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognised competence, in their respective Partner States: Provided that no more than (a) two Judges of the First Instance Division; or (b) one Judge of the Appellate Division shall be appointed on the recommendation of the same Partner State."*

<sup>32</sup> Article 4, EAC Treaty.

<sup>33</sup> See Treaty for the establishment of the East African Community (as amended 14 December 2006 and 20 August 2007) [http://www.wto.org/english/tratop\\_e/region\\_e/rta\\_plurilateral\\_map\\_e.htm?group\\_selected=94%20](http://www.wto.org/english/tratop_e/region_e/rta_plurilateral_map_e.htm?group_selected=94%20).

<sup>34</sup> Article 76, EAC Treaty.

<sup>35</sup> Article 27, EAC Treaty.

<sup>36</sup> Article 35A, EAC Treaty.

The Court shall be composed of a maximum of fifteen Judges of whom not more than ten shall be appointed to the First Instance Division and not more than five shall be appointed to the Appellate Division. Articles 23 to 25 regulate the relevant terms for the Judges of the EAC Court of Justice. The Treaty also contemplates the removal from office and temporary membership of the Judges of the Court.<sup>37</sup> In such instance, the tribunal shall consist of three eminent Judges drawn from within the Commonwealth of Nations.

Furthermore, Arbitration Clauses and Special Agreements are considered in Article 32 of the Treaty, confirming that the Court shall have jurisdiction over any matter related to the Treaty, including private party contracts.

The Jurisdiction of National Courts is explained in Article 33, which specifically states that: “except where jurisdiction is conferred on the Court by this Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States”. Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.

Preliminary Rulings of National Courts are also considered in Article 34. Particularly, it mentions that: “where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question”.

Issues regarding the Judgment of the Court are also regulated in Article 35, as follows:

*“The Court shall consider and determine every reference made to it pursuant to this Treaty in accordance with the rules of the Court and shall deliver in public session, a reasoned judgment: Provided that if the Court considers that in the special circumstances of the case it is undesirable that its judgment be delivered in open court, the Court may make an order to that effect and deliver its judgment before the parties privately.”*

The Court shall deliver one judgment only in respect of every reference to it, which shall be the judgment of the Court reached in private by majority verdict. It also contemplates the possibility that a judge may deliver a dissenting judgment.

An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which, by its nature, might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made, either on account of some mistake, fraud or error on the face of the record or because an injustice has been done.

Appealing a judgment of the First Instance is also feasible, and regulated in Article 35A, which shall be done on the following grounds:

- a) points of law;
- b) lack of jurisdiction; or
- c) procedural irregularity.”

Article 36 considers the possibility for the Summit, the Council or a Partner State to request the Court to give an advisory opinion regarding a question of law arising from this Treaty, which affects the Community, and the Partner State, the Secretary-General or any other Partner State shall in the case of every such request have the right to be represented and take part in the proceedings.

Furthermore, this Treaty permits the parties to be represented before the Court.<sup>38</sup>

*“Every party to a dispute or reference before the Court may be represented by an advocate entitled to appear before a superior court of any of the Partner States appointed by that party.”*

It also considers that the Counsel to the Community shall be entitled to appear before the Court in any matter in which the Community or any of its institutions is a party or in respect of any matter where the Counsel to the Community thinks that such an appearance would be desirable.

<sup>37</sup> Article 26.

<sup>38</sup> Article 37.

This procedure only accepts the methods provided in this Treaty to solve disputes concerning the interpretation or application.<sup>39</sup> A Partner State or the Council shall take, without delay, the measures required to implement a judgment of the Court.

For specifics on the regulations for the Court, see the Rules of the Court. The rules for example details: the quorum for deliberations of the Court; the requirement for proceedings before the Court to be either written or oral; and the procedure for the record of each hearing to be signed by the President or Vice-president of the Court and be kept and maintained by the Registrar.

The rules relating to the execution of judgments are considered in Article 44 of this Treaty. The execution of a judgment of the Court, which imposes a pecuniary obligation on a person, shall be governed by the rules of civil procedure in force in the Partner State in which execution is to take place. The order for execution shall be appended to the judgment of the Court, which shall require only the verification of the authenticity of the judgment by the Registrar, whereupon the party in whose favour execution is to take place may proceed to execute the judgment.

Article 45 of the Treaty, institutes the possibility for the Council to appoint a Registrar of the Court from among citizens of the Partner States qualified to hold such high judicial office in their respective Partner States. The Court shall employ such other staff as may be required to enable it to perform its functions and who shall hold office in the service of the Court. The Seat of the Court shall be determined by the Summit according to Article 47.

In certain circumstances, as considered in Article 139, it is also permitted to dissolve the Permanent Tripartite Commission and its Secretariat upon the coming into force of this Treaty.

The Protocol on the Establishment of the East African Community Common Market entered into force in July 2010. The Protocol includes Annexes on the following subjects: movement of persons, movement of workers, right of establishment, right of residence, free movement of capital and trade in services.<sup>40</sup> This Protocol confirms in its Article 54 that disputes “shall be settled in accordance with the provisions of the Treaty”.

---

#### Settlement of disputes on Customs Union issues

The EAC Treaty mentions in Article 27 that the East African Court of Justice (EACJ) initially shall have jurisdiction over the interpretation and application of this Treaty. This Treaty establishes a Customs Union that specifically covers the following subjects<sup>41</sup>:

*“The Partner States agree to establish a Customs Union details of which shall be contained in a Protocol which shall, inter alia, include the following:*

- (a) The application of the principle of asymmetry;*
- (b) The elimination of internal tariffs and other charges of equivalent effect;*
- (c) The elimination of non-tariff barriers;*
- (d) Establishment of a common external tariff;*
- (e) Rules of origin;*
- (f) Dumping;*
- (g) Subsidies and countervailing duties;*
- (h) Security and other restrictions to trade;*
- (i) Competition;*
- (j) Duty drawback, refund and remission of duties and taxes;*
- (k) Customs co-operation;*
- (l) Re-exportation of goods; and*
- (m) Simplification and harmonisation of trade documentation and procedures.”*

<sup>39</sup> Article 38.

<sup>40</sup> See East African Community towards a Common Market. [http://www.eac.int/commonmarket/documentation/cat\\_view/24-documents-a-downloads/30-common-market-protocol-a-annexes.html](http://www.eac.int/commonmarket/documentation/cat_view/24-documents-a-downloads/30-common-market-protocol-a-annexes.html). Accessed: 09 August 2012.

<sup>41</sup> Article 75, EAC Treaty.

The EAC Treaty also considers a safeguard clause, mentioning that<sup>42</sup>:

*"In the event of serious injury occurring to the economy of a Partner State following the application of the provisions of this Chapter, the Partner State concerned shall, after informing the Council through the Secretary-General and the other Partner States, take necessary safeguard measures. The Council shall examine the method and effect of the application of existing safeguard measures and take decisions thereon."*

Article 41 of the Protocol on the establishment of the East African Customs Union<sup>43</sup> establishes that the settlement of disputes will be implemented in accordance with the regulations specified in Annex XI of the Protocol.<sup>44</sup> This specific mechanism shall handle all matters pertaining to:

- a) Anti-dumping measures;
- b) Subsidies and countervailing duties;
- c) Safeguard measures;
- d) Rules of origin; and
- e) Any other matter under the Protocol.

This is a mechanism that provides for the possibility for an amicable settlement first through consultations. If parties have not held consultations after specific periods of time (10 days for perishables or 30 days), they may refer the issue, requesting the establishment of a Panel to the Committee on Trade Remedies.<sup>45</sup> A Panel should be constituted within seven days of the meeting of the Committee, preferably from the indicative list (confirmed by the annual proposals of the Partner States) held by the Secretariat.<sup>46</sup>

Disputing parties can comment on the Report of the Panel, as well as the Interim Report.<sup>47</sup> The Committee on Trade Remedies will be notified about the Report, and this Committee will have the final and, therefore, binding decision as to whether or not to adopt the Report.<sup>48</sup> A reasonable period of time can be set up to implement Panel Reports: voluntarily, mutually, or by an arbitral award.<sup>49</sup> The Council of Ministers will keep under surveillance the resolutions of the Committee.<sup>50</sup>

Alternative means of dispute settlement are also available, as well as binding arbitration for the parties to settle their dispute.<sup>51</sup>

---

### 1.2.3 Organs and Institutions Involved in the Settlement of Disputes

#### Organs in the settlement of disputes of Common Market issues

Several institutions are contemplated in Chapter three of the EAC Treaty. Article 9 establishes the Organs and Institutions of the Community as follows: (a) the Summit; (b) the Sectoral Council<sup>52</sup>; (c) the Co-ordination Committee; (d) Sectoral Committees<sup>53</sup>; (e) the East African Court of Justice (including judges of the court, in

---

<sup>42</sup> Article 78, EAC Treaty.

<sup>43</sup> East African Community Secretariat, Protocol on the Establishment of the East African Customs Union, 30 November 1999.

<sup>44</sup> The East African Community Customs Union (dispute settlement mechanism regulations).

<sup>45</sup> Article 6.3 and 8.1 EAC Customs Union Dispute Settlement Mechanism Regulations (Annex XI).

<sup>46</sup> Article 8.4 and 8.7 EAC Customs Union Dispute Settlement Mechanism Regulations (Annex XI).

<sup>47</sup> Article 15, EAC Customs Union Dispute Settlement Mechanism Regulations (Annex XI).

<sup>48</sup> Article 16, EAC Customs Union Dispute Settlement Mechanism Regulations (Annex XI).

<sup>49</sup> Article 21.2 a, b and c, EAC Customs Union Dispute Settlement Mechanism Regulations (Annex XI).

<sup>50</sup> Article 21.4 a, b and c, EAC Customs Union Dispute Settlement Mechanism Regulations (Annex XI).

<sup>51</sup> Article 7 and 20, EAC Customs Union Dispute Settlement Mechanism Regulations (Annex XI).

<sup>52</sup> Article 14, EAC Treaty.

<sup>53</sup> Article 20, EAC Treaty.

first and appellate instance, and the Registrar); (f) the East African Legislative Assembly; (g) the Secretariat; and (h) such other organs as may be established by the Summit. The Community also has a Secretary-General.<sup>54</sup>

The institutions of the Community shall be such bodies, departments and services as may be established by the Summit.

.....

**Organs in the settlement of disputes of Customs Union issues**

Organs include: the Panel, Committee on Trade Remedies (Article 24 of the Protocol), Council i.e. the Council of Ministers (Article 9 of the Treaty), and the Secretariat of the Community (Article 9 of the Treaty).

.....

**1.2.4 Principles Involved in the Settlement of Disputes of Common Market Issues**

The Fundamental Principles of the Community shall govern the achievement of the objectives of the Community by the Partner States. These include: (a) mutual trust, political will and sovereign equality; (b) peaceful co-existence and good neighbourliness; (c) peaceful settlement of disputes; (d) good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; (e) equitable distribution of benefits; and (f) co-operation for mutual benefit.<sup>55</sup>

Operational principles, which "shall govern the practical achievement of the objectives of the Community shall include: (a) people-centred and market-driven co-operation; (b) the provision by the Partner States of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure; (c) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology; (d) the principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stakeholders in the process of integration; (e) the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds; (f) the equitable distribution of benefits accruing or to be derived from the operations of the Community and measures to address economic imbalances that may arise from such operations; (g) the principle of complementarity; and (h) the principle of asymmetry".<sup>56</sup>

.....

**1.2.5 Case Law**

No trade cases have been brought to the EAC Court of Justice.<sup>57</sup>

.....

**1.3 SADC Consolidated Protocol on Trade**

The Southern African Development Community (SADC) Protocol regulates the settlement of trade disputes among its Member States as follows:

.....

**1.3.1 Member States of SADC**

The Republic of Angola, the Republic of Botswana, the Democratic Republic of the Congo, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mauritius, the Republic of Mozambique, the Republic of Namibia, the Republic of Seychelles, the Republic of South Africa, the Kingdom of Swaziland, the United Republic of Tanzania, the Republic of Zambia and the Republic of Zimbabwe.

.....

---

<sup>54</sup> Article 67, EAC Treaty.

<sup>55</sup> Article 6, EAC Treaty.

<sup>56</sup> Article 7, EAC Treaty.

<sup>57</sup> Although a number of cases have been heard by the EAC court of Justice on human rights issues, no specific trade cases have been brought to the EAC Court of Justice at the time of this writing. (<http://www.eacj.org/docs/judgements/KPA-vs-Modern-Holdings.pdf> and Kenya and Tanzania, or [http://www.eacj.org/pending\\_cases.php](http://www.eacj.org/pending_cases.php)).

### 1.3.2 Institutions Involved in the Settlement of Disputes

In Chapter five of the Treaty, Article 9 regulates the establishment of institutions. The following institutions are hereby established: the Summit of Heads of State or Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; the Tribunal; and SADC National Committees. Other institutions may be established as necessary.

The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.<sup>58</sup> The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit. Members of the Tribunal shall be appointed for a specified period. The Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it. The decisions of the Tribunal shall be final and binding.

SADC also permits that each Member State creates a SADC National Committee as follows:<sup>59</sup>

*“Each SADC National Committee shall consist of key stakeholders. Each SADC National Committee shall, in its composition, reflect the core areas of integration and co-ordination referred to in paragraph 2 of Article 12 of this Treaty. It shall be the responsibility of each SADC National Committee to: provide input at the national level in the formulation of SADC policies, strategies and programmes of action; co-ordinate and oversee, at the national level, implementation of SADC programmes of action; initiate projects and issue papers as an input to the preparation of the Regional Indicative Strategic Development Plan, in accordance with the priority areas set out in the SADC Common Agenda; and create a National Steering Committee, Sub-committees and Technical Committees. Each National Steering Committee shall consist of the Chairperson of the SADC National Committee and the Chairpersons of the Sub-committees. Sub-committees and Technical Committees of the SADC National Committee shall operate at ministerial and officials levels. A National Steering Committee shall be responsible for ensuring rapid implementation of programmes that would otherwise wait for a formal meeting of the SADC National Committee. Sub-committees and Technical Committees shall endeavour to involve key stakeholders in their operations. Each Member State shall create a national secretariat to facilitate the operation of the SADC National Committee. Each national secretariat of a SADC National Committee shall produce and submit reports to the Secretariat at specified intervals. Each Member State shall provide funds for the operation of its national secretariat which shall be structured according to the core areas of integration referred to in paragraph 2 of Article 12 of this Treaty. Each SADC National Committee shall meet at least four times a year. For purposes of this Article, key stakeholders include: government; private sector; civil society; non-governmental organisations; and workers and employers organisations.”*

### 1.3.3 Mechanism to Settle Disputes

The inter-state mechanism to settle trade disputes that may arise between SADC Members is contained in Annex VI as indicated in Article 32 of the Consolidated Protocol on Trade with the following text:

*“The rules and procedures of Annex VI shall apply to the settlement of disputes between Member States concerning their rights and obligations under this Protocol.”*

In the dispute settlement mechanism included in Annex VI of the SADC Protocol, once a forum is chosen, it excludes the other (Article 1bis) and applies to all the rights and obligations of the SADC Protocol (Article 1). This mechanism is very similar to that of the WTO, having specific deadlines, procedures for multiple complaints (Article 11); and third party participation (Article 12). Moreover, it considers the role of experts (Article 13); issues with regards to expenses that should be paid to panellists and experts appointed (Article 19); and regulations that the Committee of Ministers of Trade (CMT) must adopt to facilitate the implementation of the dispute settlement mechanism of the SADC Protocol (Article 20).

This dispute settlement is a quasi-adjudicative mechanism, composed by a political stage through consultations between the disputing parties (Article 3), and by two adjudicative stages with a Panel (Article 5), and an appellate stage (Article 15A). Specifically, at the consultation stage, there are three situations when the complainant party can automatically request the establishment of a Panel. The first is when, within 10 days, the responding party does not contest the consultations' notification. The second is if, within 30 days, disputing

<sup>58</sup> Article 16.

<sup>59</sup> Article 16A.



parties do not commence with consultations.<sup>60</sup> The third is if, in the period of 60 days, the parties have not settled the dispute.<sup>61</sup> Moreover, in the event that a third party has a substantial interest in the dispute, this party can request the complainant party to join consultations. If the request to join consultations is not accepted, the third party can initiate its own consultations.<sup>62</sup> Deadlines are shorter when the dispute concerns perishable goods.<sup>63</sup>

At the first adjudicative stage, the Registrar of the Tribunal is responsible for establishing a Panel within 20 days of the request for consultations.<sup>64</sup> The Panel will be composed of three panellists<sup>65</sup> with specific professional qualifications<sup>66</sup>, preferably from an indicative roster of panellists.<sup>67</sup> Disputing Member States will first endeavour to agree on the chair<sup>68</sup>, and each disputing Member will appoint a panellist, whose nationality is different from that of any of the disputing parties.<sup>69</sup> In the event of failure to appoint the chair or a panellist, the Executive Secretary of SADC will make the selection by lot from the indicative roster.<sup>70</sup>

Procedures for the Panel are also contemplated; disputing Member States have the right to at least one hearing before the Panel, as well as written initial and rebuttal submissions.<sup>71</sup> The Panel shall submit an initial report within 90 days after the last panellist is selected, to which disputing parties may submit written comments.<sup>72</sup> Within 30 days of the submission of the initial report, the Panel shall issue its final report through the Registrar of the Tribunal.<sup>73</sup>

In its terms of reference, the Panel has to examine, in the light of the relevant provisions of the protocol, "the matter referred to the Registrar of the Tribunal and to make findings, determinations and recommendations."<sup>74</sup> The Panel will instruct the losing party to put remedial measures in place to ensure conformity with the SADC Protocol<sup>75</sup>, and could recommend possible ways for their implementation.<sup>76</sup> Disputing parties can appeal issues of law relating to the final report in front of the Tribunal.<sup>77</sup>

In order to implement the recommendations of the Panel, parties shall agree on a reasonable period of time (RPT), which shall not exceed six months from the date of adoption of the Panel report.<sup>78</sup> If recommendations are not implemented within the RPT, within 20 days after its expiration, disputing parties should negotiate a mutually satisfactory solution. If parties fail to negotiate this solution, the complainant can request authorisation from the CMT, through the Registrar, to suspend concessions (same or other sectors) or other obligations equivalent to the level of the nullification or impairment.<sup>79</sup> This authorisation shall be granted by the CMT unless it is decided otherwise by consensus. If the respondent Member State objects to the level of suspension proposed, the matter shall be referred to arbitration (preferably by the original Panel,

---

<sup>60</sup> Article 3.3, SADC.

<sup>61</sup> Article 3.7, SADC.

<sup>62</sup> Article 3.5, SADC.

<sup>63</sup> Article 3.8, SADC.

<sup>64</sup> Article 5.1, SADC.

<sup>65</sup> Article 6, SADC.

<sup>66</sup> Article 7, SADC.

<sup>67</sup> Article 6, SADC.

<sup>68</sup> Article 8.2 (a), SADC.

<sup>69</sup> Article 8.2 (b), SADC.

<sup>70</sup> Article 8.3, SADC.

<sup>71</sup> Article 10, SADC.

<sup>72</sup> For disputes on perishable goods, panellists shall submit the initial report within 45 days. Article 14, SADC.

<sup>73</sup> Article 15, SADC.

<sup>74</sup> Article 9 (a), SADC.

<sup>75</sup> Article 9 (c), SADC.

<sup>76</sup> Article 16, SADC.

<sup>77</sup> Article 15A, SADC.

<sup>78</sup> Article 17, SADC.

<sup>79</sup> Article 18.2 and 18.4, SADC.



failing which the Executive Secretary shall appoint a new Panel within 10 days of receipt of the request for arbitration) for issuing of a final decision.<sup>80</sup>

Alternative means of dispute settlement with Good Offices, conciliation and mediation are also considered in Article 4. No provisions are prescribed for adoption by the CMT of Tribunal decisions or for subsequent surveillance of implementation or determination through litigation of an RTP for the implementation of a decision.<sup>81</sup> The Article also does not specify the type of recommendations that the Tribunal can provide in the appellate stage.



#### **1.3.4 Case Law**

According to the publicly available information, no cases have been brought under the Trade Protocol of SADC.

---

<sup>80</sup> Article 18.5 and 18.6, SADC.

<sup>81</sup> Ng'ong'ola C. Replication of WTO dispute settlement process. *SADC Law Journal*, p.62.

## 2. Draft TFTA Text 2010

The Draft TFTA Text of December 2010 contains some preliminary provisions for dispute settlement mechanisms for the future TFTA, which are revised in this section.

### 2.1 TFTA Member States

The negotiating parties of the future TFTA are COMESA, EAC and SADC.

### 2.2 Institutions Involved in the Settlement of Disputes

*Ad hoc* Panel, Tripartite Council and Tripartite Secretariat.

### 2.3 Mechanisms to Settle Disputes

Part IX of the Draft TFTA Text provides a dispute settlement draft in Article 39. Specifically, it considers that dispute settlement mechanisms in Tripartite Member States shall endeavour to agree on the interpretation and application of this Agreement, and shall make every effort, through co-operation and consultation, or the use of good offices, conciliation and mediation, to arrive at a mutually satisfactory solution.

If the Tripartite Member States fail to resolve a dispute amicably, they shall have recourse to the Tripartite Dispute Settlement Mechanism. However, no procedures are yet specified or considered for this mechanism.

The settlement of any dispute among Tripartite Member States shall, whenever possible, imply removal of a measure not conforming to the provisions of this Agreement or causing nullification or impairment of a benefit under such provision.

In the event of inconsistency or a conflict between this Agreement and the Treaties and instruments of COMESA, EAC and SADC, this Agreement shall prevail to the extent of the inconsistency or conflict.

The implementation of the provisions of this Article shall be in accordance with Annex 14 to this Agreement.

Annex 14 of the Tripartite Dispute Settlement Mechanism under Article 39(5) of the Agreement establishes the following rules to settle disputes: the mechanism consists of a possibility for an amicable settlement first through consultations; if parties have not held consultations after specific periods of time (10 days for perishables or 30 days) they may refer the issue to the Tripartite Council, requesting the establishment of a Panel;<sup>82</sup> and a Panel should be constituted within seven days of the meeting of the Tripartite Council, preferably from the indicative list (compiled from the annual proposals of the Partner States) held by the Tripartite Secretariat.<sup>83</sup>

Disputing parties can comment on the Report of the Panel, as well as the interim report.<sup>84</sup> The Tripartite Council will be notified of the report and will have the final and therefore, binding decision as to whether or not to adopt the Panel's report.<sup>85</sup> A reasonable period of time to implement Panel reports can be set up voluntarily, mutually, or by an arbitral award.<sup>86</sup> The Tripartite Council will keep the resolutions of the Committee under surveillance.<sup>87</sup>

Alternative means of dispute settlement are also available, as well as binding arbitration to allow the parties to settle their dispute.<sup>88</sup>

<sup>82</sup> Article 5.3 and 7.1, TFTA Dispute Settlement Mechanism (Annex 14).

<sup>83</sup> Article 7.4 and 7.7, TFTA Dispute Settlement Mechanism (Annex 14).

<sup>84</sup> Article 14 TFTA, Dispute Settlement Mechanism (Annex 14).

<sup>85</sup> Article 15 TFTA, Dispute Settlement Mechanism (Annex 14).

<sup>86</sup> Article 20.2 a, b and c, TFTA Dispute Settlement Mechanism (Annex 14).

<sup>87</sup> Article 20.4, TFTA Dispute Settlement Mechanism (Annex 14).

<sup>88</sup> Article 6 and 19, TFTA Dispute Settlement Mechanism (Annex 14).

It is noted that this dispute settlement mechanism is almost an exact copy of the dispute settlement mechanism contained in the EAC Protocol for the Customs Union. In the last section of this Module, some recommendations will be made to strengthen its adjudicative nature.

**Table 1: Comparison of dispute settlement mechanisms TFTA Member States and Draft TFTA Text**

Provisions	COMESA	EAC		SADC	Draft TFTA Text
		Common Market	Customs Union		
Authority	COMESA Court of Justice	East African Court of Justice (EACJ). Appellate Division (Art. 27)	Panel, Committee on Trade Remedies (Art. 24, Protocol) Council of Ministers (Art. 9, Treaty)	Panel and Tribunal of SADC (for appellate stage)	Tripartite Council and Panel
Compulsory jurisdiction	Yes (Art. 23)	Yes	No rules	Yes (Art. 27)	No rules yet
Forum choice	Forum Exclusivity (Art. 34)	Exclusive (Art. 38.1)	To WTO if disputes arise between a Partner State and a foreign country (Art.4.4)	Exclusive for same matter in SADC	No rules yet
Composition of Panels	No Panels. Technical Committees and afterwards Court of Justice	No	Yes from roster of panellists	Yes, from roster of panellists	Yes, from roster of panellists (Art. 7.4 and 7.7)
Binding decisions	Technical Committees, no Court of Justice, yes (Art. 31.1)	Appellate Division, yes (Art. 35 A)	Yes, but by the Committee on Trade Remedies and Council of Ministers	Yes, final	Yes, but by the Tripartite Council (Art. 15)
Implementation of final report	No rules	Shall take required measures without delay (Art. 38.3)	No rules	RPT implementing is voluntary, not adjudicative as in WTO	No rules yet
If no implementation	Sanctions (Art. 34.4)	No rules	Surveillance	Negotiations on the level of suspension. Arbitration on level of suspension	Surveillance by Tripartite Council (Art. 20.4)
Trade cases	Only Technical Committees. None to the Court of Justice	None. Only cases on human rights	None	None	Mechanism not yet finalised

## PART II. DISPUTE SETTLEMENT MECHANISMS OF THE WTO AND FTAS

### 3. Dispute Settlement in the GATT Times and in the WTO

The dispute settlement system of the WTO has been operational over a period of time and is arguably one of the most prolific of all international dispute settlement systems. This system was built on the experience gained and used to solve disputes between contracting parties under the General Agreement on Trade and Tariffs (GATT). Both mechanisms are examined to better understand the strengths of the Dispute Settlement Understanding (DSU) of the WTO versus the GATT method of solving disputes.

#### 3.1 Dispute Settlement in GATT Law (1947 to 1994)

##### 3.1.1 Institutions Involved in the Settlement of Disputes

Working Parties (political bodies constituted by representatives of the Members).

##### 3.1.2 Main Features of Political GATT Model

In the GATT, between 1947 and 1994, disputes were solved using Articles XXII and XXIII which regulated the consultations and the nullification or impairment of a benefit respectively.<sup>89</sup> The disputes were dealt with within the framework of Working Parties.<sup>90</sup> Later, in cases where the dispute was not solved through consultative procedures, a procedure was agreed on for a third adjudicative body.<sup>91</sup> The third adjudicative body, whose procedures changed over the years, was named the Panel on Complaints.<sup>92</sup>

The GATT Panel procedures had weaknesses which were eliminated and replaced with adjudicative elements. This section reviews these Panel procedures with the aim of identifying the weaknesses of the GATT dispute settlement provisions during these years (1947 to 1994). Through these weaknesses it is possible to recognise the advantages of the political model of dispute settlement used in the multilateral trading system.

In the GATT 1947, contracting parties<sup>93</sup> solved their own disputes by making decisions on a technical, diplomatic and political basis.<sup>94</sup> In 1950 a Working Party was constituted to investigate one of the earliest complaints.<sup>95</sup>

<sup>89</sup> For a deeper analysis of the preparatory work and the survey of practice and procedures of these two Articles, See Jackson, J. *World Trade and the Law of the GATT* (USA, The Bobbs-Merrill Company, Inc., 1969), pp.166–187

<sup>90</sup> Working Parties were small groups of government representatives with a direct interest in the dispute (i.e. in finding a settlement, since they each represented the complainant, the defendant and other governments likely to be affected by the outcome). They were groups designed for political exchange and negotiation and had no third-party decision-making power. In spite of its consultative nature, the Working Party was invested with adjudicatory power. This was the case when the United States asked a Working Party for an 'advisory ruling' to find whether or not Canada's agricultural trade restrictions violated Article XI. The neutral members of the Working Party (excluding the United States) answered some legal questions, but refused to rule on the key issue. See Hudec, R. *Adjudication of International Trade Disputes* (Great Britain, Trade Policy Research Centre, 1978), pp. 6–7 and 19–20, and also, Hudec, R. *The GATT Legal System and World Trade Diplomacy* (USA, Butterworth Legal Publishers, 1990) Second Edition, pp. 77–80.

<sup>91</sup> The differences between the composition and the working methods between the Panel on Complaints and those of the Working Party are established in a Note by the Executive Secretary, GATT Doc. L/392/Rev.1, 6.10.1955, pp. 2–3.

<sup>92</sup> In 1955 a Panel on complaints of seven individuals was composed. See Jackson, J. *World Trade and the Law of the GATT*, supra (Note 16), pp. 173–174.

<sup>93</sup> At that time the contracting parties consisted of 23 governments.

<sup>94</sup> See Lacarte J. and Pierola, F. Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round? In *Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches*, ed. Lacarte, J. and Granados, J. (London, Cameron May, 2004), pp. 33–35.

<sup>95</sup> Chile vs. Australia, regarding the action of removing a subsidy on an Australian fertilizer. The working group was composed of five nations, two were the parties involved in the dispute and three were other contracting parties. For further information See Jackson, J. *World Trade and the Law of the GATT*, supra (Note 16), pp. 166–187.

In 1952 they compiled a Panel procedure<sup>96</sup> which was adopted in 1958.<sup>97</sup> This Panel procedure was informal, with vague rulings where the judges and complainants were diplomats and not practising lawyers.<sup>98</sup> From the second decade (1960) both the contracting parties and the policy agenda changed.<sup>99</sup> Many modifications were made towards legalising the GATT dispute settlement provisions.<sup>100</sup>

At the end of the Tokyo Round in 1979, the contracting parties created an Understanding of Dispute Settlement Procedures and Practices (Understanding 1979). Understanding 1979 established some stages in the procedure, i.e. notification, consultation, good offices, establishment and composition of Panels, third party rights, right of Panels to get information, nature and content of Panel reports, desirability of prompt action (for Panels and contracting parties), surveillance, and technical co-operation for developing countries.<sup>101</sup> It also declared that the aim of the GATT dispute settlement system favoured a mutually acceptable solution.<sup>102</sup>

In the Ministerial Declaration of 1982, the EC led the confirmation of the principle of political commitment (or consensus principle) in Understanding 1979. This principle articulated that it was the traditional right of parties to participate in consensus decisions. In other words, it allowed the adoption of Panel rulings and the authorisation of counteraction to be blocked.<sup>103</sup> Thus, the contracting parties only agreed on establishing rules for alternative dispute settlement mechanisms, Panel mandates and Panel conclusions. Furthermore, the rules for surveillance and compensation were reinforced.<sup>104</sup> These improvements were part of a rule-based dispute settlement procedure which, because of the possibility of blockage, was considered by some authors as only modestly effective.<sup>105</sup>

In 1984 the contracting parties adopted a decision regarding the selection of Panel members.<sup>106</sup> This decision contained a roster from governments with qualified individuals to become Panel members, an indicative list of non-governmental experts and the right of the Director-General to name Panel members from the non-governmental roster within 30 days.<sup>107</sup> In addition, the Panel members had the latitude to determine their own working procedures.<sup>108</sup>

In the dispute settlement negotiations of the Uruguay Round<sup>109</sup>, a central question needed to be answered: should the dispute settlement procedure retain the requirement of consensus in decision-making?<sup>110</sup>

<sup>96</sup> See Hudec, R. *Adjudication of International Trade Disputes*, supra (Note 17), p. 7.

<sup>97</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System* (USA, Butterworth Legal Publishers, 1993), p. 11.

<sup>98</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (Note 24), p. 12. The contracting parties were pleased with this Panel procedure because 53 disputes were launched during the first decade of the GATT. See Hudec, R. *The GATT Legal System and World Trade Diplomacy*, supra (Note 17), pp. 75–94.

<sup>99</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (Note 17), p. 12.

<sup>100</sup> For example, in 1962 a Panel ruled in the Uruguayan recourse to Article XXII that, if a *prima facie* violation of any provision of the GATT demonstrated, the burden of proof shifts to the respondent. Later, the Contracting Parties adopted the Decision of 5 April 1966 which sets out procedures intended to facilitate the complaints of developing countries against developed countries. See Lacarte, J. and Pierola, F. *Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?*, supra (Note 21), pp. 36–38.

<sup>101</sup> See Lacarte, J. and Pierola, F. *Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?*, supra (Note 21), p. 39.

<sup>102</sup> See Plank-Brumback, R.M. The GATT/WTO Dispute Settlement System and the Negotiations for a Free Trade Area of the Americas. In *Trade Rules in the Making* (Challenges in Regional and Multilateral Negotiations), Miguel Rodriguez, Patrick Low and Barbara Kotschwar (eds.) (Virginia, Organization of American States, 1999), p. 368.

<sup>103</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (Note 24), pp. 164–166.

<sup>104</sup> See Lacarte, J. and Pierola, F. *Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?*, supra (Note 24), p. 40.

<sup>105</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (Note 24), p. 167.

<sup>106</sup> This decision was taken because of a Secretariat proposal.

<sup>107</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (Note 24), p. 168.

<sup>108</sup> See Lacarte, J. and Pierola, F. *Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?*, supra (Note 21), p. 41.

<sup>109</sup> The biggest achievement of the GATT during the period of 1985–1986 was the increase of complex cases. At the same time, GATT dispute settlement activity declined as never before. The Uruguay Round began in 1986, and during the two following years, the increase of disputes reached its highest ranks due to the growing level of confidence in the system. See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System* (USA, Butterworth Legal Publishers, 1993), pp. 206–209.

<sup>110</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (Note 24), p. 231.

The contracting parties wanted to retain veto power essentially in two specific Council decisions. The first was the adoption of a Panel ruling (making it legally binding) and the second was the authorisation of counteraction. Thus, in 1989 the contracting parties adopted the Midterm Agreement which maintained the consensus principle.<sup>111</sup> Moreover, they established most of the timeframes and default procedures in some stages of Panel work.<sup>112</sup> At the end of 1980, the GATT dispute settlement mechanism saw the increase of two opposing tendencies, i.e. binding and stronger vs. political commitment.<sup>113</sup>

Some authors have pointed to the procedural weaknesses of the Panel procedure as the primary cause of the GATT's difficulties with dispute settlement.<sup>114</sup> For the purpose of this Module, these weaknesses are classified into different groups and are considered the elements of the political model of dispute settlement in the GATT (1947 to 1994). The three elements are: no final decisions, decision-making process under consensus and no pre-established or barely detailed legal stages.

a) *No final decisions*

- i. During the first decade of the GATT, the resolutions were not final because they were made by the contracting parties on a political instead of a legal basis.<sup>115</sup>
- ii. Additionally, the resolutions were pragmatic, on a case-by-case basis, and they did not refer to past decisions or serve as a projection for future ones.<sup>116</sup>

b) *Decision-making process under consensus*

- i. Political consensus in adopting the Panel ruling as the defeated party could always oppose its adoption.
- ii. Political consensus in composing the Panel, as this allowed the respondent party to block its composition.
- iii. Political consensus in establishing the Panel because, even if it was composed, it needed the approval of all parties (including the respondent) for its establishment. This situation allowed the establishment of the Panel to be blocked.
- iv. Political consensus in authorising counteraction, as the defendant had to agree with the complainant's retaliatory measures.

c) *No pre-established or barely detailed legal stages*

- i. Before 1979, a lack of clearly defined legal stages existed in the process. It was only after this date that more were defined [i.e. notification, consultations and Panel stage (establishment and composition of the Panel, third party rights before the Panel, deliberation of the Panel, preparation of the Panel report, etc.)]. The appellate stage was included only when the Dispute Settlement Understanding (DSU) entered into force.
- ii. A lack of detailed rules. Even if some stages were established, they were not rule-based. However, some advances were made in 1982 (i.e. Panel mandates, conclusions, surveillance and compensation) and in 1984 (i.e. rules for the Panel members).
- iii. A lack of timeframes. Before 1989, timeframes were not included in the dispute settlement provisions.
- iv. A lack of pre-established procedures.<sup>117</sup> In 1989 some procedures of the Panel work were established by default.

<sup>111</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (Note 24), p. 206.

<sup>112</sup> See Lacarte, J. and Pierola, F. *Comparing the WTO and GATT Dispute Settlement mechanisms: What was accomplished in the Uruguay Round?*, supra (Note 21), p. 42.

<sup>113</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (Note 24), p. 200.

<sup>114</sup> See Hudec, R. *Adjudication of International Trade Disputes* (Great Britain, Trade Policy Research Centre, 1978), supra (Note 17), p. 14.

<sup>115</sup> Public International Law says that a final decision *res judicata* must have qualities, must be founded in facts and law and must have findings. See Art. 78 of the Hague Convention 1907, and 52 of 1899. Art. 55, par 1, of the Statute of ICJ, Art. 8 par 3 of the Convention OSCE.

<sup>116</sup> See more about the rule of finality in Public International Law in Reisman, W.M. *Nullity and Revision: The Review and Enforcement of International Judgements and Awards* (New Haven, Yale University Press, 1971), p. 185.

<sup>117</sup> Some diplomatic means of peaceful dispute settlement in Public International Law (i.e. negotiation, mediation and consultation) also do not have pre-established procedures. For further information on procedural aspects of all dispute settlement means in Public International Law, See Cafilisch, L. *Cent ans de Règlement Pacifique des Différends Interétatiques*, supra (Note 2) p. 382.

When some or all political model elements are included in a dispute settlement mechanism of International Trade, a political model is formed (see table 2).

**Table 2: Political model of dispute settlement in GATT (from 1947 to 1994)**

Procedural weakness of the GATT Panel procedure (1947 to 1994)	Elements of the political DS model in GATT (1947 to 1994)
Resolutions made on a political basis by Contracting Parties	} No final decisions
Pragmatic decisions	
Political consensus in composing the Panel	} Decision-making process under consensus
Political consensus in establishing the Panel	
Political consensus in adopting the Panel ruling	
Political consensus in authorising counteraction	
Lack of legal stages	} No pre-established or barely detailed legal stages
Lack of detailed rules	
Lack of timeframes	
Lack of procedures for each legal stage	

**Source:** Ramirez-Robles, E. *Political & Quasi-adjudicative Dispute Settlement Models in European Union Free Trade Agreements is the quasi-adjudicative model a trend or is it just another model?* Staff WTO Working Paper ERSD-2006-09, p.21. [http://www.wto.org/english/res\\_e/reser\\_e/ersd200609\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd200609_e.pdf).

At the end of 1991, the Uruguay Round negotiators drafted a new reform proposal, the Understanding on Dispute Settlement.<sup>118</sup> It encompassed everything relating to the amendments made to the GATT (i.e. 1979, 1982, 1984 and 1989). The two main contributions were the elimination of the consensus principle of some decisions in the decision-making process and the incorporation of an appellate stage.<sup>119</sup>

### 3.1.3 Participation of GATT Contracting Parties in the Dispute Settlement System

Regarding the participation of contracting parties in the dispute settlement (DS) system, the following table shows that as soon as overtime contracting parties incorporated more adjudicative elements into their method of solving disputes, their participation in disputes increased.

**Table 3: Requests for consultations and reports in the GATT DS system (1948/1981–1995)**

Name of Director: Legal Affairs Division (LAD)	Requests for consultations	Panel reports circulated	Panel reports adopted	Disputes between developing and developed contracting parties	Disputes between developed contracting parties
Without LAD (1948–1981) 33 years		52	31		
H. van Tuinen (1981 and 1982)		9			
Åke Linden (1 January 1983–February 1989)		23			
Frieder Roessler (February 1989–31 August 1995) 5 years, 7 months	15	46			
Total since 14 years of LAD (in GATT times 48 years)		78 (130)	(96)	(29 = 30%)	(67 = 70%)

**Source:** This table has been prepared by the author of this Module, based on a table included in the CD Rom of: LAD@30, 28 June 2012, WTO, and on data found at [www.worldtradelaw.net](http://www.worldtradelaw.net) on August 2012.

<sup>118</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes under Articles XXII of the General Agreement on Tariffs and Trade*, MTN.TNC/W/FA (20 December 1991).

<sup>119</sup> See Hudec, R. *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (Note 24), pp. 235–236.

After this lengthy process, in 1995 the Contracting Parties adopted this proposal as one of the WTO Agreements and called it the Dispute Settlement Understanding (DSU). The DSU removed most of the political elements of the GATT (1947 to 1994) and strengthened it by replacing them with adjudicative elements.

## 3.2 WTO DSU procedure

### 3.2.1 Main Features of Quasi-adjudicative WTO/DSU Model

The DSU encompasses three stages in the process of dispute settlement, which are: consultations<sup>120</sup>, a Panel review process<sup>121</sup> and an appellate stage.<sup>122</sup> The first stage has a political nature and the last two stages embody the adjudicative nature of the dispute settlement system. These are analysed below.

In general terms, dispute settlement mechanisms with adjudicative oriented aspects refer to the establishment of a third authority that provides its rulings under a legal basis with a detailed, agreed-upon procedure, with the awards provided enjoying a legally binding status for the parties. The political aspects of a dispute settlement mechanism, meanwhile, relate to the parties' possibility to participate in the procedure without the intervention of a third neutral body, so as to solve the dispute politically, confidentially and informally. Structural elements of the dispute settlement procedures are also relevant as they affect the procedure as a whole.

In the multilateral trade arena, the differentiation between adjudicative and politically oriented dispute settlement mechanisms became relevant over a long period of time. The differentiation was built through a process that aimed to strengthen the way that disputes were solved during GATT times. In this effort, many aspects of the system were created to pursue an adjudicative and pre-established, detailed procedure in order to solve disputes.

### 3.2.2 Institutions Involved in the Settlement of Disputes

There are two types of bodies that participate in dispute settlements. The main political body is the Dispute Settlement Body (DSB). Secondly, there are adjudicative bodies such as the *ad hoc* Panels, Arbitrators, and Appellate Body. Moreover, different divisions of the WTO Secretariat (Legal Affairs Division, Rules Division and the Appellate Body Division) provide logistical and legal assistance to these three adjudicative bodies and play a key role in solving disputes between WTO Members.

### 3.2.3 Scope of the DS Mechanism

The disputes that arise from the interpretation and application of the Multi-lateral Trade Agreements (MTAs) on Goods, Services, Intellectual Property Rights; the Dispute Settlement Understanding (DSU); and the Plurilateral Trade Agreements are governed by the rules contained in the DSU.

### 3.2.4 Political and Adjudicative Features in the DS Mechanism

The difference between the political and the adjudicative features of dispute settlement mechanisms are important to countries when implementing their Free Trade Area (FTA) obligations. Adjudicative features allow parties to use mechanisms to force other parties to become compliant in terms of their FTA obligations, thus enhancing security and predictability between the trading partners. Yet, the ability to use the legal dispute settlement procedures also depends on the political and structural aspects featured in the agreement.

<sup>120</sup> Article 4 of the DSU.

<sup>121</sup> Articles 6.2 to 16 of the DSU.

<sup>122</sup> See Abi-Saab, G. The WTO Dispute Settlement and General International Law. In *Key Issues in WTO Dispute Settlement: The First Ten Years*. Yerxa, R. and Wilson B. (eds) (Cambridge, WTO/CUP, 2005), p. 9.



## Consultations

Article 4 of the DSU provides for WTO Members to begin the process of solving a particular dispute through the diplomatic means of consultations between the disputants. Consultations in the WTO have the following features:

- Diplomatic method of settling the dispute: Mexico – Corn Syrup (Article 21.5), T/DS132/AB/RW, para. 54;
- Confidential, no intervention by the Secretariat: US – Upland Cotton, WT/DS267/AB, para. 287;
- Members should attempt to obtain satisfactory adjustment on the matter before resorting to further action under the DSU; and
- “Without prejudice to the rights of any Member in further legal proceedings”, US – Underwear, WT/DS24/R, para. 7.27.

---

## Adjudicative elements of the quasi-adjudicative model of WTO DSU

Adjudicative aspects have often been associated with the strengths developed in the WTO’s DSU. These strengths include compulsory jurisdiction, detailed rules and procedures, binding decisions, automaticity in the establishment of the Panels, and retaliatory measures, among others.<sup>123</sup>

The Panel review process includes detailed rules, procedures and timeframes.<sup>124</sup> The DSU regulates the establishment of the Panels (Article 6), their terms of reference (Article 7), their composition (Article 8), the procedures for multiple complainants (Article 9), third party rights (Article 10), the function of the Panels (Article 11), the Panel procedures (Article 12), the right to seek information (Article 13), confidentiality (Article 14), the interim review stage (Article 15) and the adoption of the Panel report (Article 16). In addition, there are procedures that survey the implementation of recommendations and rulings (or compliance proceedings) (Article 21) and the regulation of compensation and retaliatory measures (Article 22).

With regards to the appellate stage, it is highly regulated and incorporates rules for the appellate review, its procedures and the adoption of Appellate Body reports (Article 17). It also includes provisions for both the Panel and the Appellate Body in relation to the confidential nature of the parties’ communications (Article 18). Issues concerning the recommendations of the Panels and the Appellate Body (Article 19) are also considered.

Within the DSU, certain procedures have been greatly influenced by particular adjudicative elements of arbitration and judicial settlement respectively. Arbitration influences the Panel review process since the adjudicator is appointed by the parties. However, it cannot be considered arbitration, since the Director-General also has the opportunity to appoint the members of the Panel. The same is true of the arbitration that establishes a reasonable period of time for implementing recommendations and rulings.<sup>125</sup> If the parties do not agree on appointing an arbitrator within 10 days, the Director-General, who until now has been an Appellate Body Member, will appoint one. The arbitration where objections are made to the proposed concessions suspension level or the correct follow-up of principles or procedures on suspending concessions, is performed by the original Panel or by an arbitrator that is designated by the Director-General.<sup>126</sup> In such arbitration the parties do not designate their adjudicator and thus, this cannot be considered arbitration. The only pure arbitration is that stated in Article 25.1 of the DSU, as an alternative means of dispute settlement to the Panel process. The judicial settlement influences the appellate stage since the adjudicator of the decision is a pre-constituted,<sup>127</sup> permanent body, giving a quasi-judicial nature to the system.

---

<sup>123</sup> Ramirez-Robles, E. Political and Quasi-Adjudicative DS Models in European Union Free Trade Agreements, is the quasi-adjudicative model a trend or is it just another model? In *World Trade Organization Working Paper ERSD-2006-09*, p. 43. See: [http://www.wto.org/english/res\\_e/reser\\_e/ersd200609\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd200609_e.pdf)

<sup>124</sup> For a greater perspective on the Panel process see Marceau, G. Consultations and the Panel Process in the WTO Dispute Settlement System. In *Key Issues in WTO Dispute Settlement: The First Ten Years*, Yexxa R. and Wilson B. (eds) (Cambridge, WTO/CUP, 2005), pp. 32–45.

<sup>125</sup> Article 21.3 (c) of the DSU.

<sup>126</sup> Article 22.6 of the DSU.

<sup>127</sup> See Abi-Saab, G. The WTO Dispute Settlement and General International Law. In *Key Issues in WTO Dispute Settlement: The First Ten Years*, supra (Note 107), p.10.

The DSU is also influenced by the common elements found in arbitration and judgement. In the Panel review and appellate stages, the decisions are binding and the third authority that resolves the dispute does it on the basis of law.

The strengths of the Panel review procedure have often been deemed responsible for the success of the WTO. For the purpose of this Module, these strengths are classified into different groups. These groups are considered the elements of the adjudicative part of the quasi-adjudicative model of dispute settlement in the WTO. These elements are: compulsory jurisdiction, final decisions, decision-making process under negative consensus and pre-established and detailed legal stages.

*a) Compulsory jurisdiction*

There is a compulsory jurisdiction component to the Dispute Settlement Body which applies to all Members. This means that if one Member brings a dispute against another, the respondent party cannot refuse to be judged by a Panel and the Appellate Body.<sup>128</sup>

*b) Final decisions*

- i) Independent bodies (i.e. Panel and Appellate Body) make the reports on a legal basis.
- ii) The report of the Panel takes a final and definitive nature when it reaches the Appellate stage and/or is adopted by the Members.<sup>129</sup> The arbitrations contemplated in the DSU (Articles 21.3, 22.6 or 25.1) cannot be appealed, consequently the awards handed down are final.
- iii) The decisions of the Panel and Appellate Body are used as valuable interpretations for future cases.

*c) Decision-making process under negative consensus*

The decision-making process under the negative consensus element encompasses the following strengths:

- i) The quasi-automatic adoption of the Panel and Appellate Body rulings is possible, making them binding;<sup>130</sup>
- ii) There is no possibility of blocking the establishment of a Panel;<sup>131</sup> and
- iii) The quasi-automatic authorisation of counteraction is possible.

*d) Pre-established and detailed legal stages*

- i) Precise legal stages have been established (i.e. consultations, Panel review and appellate stage).
- ii) Precise and detailed rules. The stages of the Panel are rule-based (i.e. Panel mandates, conclusions, surveillance and compliance and rules for the Panel members).
- iii) Timeframes for the procedures are included in the legal stages. Almost every stage of the procedure has precise timeframes that must be complied with.

*e) Pre-established procedures*

Examples are the working procedures for the Panel and Appellate Body (see table below).

<sup>128</sup> See Marceau, G. *Consultations and the Panel Process in the WTO Dispute Settlement System*, supra (Note 108), p. 30.

<sup>129</sup> For more on the principle of finality, *res iudicata* and controls on international decisions see Sacerdoti, G. Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review. In *International Trade Law and the GATT/WTO Dispute Settlement System*. Petersman, E. (ed.) (London, Kluwer Law International, 1997), pp. 249–250.

<sup>130</sup> See Marceau, G. *Consultations and the Panel Process in the WTO Dispute Settlement System*, supra (Note 108), pp. 29–30.

<sup>131</sup> Article 6.1 of the DSU.

**Table 4: Quasi-adjudicative model of dispute settlement in the WTO**

<b>Procedural strengths of the WTO DS system</b>	<b>Elements of the WTO quasi-adjudicative DS model</b>
Consultations	} Consultations } Compulsory jurisdiction
Compulsory jurisdiction	
Resolutions made on a legal basis by a third authority	} Final decisions
Appellate stage	
Consistent interpretations	} Decision-making process under negative consensus
Quasi-automatic adoption of the Panels and Appellate Body rulings	
Quasi-automatic establishment of the Panel	
Quasi-automatic authorisation of counteraction	
Precise legal stages	} Pre-established and detailed procedures
Precise and detailed rules	
Timeframes in the stages of the procedure	
Procedures for each legal stage	

**Source:** Ramirez-Robles, E. 2006. WTO Working Paper.

The adjudicative elements (as listed above) form the dispute settlement system of the WTO which, with the consultations stage, is a quasi-adjudicative model.

Even though countries have developed their own models and mechanisms for dispute settlement in their FTAs, the DSU has undoubtedly had a significant influence on the adjudication component. At a bilateral level, the EU took its first steps towards the implementation of a quasi-adjudicative model in the FTA with Mexico.

.....

### 3.2.5 Other Key Aspects

Other key aspects are those provisions that affect all the dispute settlement procedures, without necessarily being procedural stages in themselves. Generally speaking, these include some of the relevant aspects that the parties take into account in using or failing to use DS mechanisms as a tool for implementation. Structural aspects include the scope of the mechanisms, the forum choice, or the length of the case.

.....

#### Special and differential treatment

- Consultations: Members should give special attention to the particular problems and interests of developing countries (Article 4.10 of the DSU).
- Extending consultation periods and according 'sufficient time' to prepare argumentation (Article 12.10 of the DSU).
- Panel composition: Panellist from developing Member Countries (Article 8.10 of the DSU).
- All stages: Members 'shall give' particular consideration to the special situation of Least Developed Countries (LDCs) (Article 24 of the DSU).
- Additional legal advice from the Secretariat (Article 27 of the DSU).
- Right to invoke the provisions of the Decision of 5 April 1966 (Article 3.12 of the DSU).

Special attention is drawn to Article 3.12 of the DSU regarding the application of the 1966 Decision (Decision of 5 April 1966 on Procedures under Article XXIII, BISD 14S/18). To date, the provisions of the 1966 Decision have been invoked only once (see document WT/DS361/1):

*"The Understanding between the EC and Ecuador, the EC and the United States and the Article I Doha Waiver envisaged a final resolution of a long-standing dispute by 1 January 2006. Regrettably, the EC has once again taken measures inconsistent with WTO law that seriously harm an important sector of Colombia's economy. As a developing country heavily dependent on its exports of bananas, Colombia can ill-afford yet another lengthy dispute settlement proceeding conducted according to standard timeframes. Accordingly, Colombia requests the EC to hold consultations within the timeframe set out in Article 4.8 of the DSU for cases of urgency, which is within 10 days after the date of receipt of this request. Should these consultations not lead to a satisfactory settlement, Colombia will consider referring the matter to the Director-General pursuant to Article 3.12 of the DSU and the Decision of 5 April 1966 (BISD 14S/18) in the hope that his good offices will facilitate a rapid solution to this dispute and, if necessary, request the establishment of a Panel in accordance with applicable accelerated procedures..."*

### 3.2.6 Participation by DS Members in the WTO DS System

Participation in the WTO dispute settlement system has been considered as one of the main factors in determining just how successful the system has been.<sup>132</sup>

**Table 5: Requests for consultations, reports and awards in the DSU of the WTO (1995–2012)**

Period of time	Requests for consultations	Panel reports circulated	AB reports circulated	Compliance Panel reports circulated	Compliance AB reports circulated	Article 22.6 arbitrations	Article 25 awards
William Davey 23 Sep. 1995– 31 July 1999 3 years, 10 months	164	33	18	2	–	4	–
Pieter Jan Kuijper 16 Nov. 1999– 15 April 2002 2 years, 5 months	71	29	19	9	6	2	1
Bruce Wilson 16 Sep. 2002– 31 August 2010 8 years	147	60	37	16	12	12	–
Valerie Hughes 1 Sep. 2010–present (June 2012) 1 year, 9 months	27	15	12				
Total in 17 years	409	137	86	27	18	18	1

**Source:** This table has been created by the author of this Module, but it is based on a table included in the CD Rom of: LAD@30, 28 June 2012, WTO.

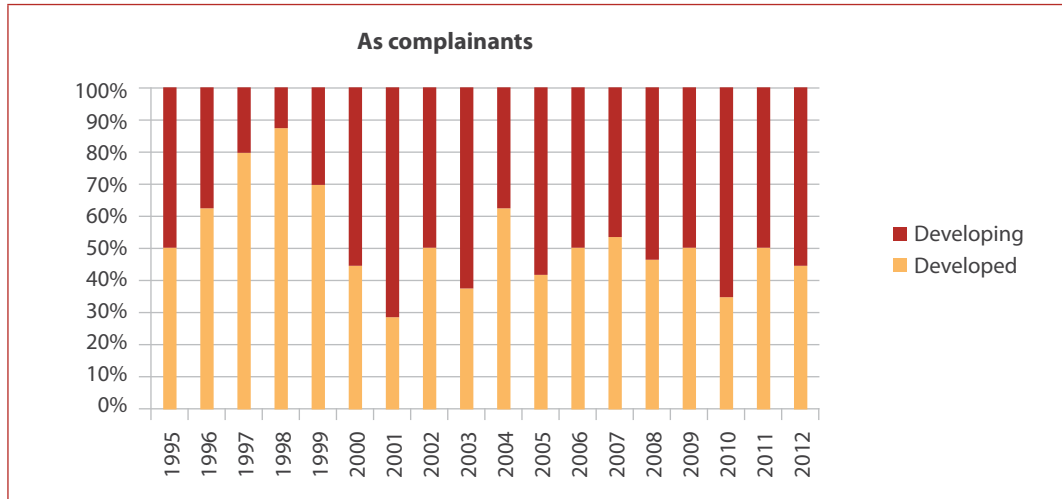
By comparing the number of Panels that have adopted reports during the GATT times and since establishment of the WTO, it is evident that the Members' participation has increased. Therefore, it seems that Members trust the WTO system and its adjudicative authorities. As indicated in Article 23 of the DSU, the quasi-judicial nature of this system provides secure access to the Members; detailed procedures; automaticity in the proceedings; deadlines; the opportunity to appeal; and exclusive and compulsory jurisdiction.

Although it is important to examine the participation of all WTO Members for the purposes of this Training Module, the following charts reflect an overview of this participation at the level of developing and developed WTO Member States. This section firstly shows the trends in the use of the system for developed and developing Members. Secondly, it specifically illustrates different parameters that can be used to measure the participation of African WTO Members in the dispute settlement system.

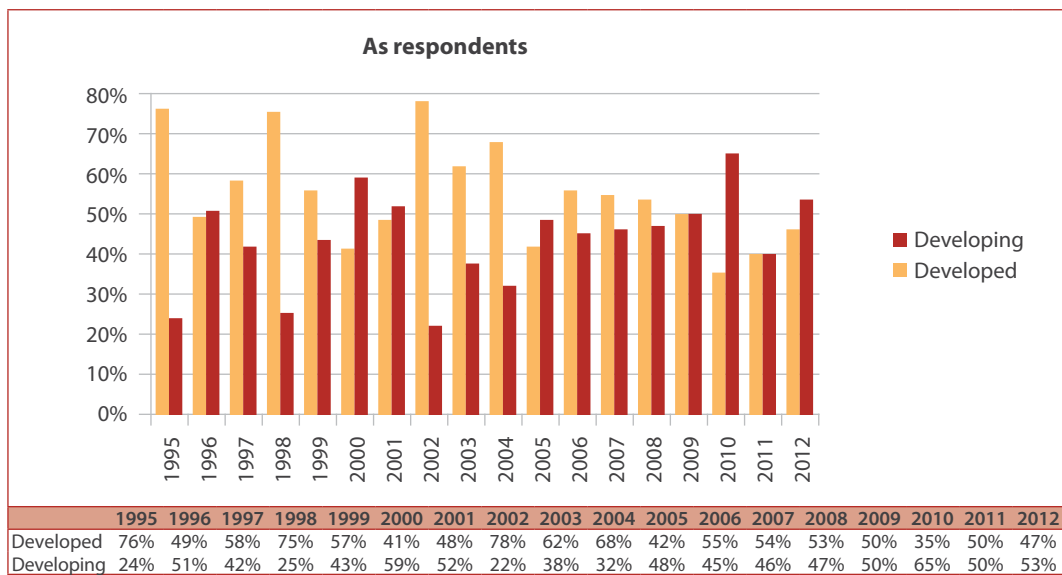
<sup>132</sup> Van den Bossche, P. *The Law and Policy of the World Trade Organization, Text Cases and Materials*. Second Edition (Cambridge, Cambridge University Press, 2008), p. 308.

### Developed and developing Members

Since the creation of the WTO 17 years ago, developed and developing Members have participated differently in the WTO dispute settlement mechanism. The following figures illustrate Member's participation as of June 2012:



Source: Table included in the CD Rom of: LAD@30, 28 June 2012, WTO.



Source: The data was provided by the Legal Affairs Division of the WTO, August 2012. The chart has been created by the author of this Module.

Figure 1 & 2: Participation by developed and developing Members in the WTO DS System

The above graphs illustrate that developing countries have benefited from the creation of the DSU, not only with respect to access to developed countries, but also with respect to access to a dispute settlement system.

Firstly, for 17 years, developing Members have been better placed, both as complainants and as respondents, than developed Members. For example, developing countries have been complainants for the longest period (eight years)<sup>133</sup>, where developed members have been had the highest rate of cases as complainants (six years).<sup>134</sup> Nevertheless, for four years both developing and developed Members have participated evenly

<sup>133</sup> The eight years that developing countries have had more cases than developed countries as complainants were: 2012, 2010, 2008, 2005, 2003, 2001, 2000 and 1995.

<sup>134</sup> The six years that developed countries have had more cases than developing Members as complainants were: 2007, 2004, 1999, 1998, 1997 and 1996.

as complainants.<sup>135</sup> Furthermore, for ten years<sup>136</sup>, developing Members had the least number of cases as respondents, while developed countries had the least number of cases as respondents for just six years.<sup>137</sup> Only for two years (2011 and 2009) did developing and developed Members have the same number of cases.

Secondly, it can be noted that developing country participation increased after the GATT times when the WTO system came into play. Table 3 shows that of the total number of adopted reports, only 30% (29 reports) were adopted within the 48 years of the GATT system.

Since developing countries are the majority of the WTO Members, it is important to examine which of the developing countries are participating in the WTO dispute settlement system.

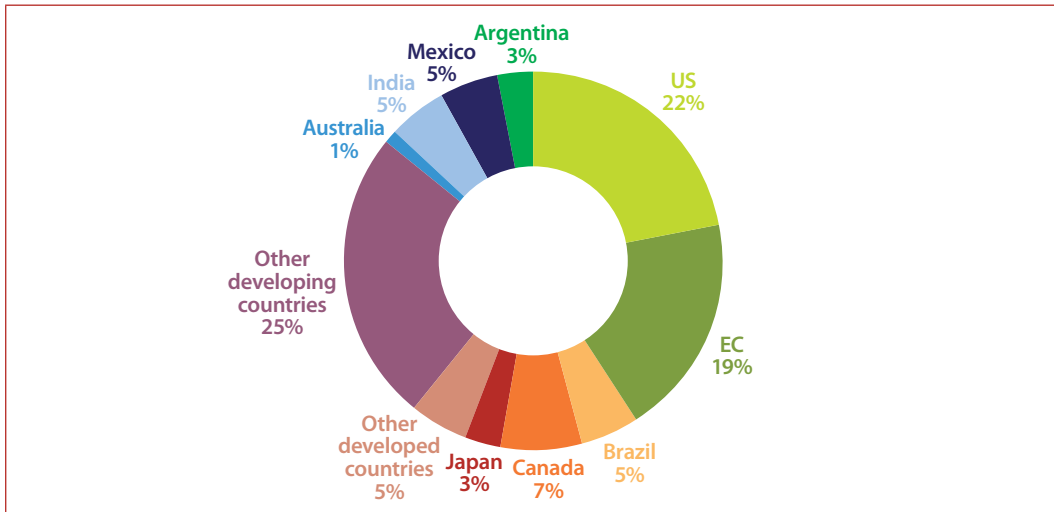


Figure 3: Specific developed and developing Members as complainants

Source: Figure included in the CD Rom of: LAD@30, 28 June 2012, WTO.

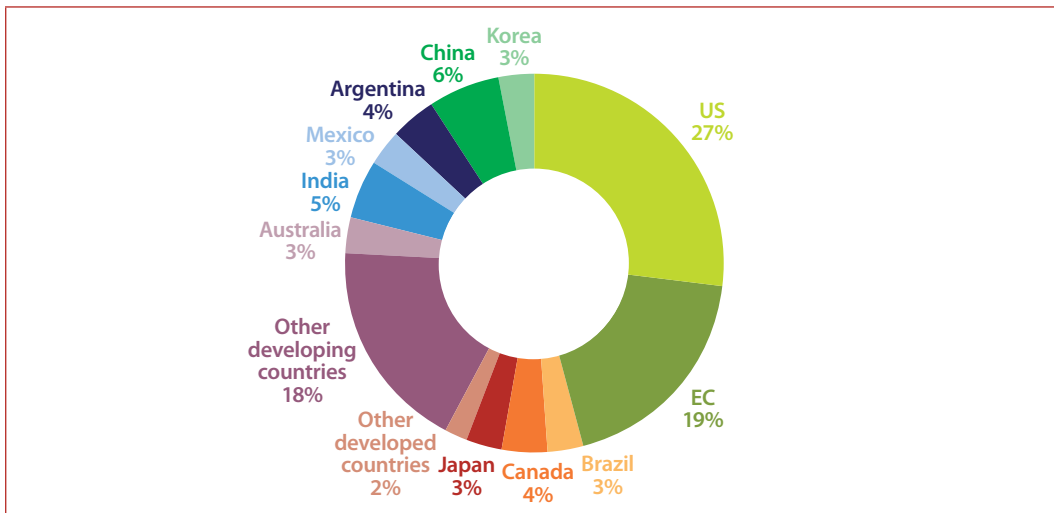


Figure 4: Developed and developing Members as respondents

Source: Figure included in the CD Rom of: LAD@30, 28 June 2012, WTO.

<sup>135</sup> The four years that developed and developing members have been even as complainants were: 2011, 2009, 2006 and 2002.

<sup>136</sup> The ten years that developing countries have had fewer cases than developed countries as respondents were: 2008, 2007, 2006, 2004, 2003, 2002, 1999, 1998, 1997 and 1995.

<sup>137</sup> The six years that developed countries have had fewer cases than developing members as respondents were: 2012, 2010, 2005, 2001, 2000 and 1996.

**Table 6: Most frequent complainants and respondents**

Member	Number of cases initiated	Member	Number of cases defended
US	100	US	116
EC	87	EC	85
Canada	33	China	26
Brazil	25	India	21
Mexico	21	Argentina	18
India	21	Canada	17
Argentina	15	Japan	15
Korea	15	Brazil	14
Japan	15	Mexico	14
Thailand	13	Korea	14

**Source:** Table included in the CD Rom of: LAD@30, 28 June 2012, WTO.

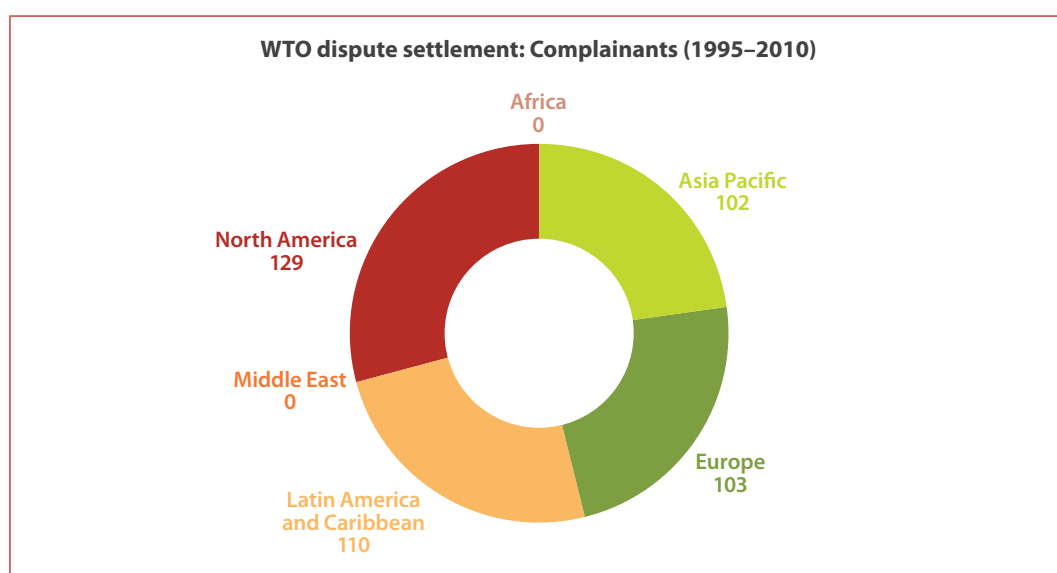
Certainly, developing country participation in the WTO DSU has increased since GATT times, and these countries have been better placed than developed countries. However, in order to gain a fair assessment of whether all developing Members participate similarly in the DSU, it is critical to examine their individual circumstances.

The following section presents the participation of African Members in the WTO dispute settlement system.

#### African Members (developing and LDC Members)

To date, the WTO has 156 Members which are self-determined as developed, developing and least developed country (LDC) Members. Of all the WTO Members, the majority are developing countries of which 42 are African countries. African countries count for 27% of the total WTO Membership and 35% of developing country Membership.<sup>138</sup>

African Member participation in the WTO dispute settlement system has been measured using the following indices: complainant, respondent, third party, Panellist and Appellate Body participation.<sup>139</sup> Figures illustrating the participation of African countries in the WTO dispute settlement mechanism are provided below.

**Figure 5: Complainant participation**

**Source:** Apecu, J. *African Participation at the World Trade Organization Legal and Institutional Aspects*, PhD Thesis No. 918.

<sup>138</sup> Apecu, J. *African Participation at the World Trade Organization Legal and Institutional Aspects*. PhD Thesis No. 918, Graduate Institute of International and Development Studies, Geneva, p. 3.

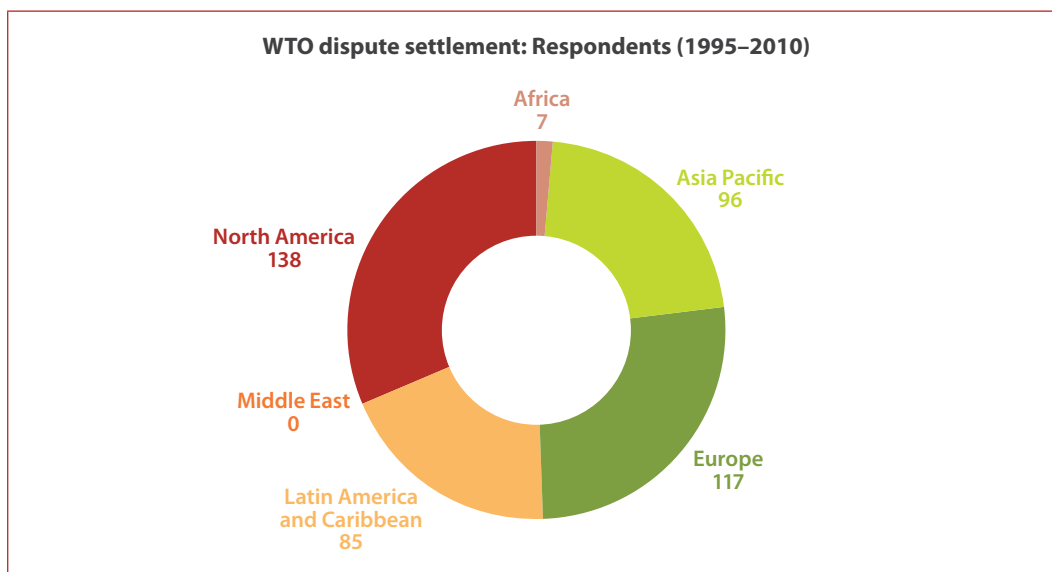
<sup>139</sup> Apecu, J. *African Participation at the World Trade Organization Legal and Institutional Aspects*. PhD Thesis No. 918. p. 217.

The WTO dispute settlement process is shaped by a request for consultations (Article 4, DSU). As of December 2010, a total of 419 complaints had been filed with the WTO by 444 complainants. The figure above shows the distribution of complainants in different regions in the period 1995–2010.

Apecu has thoroughly pointed out the possible reasons why African countries may not yet have participated in the WTO dispute settlement system<sup>140</sup>:

1. Developing countries and LDCs may have less interest in clarifying systemic principles of WTO Law, particularly since for some obligations they have waivers from the WTO obligations;
2. High cost of WTO dispute settlement. This is debatable since the Advisory Centre provides free legal advice to LDCs and preferential rates to developing Member Countries;
3. Lack of expertise. This author highlights that many of the African countries have been WTO Members since its inception, and therefore there is no justification for not having developed this expertise;
4. The habit of dispute initiation. This author argues that some of the African countries are “unaccustomed to the rule of law” and that, in addition to this factor, their democracies are “fragile” and also have “weak governance structures”;
5. The cost in time and staying in power is also a factor. Many new democracies, including the governments of African countries do not have professional civil servant careers, and therefore professionals easily rotate and expertise does not keep up over time;
6. Fear of losing unilateral preferences from large trading partners. There is political reluctance to initiate disputes against large trading partners;
7. Effective enforcement under WTO law. The remedy of withdrawal of equivalent concessions is sometimes difficult for small economies to implement;
8. Although the WTO is multilateral, it has been built from bilateral concessions. This author specifies that “the purpose of the dispute settlement procedure, and of renegotiation provisions more generally, is to preserve reciprocity”. However, many African countries have never participated in trading on a substantive scale; therefore it may be irrelevant for them to initiate a dispute; and
9. Disputed trade measures are proportional to the diversity of a country’s exports over products and partners.

The figure below shows the distribution of participation as respondents in WTO dispute settlement by Members in different regions, in the period 1995–2010.



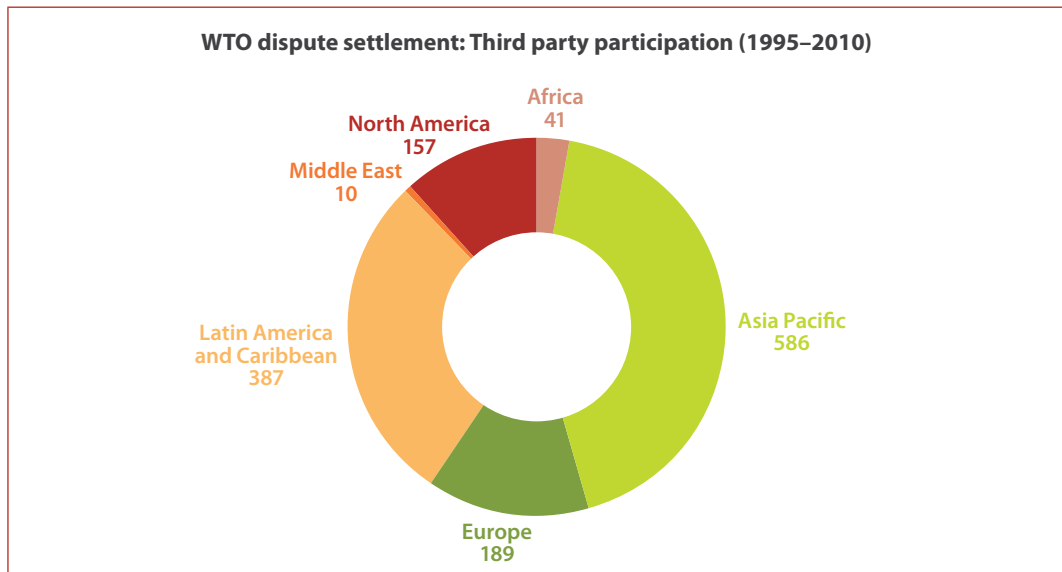
**Figure 6: Respondent participation**

**Source:** Apecu, *J. African Participation at the World Trade Organization Legal and Institutional Aspects*. PhD Thesis No. 918.

<sup>140</sup> Apecu, *J. African Participation at the World Trade Organization Legal and Institutional Aspects*. PhD Thesis No. 918, pp. 219–221.



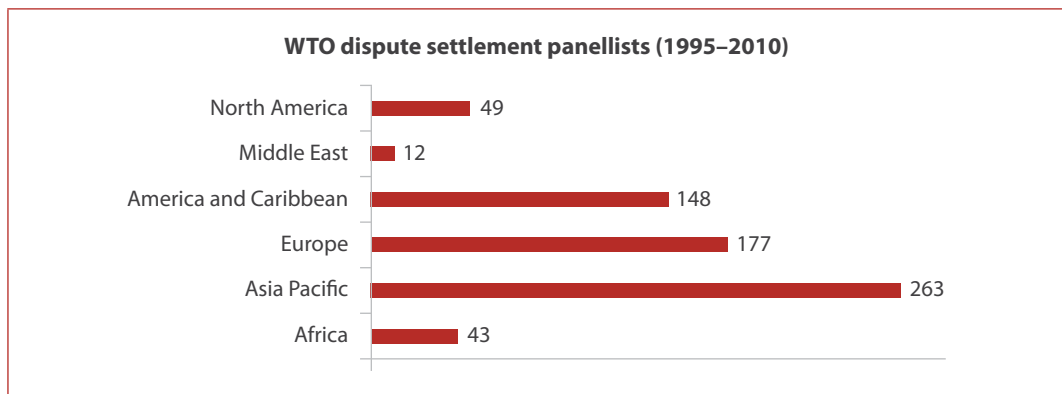
Figure 7 shows the distribution of participation as third parties in WTO dispute settlement by Members in different regions, in the period 1995–2010.



**Figure 7: Third party participation**

**Source:** Apecu, J. *African Participation at the World Trade Organization Legal and Institutional Aspects*. PhD Thesis No. 918.

The next figure shows the distribution of panellists by region in the period 1995–2010.



**Figure 8: Panellist participation by region**

**Source:** Apecu, J. *African Participation at the World Trade Organization Legal and Institutional Aspects*. PhD Thesis No. 918.

Article 17.3 of the DSU provides that Appellate Body Members “shall be broadly representative of membership in the WTO”. The table below illustrates the country of origin of Appellate Body Members as they have evolved over the time period 1995 to 2012.

**Table 7: Regional overview of Members of the Appellate Body (1995–2012)**

1995	2000	2001	2003	2006	2007	2009	2010	2011/12
United States	United States	United States	United States	United States	United States	United States	United States	United States
New Zealand	India	India	India	India	China	China	China	China
Germany	Germany	EC	EC	EC	EC	EC	EU	EU
Egypt	Egypt	Egypt	Egypt	Egypt	South Africa	South Africa	South Africa	South Africa
Philippines	Philippines	Australia	Australia	South Africa	Philippines	Philippines	Philippines	India
Uruguay	Uruguay	Brazil	Brazil	Brazil	Brazil	Mexico	Mexico	Mexico
Japan	Japan	Japan	Japan	Japan	Japan	Japan	Japan	Korea

**Source:** Apecu, J. *African Participation at the World Trade Organization Legal and Institutional Aspects*. PhD Thesis No. 918.

At a regional level, countries have also included dispute settlement mechanisms with political and adjudicative aspects. Most of the current trade agreements, including the ones analysed in the present study, introduce political and structural features that do not necessarily ease the use of dispute settlement mechanisms to implement the agreed obligations. As a result, in the face of legal or economic barriers, countries attempt to solve their trade disputes through consultations outside the formal means established in their trade agreements.

## 4. Dispute Settlement in Other FTAs

This section presents the first quasi-adjudicative dispute settlement mechanisms that the US and the EU included in their FTAs with third countries. This is the case of the North American Free Trade Agreement (NAFTA) and the EU–Mexico FTA.

### 4.1 North American Free Trade Agreement

The pioneer Agreement that incorporated a combination of the mentioned features was the Tripartite (North-South) Agreement titled: North American Free Trade Agreement (NAFTA).

The dispute settlement mechanism for the interpretation and application of the NAFTA obligations is contained in Chapter 20 of the Agreement. This chapter became the negotiating benchmark for subsequent FTAs between the US and developing trade partners.

#### 4.1.1 Member States of NAFTA

NAFTA is signed between Canada, the US and Mexico.

#### 4.1.2 Institutions Involved in the Settlement of Disputes

Free Trade Commission and *ad hoc* Panels.

#### 4.1.3 Political and Adjudicative Features in the Mechanism to Settle Disputes

This segment explores the political and adjudicative features of NAFTA. It also describes the relevant structural aspects that have affected the parties' ability to use this dispute settlement mechanism.

##### Political features

Political aspects allow the parties to engage directly to settle their disputes, without the intervention of third parties and the legal scrutiny of measures. These stages grant further flexibility to the countries, as they eventually allow the parties to reach a mutually satisfactory solution in politically sensitive cases. This means that any solution would need the explicit consent of the non-complying party, thus leaving the suing country at a disadvantage.

##### *Political authorities*

Political authorities are high-level government officials whose main functions include the settlement of bilateral disputes. Thus far, they have played the most important role when addressing various bilateral trade concerns. Although these political authorities have been named differently in the FTAs, their function remains the same – for NAFTA<sup>141</sup> it is the Free Trade Commission.

The frequency of meetings between these authorities varies depending on the political agenda, but normally they meet once a year and in a confidential manner. They deal with subjects that have not yet been solved in a previous stage at a technical level and are the last politically informal stage prior to the arbitral phase.

<sup>141</sup> Article 2001.b, NAFTA.

*Composition of the Panels*

In NAFTA, the parties shall establish a roster, by consensus, of 30 individuals to serve for a period three years, with the possibility of reappointing them.<sup>142</sup> The Panel should be constituted of five members<sup>143</sup>, and the parties should agree on the Panel's chair within 15 days. If no agreement is reached within five days, the chair will be selected by lot,<sup>144</sup> and each disputing party should select two panellists.<sup>145</sup> In the case where the parties fail to do so, the panellists should be drawn by lot from the roster.<sup>146</sup>

This procedure relies heavily on the initial formation of a roster of panellists, with the shortcoming that if no roster is initially formed, the establishment of each Panel would require the express co-operation of the defending party. This means that the entire dispute settlement system may be blocked by the respondent if the parties have failed to envisage an alternative procedure. While many agreements based on the WTO's DS mechanism do include procedures to overcome such a deadlock, the agreements negotiated by the United States, including NAFTA, lack such procedures.

**Adjudicative features**

A number of adjudicative features have been incorporated in the NAFTA text.

*Rules of procedure*

The rules of procedure typically feature deadlines for each procedural step in order to ensure that the Panels deliver final decisions within specific timeframes. The NAFTA rules of procedure<sup>147</sup> contemplate that the parties have at least one hearing before the Panel, as well as the opportunity to provide initial and rebuttal written submissions. Confidentiality is required for the deliberations, initial report, all written submissions and for all communications with the Panel. Unless the disputing parties agree otherwise, the Panel must conduct its proceedings in accordance with the Model Rules of Procedure.

*Binding decisions*

A Panel's decision determines whether the matter at hand is inconsistent with the parties' obligations under the agreement. In some cases, this could even nullify or impair benefits that complaining governments could reasonably have expected under the Agreement. The Panel may also offer suggestions on how best to resolve the dispute, such as the withdrawal of the matter at hand, but the parties are not obliged to do so.

The Panel's decisions are binding on the parties. This is the case when this condition is explicitly recognised in the text of the provision or when retaliatory measures are contemplated in the procedure. Prior to the signature of NAFTA, Mexico used to solve its disputes politically, and hence NAFTA became the new face of the dispute settlement mechanisms in the country. NAFTA contemplates the suspension of benefits between the parties if they do not comply with the Panel's report.<sup>148</sup>

*Non-implementation of the final report*

While NAFTA<sup>149</sup> establishes that the disputing parties agree on the resolution of the dispute in conformity with the determinations and recommendations of the Panel, it also provides specific procedures for instances where the affected party may not implement the decision of the final report.

<sup>142</sup> Article 2009.1, NAFTA.

<sup>143</sup> Article 2011.1.a, NAFTA.

<sup>144</sup> Article 2011.1.b, NAFTA.

<sup>145</sup> Article 2011.1.c, NAFTA.

<sup>146</sup> Article 2011.1.d, NAFTA.

<sup>147</sup> Article 2012, NAFTA.

<sup>148</sup> Article 2019 of NAFTA.

<sup>149</sup> Article 2018.1 of NAFTA.

NAFTA deals with the non-implementation of the final reports in a unique manner and has a drastic approach. Should the Panel determine that the challenged measure is inconsistent with NAFTA obligations or causes nullification or impairment, the complaining party may suspend benefits of equivalent effect in the same or other sectors if the parties have failed to reach agreement and solved the matter within 30 days of the Panel's decision.<sup>150</sup>

---

### Other key aspects

As mentioned above, other key aspects are those provisions that affect all the dispute settlement procedures without being procedural stages.

---

### *Scope of dispute settlement mechanisms*

In addition to the general dispute settlement (DS) mechanism established in Chapter 20, the NAFTA sets out two more mechanisms for specific disciplines of the Agreement. These procedures differ from the general Chapter 20, not only in that they are limited in scope, but also in that they address disputes brought by private parties.

The settlement of disputes between a NAFTA party and an investor from another NAFTA party is regulated in Chapter 11 of the Treaty. This mechanism considers that the NAFTA investor can challenge a host government that has allegedly infringed its investment obligations. The procedural rules that apply to this type of dispute are those contained in the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), ICSID's Additional Facility Rules, and the Rules of the United Nations Commission for International Trade Law (UNCITRAL Rules).

NAFTA also considers bi-national Panels in Chapter 19 to review final determinations on anti-dumping and countervailing duties, rather than a judicial review by domestic courts. This allows industry to request a review of an investigating authority by an impartial party.

The DS mechanism of Chapter 20<sup>151</sup> covers all disputes between the parties regarding the interpretation or application of the Agreement, as well as those cases in which a party considers that a measure of another party is inconsistent with the obligations of the Agreement. The Panel can select boards of scientific experts to assist them in reviewing certain issues such as environmental, health, safety or scientific matters. Disputes on agriculture, sanitary and phyto-sanitary (SPS) measures, government procurement, non-compliance of a party with a final award, and financial services can also be subject to the procedures contained in Chapter 20.

---

### *Forum choice*

In most areas of the NAFTA, it is mentioned that both WTO and Chapter 20 are applicable, but that one forum excludes the other.<sup>152</sup>

It is also possible that for particular subjects, the parties agree on one specific forum, as is the case in NAFTA for provisions regarding environmental, conservation, SPS, and technical barrier to trade (TBT) issues.<sup>153</sup> This possibility of "forum shopping" remains controversial, as it allows one party to bypass a DS procedure in favour of another one considered more beneficial. The NAFTA experience shows that where this option exists, parties tend to rely on the system of the DSU, which allows the respondent to block the procedures and guarantee multilateral oversight over the results of the controversy. This has happened in the cases brought by the United States against Mexico in the context of a sugar dispute, as well as in the current tuna dispute brought by Mexico against the United States, even though NAFTA rules seemed to limit the choice of forum in the latter case.

---

<sup>150</sup> Article 2019, NAFTA.

<sup>151</sup> Article 2004, NAFTA.

<sup>152</sup> Article 2005.1 and 6, NAFTA.

<sup>153</sup> Article 2005.3, 4, NAFTA.

### Length of a case

The length of a case is relevant because many industries prefer not to push their governments to start a dispute if a case takes too long to be solved. Consequently, a lengthy process becomes one of the reasons why countries frequently fail to use the DS mechanisms as a tool to implement the obligations under a commercial agreement.

Clearly, every case changes depending on the complexity of the legal and political issues involved. As a result, the timeframes are flexible and are not always respected. Nevertheless, a time average can be established, as it is mentioned in every agreement. In the case of NAFTA, it takes approximately five months<sup>154</sup> from the request for the establishment of a Panel to the issuance of the final report. In practice, these timeframes were almost accurate for one case, *Brooms*.<sup>155</sup> However, in the case of *Cross-border Trucking Services*, it took a year for the Panel to issue the report.<sup>156</sup>

Five years after the creation of the DSU, in 2000, the EU signed the first FTA which contained a quasi-adjudicative model of dispute settlement. This FTA was signed with Mexico, a country which, since it agreed to be part of NAFTA, only had quasi-adjudicative dispute settlement models in its FTAs.

---

## 4.2 EU–Mexico FTA

The EU–Mexico relationship was established through two Agreements,<sup>157</sup> along with a Final Act signed in 1997.<sup>158</sup> The Global Agreement<sup>159</sup> includes political, economic and trade areas of shared competencies of the EC and its Member States. The Interim Agreement (no longer in force) used to cover trade matters relating to exclusive EC competencies.<sup>160</sup> The FTA EU–Mexico was established on 01 July 2000 through Decision 2/2000<sup>161</sup> of the Joint Council.<sup>162</sup> This Decision established a FTA for goods. The following year, on 01 March 2001, Decision 2/2001 entered into force and established a FTA for services.<sup>163</sup>

---

### 4.2.1 Institutions Involved in the Settlement of Disputes

The Association Council, the Joint Council, the Joint Committees and the Technical Committees.

---

<sup>154</sup> In total it should take 150 days – 30 days to establish the Panel from the request for the establishment of the Panel (Article 2011, NAFTA), plus 90 days for the Panel to issue its initial report (Article 2016), plus 30 days from the issuance of the initial report for the Panel to deliver its final report.

<sup>155</sup> The Panel was established on 17 July 1997, and the final report was adopted on 30 January 1998.

<sup>156</sup> The Panel was established on 02 February 2000, and the adoption of the report was on 02 February 2001.

<sup>157</sup> The first move towards the signature of these Agreements was in 1975 with a Co-operation Agreement between Mexico and the European Communities. It was substituted in 1991 with another Co-operation Agreement, but of the third generation. Then, in 1995, with a Joint Declaration, both parties stated their interest in deepening their relationship. To learn more about these Agreements, see Ramírez-Robles, E. *Solución de Controversias en los acuerdos celebrados entre México y la Comunidad Europea*. (Guadalajara, Universidad de Guadalajara, 2003), pp. 85–104.

<sup>158</sup> See Reiter, J. The EU–Mexico Free Trade Agreement: Assessing the EU approach to regulatory issues. In *Regionalism, Multilateralism and Economic Integration, the recent experience*. Sampson, G.P. and Woolcock, S. (eds.) (Hong Kong, The United Nations University, 2003), p. 66.

<sup>159</sup> Economic Partnership, Political Co-ordination and Co-operation Agreement between the EC and its Member States, as the one part, and the United Mexican States, as the other part (OJ L276/45) 28.10.2000.

<sup>160</sup> The Interim Agreement established the objectives of the negotiation in trade liberalisation with the aim of applying, as quickly as possible, the dispositions of the Global Agreement with regard to trade and trade related issues. This Interim Agreement entered into force in July 1998 and remained in force until being superseded by the Global Agreement.

<sup>161</sup> Decision 2/2000 (OJ L157) on 30.06.2000 and the annexes were published in (OJ L245) on 29.09.2000. Available at: <http://www.economia-bruselas.gob.mx/ls23al.php?s=501&p=4&l=2>.

<sup>162</sup> Highest Authority at a ministerial level for both Contracting Parties.

<sup>163</sup> Available at: [http://europa.eu.int/comm/external\\_relations/mexico/intro/index.htm](http://europa.eu.int/comm/external_relations/mexico/intro/index.htm). Decision 2/2001 (OJ L70) 12.03.2001.

## 4.2.2 Political and Adjudicative Features of the Mechanism to Settle Disputes

### Political features

Consultations are held by the authority which is formed by the parties and may settle the dispute in the first stage (i.e. The Association Council). This authority issues non-binding decisions, whereas, in the political models, the decisions taken by the parties were binding.

Important weaknesses were found in the FTA EU–Mexico. Although it is not possible for procedures to concurrently take place<sup>164</sup>, one of the weaknesses is the possibility of choosing two to settle the dispute for the same matter.<sup>165</sup> The WTO is the alternative forum to the Panel that is mandated in this FTA to settle disputes in its second stage.<sup>166</sup> In addition, the Panel procedures of the FTA will not consider issues relating to each party's WTO rights and obligations.<sup>167</sup> A further weakness found in this FTA, which similarly occurs in EU dispute settlement political models, is that appropriate measures are also included in the Global Agreement.<sup>168</sup>

---

### Adjudicative features

The set of rules relating to the dispute settlement mechanism in the FTA between Mexico and the EU is shaped with detailed rules and specific timeframes. It encompasses the stages of the procedure (consultation plus arbitration), the appointment of arbitrators, the content of the Panel reports (interim and final)<sup>169</sup> and the way to implement the final report.<sup>170</sup> It also includes rules of procedure<sup>171</sup> and a Code of Conduct<sup>172</sup> for the arbitrators. These elements are: final decisions, decision-making process by a third authority and detailed and pre-established procedures.

#### a) Resolutions on a legal basis by third authorities

- i. The Panel is the third authority that adjudicates decisions on a legal basis.

#### b) Binding decisions

The decisions that are binding are those that:

- i. Settle the dispute;
- ii. Determine the conformity of the measures that the losing party will take to comply with the ruling (i.e. EU–Mexico); and
- iii. Determine whether the level of suspension is equivalent to the level of nullification (i.e. EU–Chile).

#### c) Pre-established and detailed legal stages

- i. Precise legal stages have been established (consultations and Panel review).
- ii. Precise and detailed rules. The Panel stage is rule-based (i.e. Panel mandates and conclusions, surveillance and compliance rules, and no possibility of blocking the establishment of a Panel (only in the EU–Mexico).
- iii. Timeframes are shorter than in the DSU and are included in almost every legal stage of the procedure.
- iv. There are pre-established procedures (i.e. model rules of procedure for the Panel).

<sup>164</sup> Article 47.4, second phrase, EU–Mexico FTA (Decision 2/2000).

<sup>165</sup> A similar provision was found in the EU–South Africa FTA.

<sup>166</sup> Article 47.4, first and third phrase, EU–Mexico FTA (Decision 2/2000).

<sup>167</sup> Article 47.3, EU–Mexico FTA (Decision 2/2000).

<sup>168</sup> Article 58.1, paragraph 2 and 3 of the Global Agreement EU–Mexico. If one of the Parties considers that the other has not fulfilled the obligations of the Agreement, this party can adopt appropriate measures. The Parties will provide the Joint Council with information to reach a mutually agreed solution within 30 days. Appropriate measures will be those that complicate the Agreement the least.

<sup>169</sup> The arbitral award is binding.

<sup>170</sup> Title VI, Article 46 of the Decision 1/2000 and Title V, Article 42 of the Decision 2/2001.

<sup>171</sup> Annex III with reference of the Article 43 of the Decision 2/2001.

<sup>172</sup> Appendix I of the Decision 2/2001.

Despite the incorporation of the previously mentioned adjudicative elements in the dispute settlement EU FTAs provisions, no bilateral cases have yet been launched. Apparently, the incorporation of adjudicative elements has not been a reason to have a bilateral dispute as it was in the case of the GATT. Some weaknesses still exist, but they will be analysed at a later date.<sup>173</sup>

**Table 8: Dispute settlement mechanisms of NAFTA, EU–Mexico and TFTA**

Provisions	NAFTA (Chapter 20)	EU–MEXICO FTA OJ L157/26 of 30.06.2000	Draft TFTA text
Authority	Free Trade Commission: Formed by the parties. In the first instance, it may settle the dispute with a decision (Art. 2001.b)		Tripartite Council and Panel
Forum choice	WTO or FTA (Art. 2005.1, 6). NAFTA for Environment, SPS and TBT (Art. 2005.3, 4)	The forums are: WTO and the procedures of the FTA, <b>they are not mutually</b> exclusive, but the proceedings cannot be concurrent (Art. 47.4 )	No rules yet
Composition of Panels	Panel of 5 Members (Art. 2011.1.a) from a roster of 30 individuals (by consensus, so <b>allows blockage</b> ) (Art. 2009.1) . The chair is selected by consensus within 15 days, if it fails, a lot selection takes place within 5 days (Art. 2011.1.b). Each disputing party should select two panellists (Art. 2011.1.c), failure to do so will result in a lot selection from the roster (Art. 2011.1.d)	Panel composed of 3 arbitrators. Each party appoints one arbitrator. Each party proposes 3 arbitrators to serve as chair and they also choose the chair. If one of the parties fails to propose an arbitrator or choose the chair, they will be chosen by lot (Art. 44)	Yes, from roster of panellists (Art. 7.4 and 7.7)
Binding decisions	Decisions of the Panel are binding (suspension of benefits, Art. 2019)	Decisions of the Panel are binding	Yes, but from Tripartite Council (Art. 15)
Implementation of the final report	Disputing parties shall agree on the resolution of the dispute in conformity with the determinations and recommendations of the Panel (Art. 2018.1)	The party concerned shall give notice as to the measures adopted in order to implement the final report before the expiry of a reasonable period of time ( <b>RPT previously determined (either by agreement of the parties or by arbitration. The ruling should be given within 15 days)</b> )	No rules yet
Non-implementation	If the Panel determines that the measure is inconsistent with NAFTA or causes nullification or impairment and does not reach agreement within 30 days, the complaining party may suspend benefits of equivalent effect in the same or other sectors (Art. 2019)	Upon notification, any of the parties may request an Arbitration Panel to rule on the conformity of those measures, the <b>award should be issued within 60 days</b> (Art. 46.5). If the concerned party fails to notify, or the Arbitration Panel considers that the measures required to implement the report are inconsistent, the complaining party has the opportunity to enter into consultations with the other party to agree on a <b>mutually acceptable compensation</b> (Art. 46.6). If such an agreement has not been reached within 20 days from the request for consultations, the complaining party shall be entitled to suspend benefits (Art. 46.6) Counteraction: <b>Allowed</b> under certain circumstances (Art. 46.7).	Surveillance from Tripartite Council (Art. 20.4)
Cases	Two (US vs. Mexico)	None	Not yet in force

**Source:** Created by the author of this Training Module.

<sup>173</sup> The author's PhD thesis explores these flexibilities of dispute settlement provisions in the EU–Mexico FTA in-depth.



## PART III. CONFIGURATION OF AD HOC DISPUTE SETTLEMENT MECHANISMS FOR THE TFTA

Part III of this Training Module presents, firstly, some suggestions which would make the existing dispute settlement mechanism of the Draft TFTA Text of December 2010 more effective and equitable to all signatory parties. Finally, this section presents four options with different combinations of features for dispute settlement among TFTA Member States. The proposed features are based on all the reviewed mechanisms in diverse multilateral, bilateral and plurilateral FTAs.

### 5. Suggestions to Make the Existing Draft TFTA Dispute Settlement Mechanism Effective

Negotiating parties in the TFTA have agreed on a draft DS mechanism that includes political and adjudicative features. Some political, adjudicative and horizontal features are however proposed in order to achieve an effective and equitable dispute settlement mechanism.

#### 5.1 Political Elements for the TFTA Dispute Settlement Mechanism

As previously mentioned, there are several political elements in the TFTA dispute settlement mechanism:

- Authorities: Tripartite Council;
- Consultations;
- No compulsory jurisdiction;
- No rules on forum exclusion;
- Alternative dispute settlement mechanisms;
- No automatic procedures (reports, establishment of the Panel, authorisation of counteraction);
- Final report binding by the Tripartite Council, which is formed by representatives of both parties;
- No compliance procedures (i.e. no sanctions if no implementation of the report);
- No adjudicative establishment of a reasonable report implementation timeframe; and
- No procedures for report implementation surveillance.

As mentioned before, only 96 reports on disputes between contracting parties were adopted in the 48-year GATT period. However, in the 17 years of WTO existence, 147 reports have already been adopted.

It is therefore worth examining the adjudicative elements already included in the TFTA mechanism, and those that could be included.

#### 5.2 Adjudicative Elements for the TFTA Dispute Settlement Mechanism

As previously mentioned, some of the following adjudicative features have already been included in the Draft TFTA Text on dispute settlement mechanisms:

- Authorities: Panel;
- Composition of the Panels: From roster of panellists formed by proposals of all the parties (Arts. 7.4 and 7.7);
- Binding decisions: Yes but from Tripartite Council (Art. 15);
- Surveillance from Tripartite Council (Art. 20.4); and
- Secretariat (although it is not clear whether this provides only administrative support or whether it also provides legal support).

It has been noted, that the above-mentioned adjudicative features were included in the dispute settlement mechanism of the EAC for Customs Union issues. To date, however, no dispute has been officially launched. It must also be recalled that this mechanism was specifically included for a limited scope on Customs Union issues. For a broader scope on services and other common market issues, however, the EAC included an additional dispute settlement mechanism.

The TFTA has only considered one dispute settlement mechanism, and negotiating parties may wish to consider a broader scope than only FTA issues. In addition, many of the possible reasons why African countries do not participate as complainants in the WTO dispute settlement system disappear when it comes to bilateral agreements between active trade partners such as the TFTA members, as is illustrated in the following table:

**Table 9: Importance of establishing a more adjudicative dispute settlement mechanism in the TFTA**

Possible reasons to become a complainant	WTO	TFTA
Interest in clarifying systemic principles	Several waivers	No waivers, therefore interest increases
High cost	WTO dispute settlement (although the Advisory Centre exists)	Costs will reduce since the expertise will be local and the places of the hearings will be in Africa
Lack of expertise	Complexity in the rules, but more importantly absence of interest in following the WTO case law over 17 years of its existence	TFTA members will be highly familiar with the obligations included, and this is an opportunity to start following the case law at a regional level
The habit of dispute initiation	“Unaccustomed to the rule of law” and that in addition to this factor, their democracies are “fragile” and also have a “weak governance structure”	The first aspect can be solved by including political stages, but with automatic procedures. The rule of law can strengthen democracies
The cost in time and staying in power is also a factor	Do not have professional civil servant career	In many countries, although they do not have professional civil servant careers, they have left the experts in their positions in order to provide technical expertise
Fear of losing unilateral preferences from large trading partners	There is political reluctance to initiate disputes against large trading partners	Here, the trading partners are African countries with similar trade circumstances and which do not get concessions from each other
Effective enforcement under WTO law	The remedy of withdrawal of equivalent (and prospective) concessions is sometimes difficult to implement for small economies	The proposed options of dispute settlement compliance incorporate retroactive and monetary compensation
The purpose of the dispute settlement procedure, and of renegotiation provisions more generally, is to preserve reciprocity	Although the WTO is multilateral, it has been built from bilateral concessions. However, many African countries have never participated in trading on a substantive scale, therefore it may be irrelevant to them to start a dispute	This will be a FTA-based on trade concessions only relevant for the negotiating parties
Disputed trade measures are proportional to the diversity of a country’s exports over products and partners	This can happen within WTO Member Countries	Even if the trade share is not too large, the exports are important within the TFTA Member States

It is therefore recommended that in addition to the adjudicative elements already included, the following be added:

- Automaticity to establish a Panel and to authorise counteraction measures;
- At the consultations stage;
- At the Panel stage (working procedures for the Panel, and a code of conduct);
- Appellate stage;

- Working procedures for the Appellate instance (including implementation of the report and an adjudicative RPT);
- Retrospective counteraction (this feature is not currently included at the WTO but its inclusion has been strongly supported by WTO Members); and
- Monetary counteraction (this feature is not currently included at the WTO, but its inclusion has been strongly supported by many developing and LDC WTO Members).

As established in Article 3 of the DSU, and by the Appellate Body in WTO case law<sup>174</sup>, including quasi-adjudicative elements (such as those mentioned above) in a dispute settlement system provides security and predictability, preserves Members' rights and obligations, and will clarify the existing substantive and procedural provisions of the TFTA.

In addition to the adjudicative elements some other key elements for a good functioning of a dispute settlement mechanism can also be incorporated in the future TFTA.

---

### ***5.3 Horizontal Elements for the Dispute Settlement Mechanism of the TFTA***

As explained above, certain elements have already been included in various FTAs, such as the following:

- Transparency;
- Third party rights;
- Special and differential treatment (S&D); and
- Objectives and principles.

All these principles help with the effective and equitable treatment of TFTA Members with different levels of development. The TFTA includes developing and LDC Members and in order to promote equity between signatory parties, it may be appropriate to include S&D.

---

<sup>174</sup> Japan – Alcoholic Beverages II, WT/DS8/AB/R, p. 31 and US – Wool Shirts and Blouses, WT/DS33/AB/R, p. 19.

## 6. Options for a New Quasi-Adjudicative Dispute Settlement Mechanism

In order to propose options for a new quasi-adjudicative dispute settlement mechanism, the key adjudicative and horizontal elements will firstly be mentioned. Secondly, four different combinations of these elements will be provided.

### 6.1 Political features for the TFTA dispute settlement mechanism

- Political institutions (Joint Council of Ministers, Joint Committee of Ministers, Joint Technical Committees).
- Roster of mediators.
- Consultations and mediation.

### 6.2 Adjudicative Features for the TFTA Dispute Settlement Mechanism

#### Adjudicative institutions

A Registrar will appoint the panellists and arbitrators, as well as an Appellate Body. The Secretariat will maintain the rosters of panellists and arbitrators.

The Appellate Body will be a permanent body. If the negotiating parties of the TFTA are considering the establishment of a Court, then this Tripartite Court of Justice could perform the role of the second and last adjudicative instances, in other words, an Appellate, where the judge may deliver a dissenting opinion.

#### Decision-making in the TFTA dispute settlement mechanism

##### *Consensus*

All the decisions taken by the Panel and Appellate Body shall be under consensus, except for those specified in the negative consensus section.

##### *Negative consensus*

Negative consensus means that blocking a decision is possible only if all the parties agree to block it. Negative consensus is required for the following decisions:

- i. Adopting the Panel ruling, as the defeated party could otherwise oppose adoption;
- ii. Composing the Panel: as this would otherwise allow the respondent party to block its composition;
- iii. Establishing the Panel because, even if it is composed, the approval of all parties (including the respondent) is needed for its establishment; and
- iv. Authorising counteraction, as even the defending party has to agree with the complainant's retaliatory measures.

#### Automaticity from one political instance to the next one

Bilateral concerns can be heard in the tripartite meetings of political bodies (Technical Committees, Ministerial Committees and Ministerial Council), but with specific deadlines and resulting in negative consensus before they automatically pass to the next political stage.

*Consultations*

Disputing parties get together with the specific objective of discussing and, if possible, solving the dispute. This meeting is bilateral and confidential; no third party authorities/experts are involved. This period also provides the parties with the opportunity to obtain as much information as is needed in terms of deadlines and automaticity of stages following negative consensus. It is at the discretion of the complainant party to continue the procedure with mediation.

.....

*Mediation*

This phase constitutes continuation of the dispute with a third authority that will propose a solution on a non-legal basis. The mediator can be appointed by the Registrar from the indicative roster of mediators.

.....

**Automaticity from political instance to the adjudicative instances**

In the event that the dispute is not solved through mediation, it is critical to establish deadlines and automatic decisions (e.g. negative consensus) in order to pass to the next stage (i.e. Panel).

.....

**Choice of forum in TFTA dispute settlement mechanism**

In the event of existing overlapping obligations between the WTO and the TFTA, the complaining party will choose the preferred forum. However, it is important to clarify that the obligations and measures will only be examined in one forum, and shall not be examined in the other forum.

.....

**Automaticity from one adjudicative instance to the next**

If the dispute is not solved by the Panel, as in previous instances, through deadlines and negative consensus, the dispute can proceed to be solved in a final instance (e.g. Appellate).

.....

**TFTA Secretariat can provide legal support in addition to administrative support**

Having a highly qualified Secretariat that also provides legal support to the *ad hoc* Panels composed will facilitate the solving of disputes in terms of time, quality of the reports, and preserving the precedent principle.

.....

**Scope of disputes in the TFTA dispute settlement mechanism**

This provision can be included in the text in the following form:

All the obligations of this agreement are applicable to the dispute settlement mechanisms of the TFTA. Alternatively, it can mention that an “actual or proposed” measure of another party “is or would” be inconsistent with the obligations of the Agreement. In addition, it can specify that non-violation complaints under particular chapters of the agreement such as National Treatment and Market Access for Goods, Textiles and Apparel, Rules of Origin and Origin Procedures, Government Procurement, Cross-border Trade in Services, or Intellectual Property Rights are being nullified or impaired as a result of a measure by another party that is not consistent with this Agreement. No party may invoke this with respect to a benefit under the Chapter on Investment (Cross-border Trade in Services) or on Intellectual Property Rights if the measure is subject to an exception in terms of the General Exceptions.

Finally, it can be specified that this mechanism does not apply to disputes between COMESA Members, EAC Members and SADC Members concerning a breach of their respective Treaties.

.....

**Preliminary rulings**

Preliminary rulings have played a very important role in the sustainability of the existing WTO dispute settlement system. The main function is basically to solve those issues that have not been contemplated in the DSU.

.....

**Model rules of procedure**

It is important to include a table that establishes ideal deadlines for the proceedings, and requires written submissions and oral hearings for the disputing parties.

**Compliance procedures**

As mentioned earlier in this Module, the DSU adopts the following approach in its compliance proceedings: When suspending concessions, if the Panel has determined that the measure is inconsistent with the provisions of the agreement or causes nullification or impairment, and if the parties have not reached agreement within 45 days, the parties are required to enter into negotiations to agree on compensation. If within 30 days the parties cannot agree on compensation, the winning party is allowed to suspend benefits of equivalent effect, within 30 days in the same or other sectors.

If the defending party considers that the level of benefits to be suspended is excessive, or if it has eliminated the inconsistent measures, it may request a Panel to review the counteractive measures within 30 days. The same Panel is required to present its findings within the next 90 days (or up to 120 days).

However, this system has been strongly criticised, particularly by developing Member Countries, therefore a different approach is proposed at this stage. The alternative is that the defending party could provide annual monetary assessment.

Provisions regarding the implementation and non-implementation of the Panel’s reports are essentially identical across most FTA agreements, with the exception of NAFTA’s provisions which allow for the suspension of trade concessions in a shorter period of time. Additionally, the Chile–US, CAFTA–DR and Peru–US FTAs allow for alternative compensation to the suspension of trade benefits, including an annual monetary assessment.

**6.3 Horizontal Features for the TFTA Dispute Settlement Mechanism**

- Objectives and principles.
- Code of conduct.
- Special and differential treatment.
- Conflict of interest.
- Transparency.

Transparency rules can be found in the Rules of Procedure, where the parties are allowed to have one hearing before the Panel, which, subject to the protection of confidential information, shall be open to the public. In this procedure, each party provides initial and rebuttal submissions. The party’s written version of its oral statement, together with written responses to requests or questions from the Panel, will be made public within 10 days after their submission, subject to the protection of confidential information. Additionally, the Panel will consider requests from non-governmental entities, located in the parties’ territories, to provide written views on the dispute that may assist the Panel in evaluating the parties’ submissions and arguments, subject to the protection of confidential information. The parties have the capacity to modify the Rules of Procedure through the institutions established in each FTA.

**Third party rights**

Third parties can be considered the party that has a trade interest in the dispute, and/or *amicus curiae*. The Panel can provide certain rights to third parties, such as attending the oral hearings. Third parties can also present submissions to the Panel.

**Official language**

The TFTA can specify which the official languages of the dispute settlement proceedings are.

## 6.4 Quasi-adjudicative Options for TFTA Dispute Settlement Mechanisms

The TFTA negotiators may like to include, for the first time in a dispute settlement system of an FTA, diverse options. The complaining party may then choose the option that is more convenient according to its needs. Some of the factors that the complaining party may want to take into account in selecting an option are: nuance of the dispute (political, economic, legal); length of the solution; legal enforceability; and costs that the choice of a particular option can imply. Below are four different options that take into account the above-mentioned factors. Each of the options contains a creative combination of political and adjudicative elements, with different advantages and disadvantages. Four options are proposed:

- Option 1: Highly political and less adjudicative;
- Option 2: Less political and highly adjudicative;
- Option 3: Less political and less adjudicative; and
- Option 4: Highly political and highly adjudicative.

---

### 6.4.1 Option 1: Highly Political and Less Adjudicative (Co-operation Agreement Shape)

#### Elements of Option 1

Political elements include:

- Confidential;
- No defined stages;
- Trade concerns at Technical Committees;
- Trade concerns at Ministerial Committees;
- Trade concerns at Ministerial Council;
- Consultations (within legal teams of disputants);
- If required by the complaining party, possibility of mediation and adjudicative elements;
- Deadlines;
- Automaticity from one stage to the next; and
- Binding adoption of recommendations of the Mediator.

---

#### Advantages of Option 1

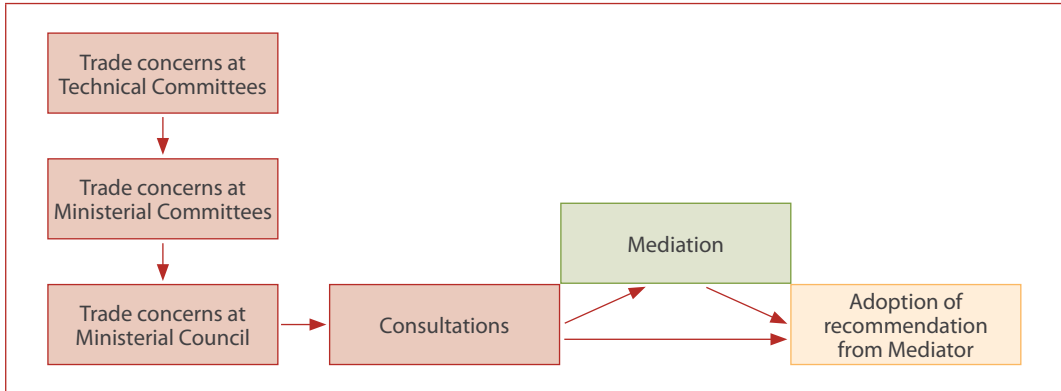
This option is recommended for highly sensitive political issues.

- It is low-cost.
- It can be the shortest option.

---

#### Disadvantages of Option 1

- Less legally enforceable.
-



Graph of Option 1

6.4.2 Option 2: Less Political and Highly Adjudicative (DSU Shape)

Elements of Option 2

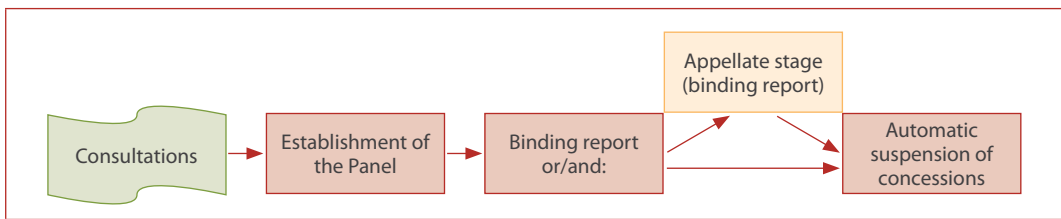
- Consultations.
- Establishment of a Panel.
- Issuance of a binding report.
- Possibility of an appellate stage.
- Binding adoption of rulings from the Panel and/or Appellate Body.

Advantages of Option 2

Highest possibility of being legally enforced.

Disadvantages of Option 2

Costs – these arise from consultations in a single place (i.e. transportation, hotel and *per diems* of the disputants), gathering the panellists (i.e. costs of services, transportation, hotel and *per diems* of the panellists), and, if needed, experts in the field of the disputes (e.g. scientific, financial, etc.).



Graph of Option 2



**6.4.3 Option 3: Less Political and Less Adjudicative (NAFTA Shape)**

**Elements of Option 3**

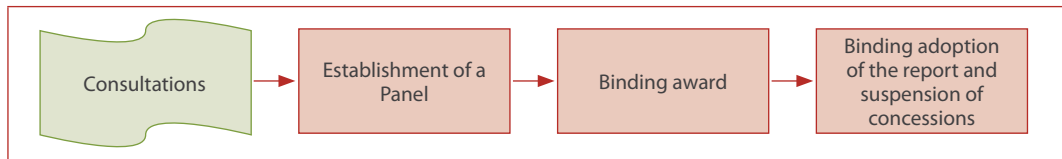
- Consultations.
- Establishment of a Panel.
- Issuance of a binding report.
- Binding adoption of rulings from the Panel.

**Advantages of Option 3**

- Shortest option.
- Cheapest option.
- Legally enforceable.

**Disadvantages of Option 3**

- No review of the Panel decision.
- Less options to reach mutually agreed solutions.



**Graph of Option 3**

**6.4.4 Option 4: Highly Political and Highly Adjudicative Option (New Shape Adapted for African Countries)**

**Elements Option 4**

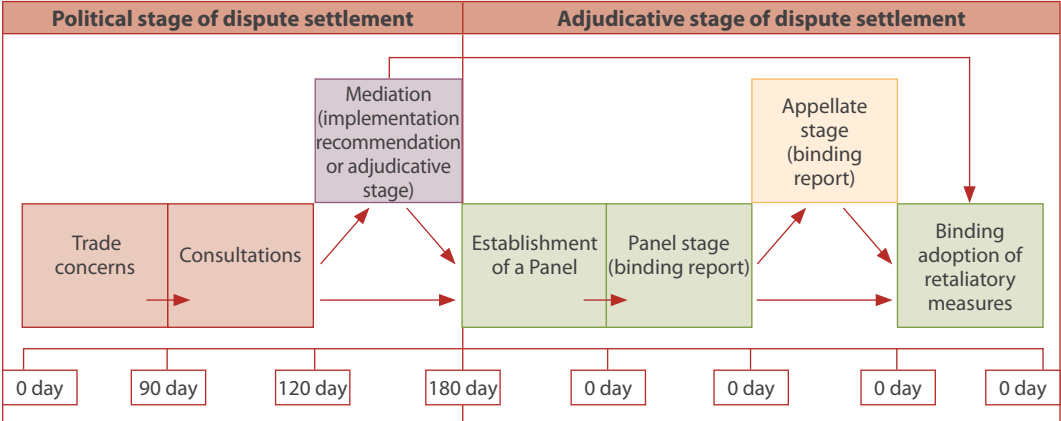
- Trade concerns.
- Consultations.
- Mediation plus establishment of a Panel.
- Issuance of a binding report, possibility of an appellate stage.
- Binding adoption of rulings from the Panel and/or Appellate Body.

**Advantages of Option 4**

- This option is recommended for sensitive political issues that represent strong economic interests.
- Legally enforceable.
- Takes into account the African need to solve disputes through political means.

**Disadvantages of Option 4**

- It is more expensive.
- It takes longer.



Graph of Option 4

## LIST OF ABBREVIATIONS

<b>ASCM</b>	Agreement on Subsidies and Countervailing Measures
<b>CMT</b>	Committee of Ministers of Trade
<b>COJ</b>	Court of Justice
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>DCs</b>	Developing Countries
<b>DS</b>	Dispute Settlement
<b>DSB</b>	Dispute Settlement Body
<b>DSU</b>	Dispute Settlement Understanding
<b>EAC</b>	East African Community
<b>EACJ</b>	East African Court of Justice
<b>EC</b>	European Community
<b>EU</b>	European Union
<b>FTA</b>	Free Trade Area
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>ICSID</b>	International Centre for the Settlement of Investment Disputes
<b>LAD</b>	Legal Aid Division
<b>LDC</b>	Least Developed Countries
<b>MTA</b>	Multilateral Trade Agreement
<b>MFN</b>	Most Favoured Nation
<b>NAFTA</b>	North American Free Trade Agreement
<b>PTA</b>	Preferential Trade Area
<b>RPT</b>	Reasonable Period of Time
<b>S&amp;D</b>	Special and Differential
<b>SADC</b>	Southern African Development Community
<b>SPS</b>	Sanitary and Phyto-Sanitary
<b>TBT</b>	Technical Barriers to Trade
<b>TFTA</b>	Tripartite Free Trade Area
<b>UNCITRAL</b>	United Nations Commission for International Trade Law
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>US</b>	United States
<b>WTO</b>	World Trade Organization





*TradeMark Southern Africa*

Physical: 1<sup>st</sup> and 2<sup>nd</sup> Floor, Building 41, CSIR Campus, 627 Meiring Naude Road, Brummeria, Pretoria, 0001, South Africa  
Postal: PO Box 107, Persequor Park, Pretoria, 0020, South Africa

Tel: +27 12 349 7500  
Fax: +27 12 349 7513  
E-mail: [info@trademarksa.org](mailto:info@trademarksa.org)

