

## Comparing EU free trade agreements Dispute Settlement



Stefan Szepesi

The aim of this *InBrief* series is to provide a synthesis of various chapters of the ten free trade agreements (FTAs) recently concluded by the European Union with developing countries, as well as other relevant trade agreements when appropriate. Each *InBrief* offers a detailed and schematic overview of a specific set of trade and trade-related provisions in these agreements.

The arrangements for settling disputes between partners are among the elements that determine the overall credibility of any international agreement as an instrument that can be effectively enforced. In trade agreements, an effective dispute settlement mechanism can help to demonstrate that the parties are committed to the agreed elimination of trade barriers, and that they will not resort to any unilateral action in violation of the agreement. Moreover, should the parties to an agreement be unequal partners in terms of political or economic power, a good dispute settlement mechanism can prevent disputes from being resolved along political or economic lines. An effectively enforced and recognised dispute settlement mechanism may also help to clarify the interpretation and scope of certain terms and conditions of an agreement, leading to a more coherent implementation, as is illustrated by the development of the multilateral trading system.

Provisions for dispute settlement essentially have two objectives. First, they should *a priori* deter the parties from violating the agreement. This is likely to be the case if the political and economic cost of breaching the agreement is perceived to be greater than the benefits. Second, should a dispute arise over a possible violation, the provisions should prevent the parties concerned from

having immediate recourse to protectionist countermeasures. Instead, a good dispute settlement mechanism allows for consultation and arbitration, and ensures that sanctions are used only as a measure of last resort.

To a large extent, the architecture of a dispute settlement mechanism determines whether it is effective or not. Both the costs and the potential gains of engaging in a dispute settlement procedure are important elements in determining its effectiveness. An overly lengthy procedure can deter a complainant from bringing its case beyond the consultation phase. The scope of dispute settlement is also important: if a trade agreement excludes certain trade or trade-related provisions from the application of its dispute settlement mechanism, the credi-

bility of these provisions is undermined. Should a matter be put to arbitration, it is crucial that all parties recognise the arbitrators' final decision and that legal means are available for enforcing this decision.

Most of the provisions for dispute settlement in international trade agreements have evolved over time. With the establishment of the World Trade Organization (WTO) following the Uruguay Round, the GATT dispute settlement provisions were replaced by more specific and transparent WTO rules and a new Dispute Settlement Body whose decisions, subject to appeal, are directly enforceable. Drawing substantially from the WTO model, recent bilateral agreements have included increasingly detailed provisions for dispute settlement. This development is clearly reflected in the

### Box 1 Dispute settlement in the WTO

The WTO's Dispute Settlement Understanding (DSU) is the second Annex to the 1994 Agreement Establishing the World Trade Organization. All articles as well as summaries and interpretations can be found at: [www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm)

Under the Doha Ministerial Declaration (2001), the members agreed to improve and clarify the DSU. The ongoing negotiations can be followed at: [http://docsonline.wto.org/under/TN/DS/W/\\*](http://docsonline.wto.org/under/TN/DS/W/*). A useful summary of the state of the negotiations is provided by ICTSD and IISD in their Doha Round Briefing Series (no. 8) at: [www.iisd.org/trade/wto/doha\\_briefing.asp](http://www.iisd.org/trade/wto/doha_briefing.asp)

**Box 2****Where to find the articles on dispute settlement in EU trade agreements****MED agreements: Article 86 (EU-Tunisia).**

[http://europa.eu.int/eur-lex/en/oj/dat/1998/l\\_097/l\\_09719980330en00020174.pdf](http://europa.eu.int/eur-lex/en/oj/dat/1998/l_097/l_09719980330en00020174.pdf)

**TDCA (South Africa): Article 104.**

[http://europa.eu.int/eur-lex/en/archive/1999/l\\_3119991204en.html](http://europa.eu.int/eur-lex/en/archive/1999/l_3119991204en.html)

**Global Agreement (Mexico): Annex XVI to the agreement.**

[http://europa.eu.int/comm/trade/issues/bilateral/countries/mexico/docs/en2\\_annex\\_16.pdf](http://europa.eu.int/comm/trade/issues/bilateral/countries/mexico/docs/en2_annex_16.pdf)

**Association Agreement (Chile): Annex XV and XVI to the agreement.**

[http://europa.eu.int/comm/trade/issues/bilateral/countries/chile/docs/euchlagr\\_xxiii.pdf](http://europa.eu.int/comm/trade/issues/bilateral/countries/chile/docs/euchlagr_xxiii.pdf)

**For other agreements, see the Trade Agreements Database and Archive by the Dartmouth Tuck School of Business.** [http://mba.tuck.dartmouth.edu/cib/research/trade\\_agreements.html](http://mba.tuck.dartmouth.edu/cib/research/trade_agreements.html)

dispute settlement provisions of recent trade agreements signed by the European Union (EU) with third countries.

## Dispute settlement in EU agreements

A comparison of various trade agreements recently signed by the EU shows that, to date, they have not included any standard dispute settlement procedure. The agreements signed with seven Mediterranean (MED) countries, South Africa, Mexico and Chile differ widely from each other in both the scope and the content of their respective dispute settlement provisions. The scope of these provisions would appear to be related to the degree to which the agreements cover other issues. The MED agreements lack substantive provisions on investment, standards, market access for agricultural products and accordingly have very limited provisions on dispute settlement. The Trade and Development Cooperation Agreement (TDCA) with South Africa is broader in scope than the MED agreements, and this is reflected by its chapter on dispute settlement, which sets out clearer procedures. Finally, the agreements with Mexico and Chile go some way further in limiting the parties' latitude for non-compliance with the agreement. In particular, the trade agreement with Chile, which the European Commission considers to be 'the most innovative and ambitious results ever negotiated by the EU', has established a strong and detailed institutional structure to prevent or settle disputes between the parties.

## The Euro-Mediterranean Association Agreements

Since the first Euro-Mediterranean Conference was held in November 1995, the EU and 12 Mediterranean countries have been engaged in negotiating Association Agreements. The overall objective is to form, by 2010, one Euro-Mediterranean Free Trade Area out of the separate agreements in place. To date, bilateral Association Agreements have been concluded with seven countries: Tunisia (1995), Israel (1995), Morocco (1996), Jordan (1997), the Palestinian Authority (1997), Algeria (2001) and Lebanon (2002).

Though the seven MED agreements are not identical, many of their provisions are similar. On dispute settlement, each of the seven agreements contains exactly the same wording. The content is limited, though: only one article is devoted to the procedure that is to be followed in the event of a dispute. In line with other agreements and WTO provisions, any matter that may arise on either side has first to be discussed by the two parties. Article 86.1 (EU-Tunisia) states that 'either Party may refer to the Association Council any dispute relating to the application or interpretation of this Agreement'. Subsequently, the Association Council, consisting of the members of the government of Tunisia, and members of the Council of the EU and the European Commission, may settle the dispute through a decision (Art.86.2). Should it not be possible to resolve the dispute in this manner, the complaining party can appoint an arbitrator, in which case the defending party (i.e. the party against whom the complaint is directed) needs to appoint a second arbitrator within two months, the Association Council

being responsible for appointing a third arbitrator (Art. 86.4).

### No time frame

The MED agreements do not contain any provisions regulating the amount of time available to the parties for appointing arbitrators, their background and their qualifications, or on the procedure they should follow. There is no mention either of any code of conduct or of the impartiality of the panel of arbitrators. Should any of the parties disagree with the appointment of an arbitrator, there are no provisions that describe how such a stalemate should be resolved. The last paragraph on dispute settlement states that the 'arbitrators' decisions shall be taken by majority vote [and] [e]ach party to the dispute shall take the steps required to implement the decision of the arbitrators' (Art. 86.4). However, there are no provisions that lay down a time frame in which such a decision needs to be taken, nor does the agreement explain what a complaining party can do if the other party fails to uphold the decision.

*Overall, the dispute settlement provisions in the MED agreements are very loosely formulated. The lack of detailed provisions leaves substantial room for political manoeuvre in any case in which the Association Council is not able to resolve a dispute. The appointment of arbitrators may be delayed without formally breaching the agreement. Moreover, the formal obligation to adhere to any decision taken by the arbitrators can easily be frustrated by the reluctance of the defending party to fully implement this decision. Because there is no procedure describing the steps that the complainant should subsequently take, any rulings given by the arbitrators are unlikely to have much of an effect on the MED partners compared with other, more detailed agreements. The overall lack of procedural guidelines could well reduce the credibility of dispute settlement procedures in the MED agreements and deter any party from having recourse to the dispute settlement mechanism if a disagreement arises.*

## The EU-South Africa TDCA

Although the TDCA concluded with South Africa in 1999, which has been in force since January 2000, covers dispute settlement in more detail than the MED agreements, its coverage remains limited to one article of the agreement (Art. 104). It distinguishes

between two kinds of disputes: those relating to generic issues such as economic, development, financial or other areas of cooperation (Titles IV-VIII) and those relating specifically to trade or trade-related areas (Title II and III). In the former case, the provisions are very similar to those in the MED agreements, with the exception that a specific time frame is given for the appointment of arbitrators (i.e. eight months) and the announcement of their decision (i.e. within 12 months of their appointment).

In the case of trade-related disputes, there are more detailed provisions and the time frame is shorter. As in the MED agreements, disputes are first referred to the Cooperation Council (Art. 104.1), a body similar to the MED's Association Council. Should a dispute not be resolved, either party may appoint an arbitrator (Art. 104.9(a)), after which the other party is required to appoint a second arbitrator within 30 days. The Cooperation Council then has to appoint a third arbitrator within 60 days. As a general rule, Article 104.9(c) states that arbitrators must report their findings 'not later than six months from the date of the composition of the arbitration panel', but in urgent cases, such as those involving perishable goods, this period is limited to three months. As with disputes of a non-trade nature, each party to the dispute 'must take the steps required to implement the decision of the arbitrators' (Art. 104.7).

### A reasonable period of time

Once the arbitrators have reported their findings, the defending party needs to inform the other party and the Cooperation Council within 60 days of how it intends to implement them (Art. 104.9(d)). If it is not possible to comply immediately, the party concerned must notify the complaining party and the Cooperation Council of a 'reasonable period of time' (i.e. not exceeding 15 months) in which it intends to do so (Art. 104.9(e)).

In principle, the TDCA allows all kind of trade-related disputes to be settled through this arbitration procedure. Yet, where a dispute would concern either party's WTO rights or obligations, it is normally not referred to the arbitration procedure (unless both parties agree to do so -Art. 104.10).

*In terms of procedures, the TDCA clearly differs from the MED agreements, as it sets out a clear time frame for the resolution of disputes. For trade-related issues, the agreement specifies that the period between the initial complaint and the implementation of the arbitrators' findings may not exceed 28 months, somewhat more than the WTO procedures for dispute settlement, which can officially last up to 18 months. In comparison with the more detailed agreements with Mexico and Chile, however, the TDCA does not include any measure that the complaining party can take if the*

*other party does not implement the arbitrators' decision in a satisfactory manner. Nor can the complaining party dispute the transitional period's maximum length of 15 months. The arbitrators have no formal role once their findings have been communicated to both parties and the Cooperation Council. As with the MED agreements, there are no provisions for the 'suspension of benefits', for instance by means of the imposition or reimposition of certain trade barriers.*

### The EU-Mexico Global Agreement

The Economic Partnership, Political Coordination and Cooperation Agreement, also known as the Global Agreement, between the EU and Mexico was signed in December 1997 and came into force in October 2000. The initial agreement postponed the establishment of dispute settlement provisions to a later decision by the Joint Council, which was taken in March 2000. This Joint Council decision (2/2000, Title VI) contains provisions that are much more detailed than those included in the MED and TDCA agreements. Not only does it provide a timetable for every procedure (which is much more elaborate than in the TDCA), it also contains a separate set of Model Rules of the Procedure (Annex XVI to the decision) as well as a Code of Conduct

**Table 1 Basic characteristics of dispute settlement procedures in EU FTAs**

	Substance of DSP		Arbitration panel				Time Frame	Suspension of benefits
	Paragraphs on DSP	Full coverage	Code of conduct	Rules on procedures	Fixed set of panellists	Amicus briefs		
MED agreements	4	✓						
TDCA with South Africa	10	*					✓	
Global Agreement with Mexico	39	**	✓	✓			✓	✓
Association Agreement with Chile	47	***	✓	✓	✓	✓	✓	✓
* Excluding matters relating to both parties' WTO rights and obligations ** Excluding matters relating to both parties' WTO rights and obligations; anti-dumping/countervailing measures (Art. 14), balance of payment difficulties (Art. 21); FTAs and CUs with third parties (Art. 23); and intellectual property matters (Art. 40) *** Excluding matters relating to both parties' WTO rights and obligations; and all provisions under the Title competition (Title VII)								

(Appendix I of Annex XVI), giving specific guidelines on the qualifications of and terms of reference and operational procedures for the arbitrators.

***In spirit the same...***

In spirit, the Global Agreement is similar to the above agreements in terms of the initial procedure for dealing with a potential dispute. Each party can request consultations after which the Joint Committee meets within 30 days of this request to 'endeavour to resolve the dispute promptly' (Art. 42.2-3). An interesting difference is the fact that the Joint Committee is an auxiliary body assisting the Joint Council, which implies that cooperation and coordination between Mexico, the EU Members States and the Commission has been institutionalised at the level of senior officials.

If the Joint Committee is not able to resolve a dispute within 45 days, either party may ask for the establishment of an arbitration panel (AP, Art. 43.1). After the first arbitrator has been proposed by the complaining party together with three candidates to chair the AP, the other party has to appoint a second arbitrator within 15 days and must also propose three candidates for the chairmanship (Art. 44.1). Hereafter, both parties have a further 15 days in which to jointly decide which candidate is to chair the panel (Art. 44.2). Should they not be able to reach a consensus, the chairman is chosen by lot from the six candidates (Art. 44.4).

***...but more detailed procedures...***

The procedure that the AP subsequently has to follow in its own deliberations, as well as in its hearings with the parties, is outlined in Annex XVI to the Joint Council decision. This Annex emphasises the independence of the arbitrators, who 'shall serve in their individual capacities and not as government representatives, nor as representatives of any organisation' (Art. 4). It also emphasises that the AP should comply with the Code of Conduct, which contains specific provisions on its impartiality. Other procedures - including the relevant time frames - are described in some detail. As for the burden of proving compliance with the agreement, the Annex states that '[a] Party asserting that a measure of the other Party is inconsistent with the provisions of the covered legal instruments shall have the burden of establishing such inconsistency' (Art. 35). On the other hand, '[a] Party asserting that a measure is subject to an exception under the covered legal instruments shall have the burden of establishing that the exception applies' (Art. 36).

***...two panel reports...***

Contrary to the other agreements, the Global Agreement provides for two reports to be issued by the AP. First, its findings, that follow from a majority vote, need to be submitted to the parties in the form of an initial report within three months of the formation of the AP (Art. 45.1), and in any event by no later than five months. Upon receiving the initial report, both parties have

15 days in which to submit their comments in writing, after which another 15 days are scheduled for the preparation of the final report (Art. 45.2). The difference with other agreements is that both parties can contribute input to the AP's final decision.

If the AP rules that the defending party indeed violated part of the agreement, the latter must inform the complaining party of its intention to implement the decision taken by the AP (Art. 46.2). If immediate compliance is impracticable, both parties 'shall endeavour' to agree on a reasonable period of time for implementation. If no agreement can be reached, Article 46.4 states that 'either Party may request the original arbitration panel to determine the length of the reasonable period of time, in the light of the particular circumstances of the case.' Hence, the provisions do not restrict the AP's role to the publication of a final report, but foresee its involvement in the implementation of its decision. Should the parties disagree on a reasonable period of time, the AP is required to rule on this matter within 15 days (Art. 46.4).

***....and rules on non-compliance***

If the defending party fails to comply with the AP's decision, if only in the other party's opinion, the AP is required to rule within 60 days on the effective compliance with the final report (Art. 46.5). If the AP's ruling is negative, the complaining party can decide to enter into consultations with the aim of agreeing on a mutually acceptable compensation award. Should no agreement for

**Figure 1 Overall assessment of DSP effectiveness**

	Length	Credibility	Procedures
	Short → Long	Weak → Strong	Few → Detailed
MED agreements	No time frame	■	■
TDCA with South Africa	■	■	■
Global Agreement with Mexico	■	■	■
Association Agreement with Chile	■	■	■

compensation be reached within 20 days, 'the complaining Party shall be entitled to suspend only the application of benefits granted under the covered legal instruments equivalent to those affected by the measure found to violate the covered legal instruments' (Art. 46.6). Hence, the complaining party can suspend benefits, but only those derived from the Global Agreement (i.e. the 'covered legal instruments'). The suspended benefits should be equivalent to those affected by the other party's violation of the agreement. Furthermore, suspension is temporary and is lifted once the other party desists from violating the agreement (Art. 46.9). If possible, the suspended benefits should come from the sector or sectors in which the other party has been found to violate the agreement. However, if this is not possible or practical, the complaining party is entitled to suspend benefits in other sectors (Art. 46.7).

After the complaining party has notified the other party of the benefits it plans to suspend (at least 60 days in advance), the other party can still have a final recourse to the AP, before whom both parties can defend their position. The AP is required to rule, within 45 days of the date of the request, as to whether the suspended benefits are proportionate to the loss caused by the other party (Art. 46.8). Should the benefits be suspended at a time when the defending party is implementing measures outlined by the final report, both parties may request the AP at any time to terminate or modify the suspension of benefits (Art. 46.10).

As the TDCA, the Global Agreement excludes arbitration proceedings that relate to the parties' WTO rights and obligations (Art. 47.3). It also excludes cases related to antidumping and countervailing measures (Art. 14), balance of payment difficulties (Art. 21), trade agreements with third parties (Art. 23), and intellectual property matters (Art. 40) from being referred to the agreement's dispute settlement procedure.

*Compared not only with the MED agreements, but also with the TDCA, the dispute settlement provisions in the Global Agreement are far more sophisticated. The formation of an arbitration panel, as well as the time frame and procedures in which it has to work, are all described in great detail. A separate Code of Conduct adds to the panel's credibility. Most importantly, the agreement goes beyond the panel's final*

*ruling in providing for situations in which one party regards the other party's implementation of its report as being unsatisfactory. Yet, disputes in a few trade and trade-related areas are excluded from the arbitration procedure.*

## The EU-Chile Association Agreement

To date, the latest free trade agreement concluded by the EU is the one signed with Chile in November 2002. Though the Association Agreement goes beyond trade to cover political dialogue and cooperation issues, its trade provisions stand out as the most advanced in EU bilateral agreements to date. Apart from trade in goods, the agreement covers services, investment, government procurement, intellectual property rights, competition, customs procedures and, in annexed agreements, wine and spirits, and sanitary and phytosanitary standards.

### *A faster procedure...*

The chapters on dispute settlement form no exception to this broad coverage. Apart from issues covered by the competition Title, the dispute settlement provisions apply to the entire Part IV of the agreement, which covers all trade and trade-related matters. Compared with other EU FTAs, the procedure for settling disputes is faster. As in the other agreements, it is stressed that 'The Parties [...] shall make every attempt through cooperation and consultations to avoid and settle disputes between them and to arrive at a mutually satisfactory resolution of any matter that might affect its operation' (Art. 183.1). Accordingly, any matter perceived to be in violation of the agreement is first referred to the Association Committee, which is similar to the Joint Committee with Mexico, the Cooperation Council with South Africa and the MED's Association Council. If no solution can be agreed upon within 45 days (or 90 days for financial services, under Art. 129.2), the complaining party may ask for an AP to be formed. Unlike the other agreements, the members of the AP are not selected on an *ad hoc* basis. The Association Agreement obliges the Association Committee to compile, within six months of the agreement's entry into force, a fixed list of 15 potential arbitrators. A third of those listed must have neither Chilean nor EU nationality, and it is only from these five

people that a chairperson may be selected (Art. 185.2).

### *...with preselected arbitrators...*

Subsequently, Article 185.3 provides for the AP to be established within three days. The chair of the Association Committee selects three arbitrators from the list: the first one is taken from the individuals nominated by the complaining party; the second one is taken from the individuals nominated by the defending party; and the third one (the chairperson) is taken from the individuals identified for that purpose under Article 185.2. Hence, the formation of an AP is not a cumbersome exercise because both the potential arbitrators and the chairperson are pre-selected by both parties. In the case of financial services, the chairperson is selected not from this list, but from a pre-selected group of five financial experts, albeit under identical conditions (Art. 129). As with the Global Agreement, the rules and procedures relating to the AP, as well as a Code of Conduct, are outlined in separate annexes to the Association Agreement (Annexes XV and XVI).

### *...public rulings and amicus curiae submissions...*

The AP must publish its findings and conclusions within three months, and in any event by no later than five months, of its establishment. These findings and conclusions are final (and are not preceded by an initial report, as is the case with the Global Agreement with Mexico). Hence, there is no scope for either party to contribute to the preparation of the final report by commenting on previous versions. However, both parties may submit written contributions at any time before the publication of the final report, whether solicited by the AP or not. Moreover, third parties are allowed to make so-called *Amicus curiae* submissions. These are unsolicited contributions by non-governmental actors claiming an interest in the dispute. Contributions of this kind can be submitted 'provided that they are made within ten days following the date of the establishment of the arbitration panel, that they are concise [...] and that they are directly relevant to the factual and legal issue under consideration by the panel' (Annex XV, Article 35). Although the AP is compelled to submit the contributions received under this rule to the parties for comment, its final ruling is not obliged to

address the arguments made in such contributions (Annex XV, Article 37).

In contrast with the other agreements, the Association Agreement states explicitly that the AP's ruling should be made public (Art. 187.1). Even hearings can be held in public, though this requires both parties' explicit consent. Upon the publication of its final report, Article 188.3 states that:

'Within 30 days after the ruling has been transmitted to the Parties and the Association Committee, the Party complained against shall notify the other Party:

- (a) of the specific measures required for complying with the ruling;
- (b) of the reasonable time frame for doing so; and
- (c) of a concrete proposal for a temporary compensation until the full implementation of the specific measures required for compliance with the ruling.'

**...and temporary compensation**

Hence, unlike other agreements, explicit provision is made for the temporary compensation of the affected party. Should the parties disagree on any of the points mentioned in the Article 188.3, the AP may be requested to rule, within 45 days, on the conformity of the measures proposed by the

defending party with the final report (Art. 188.4). Also, it may be invoked later on by the complaining party, should it be unsatisfied with the implementation of measures that are intended to put an end to the violation of its obligations (Art. 188.5). Again, the deadline for a ruling is 45 days.

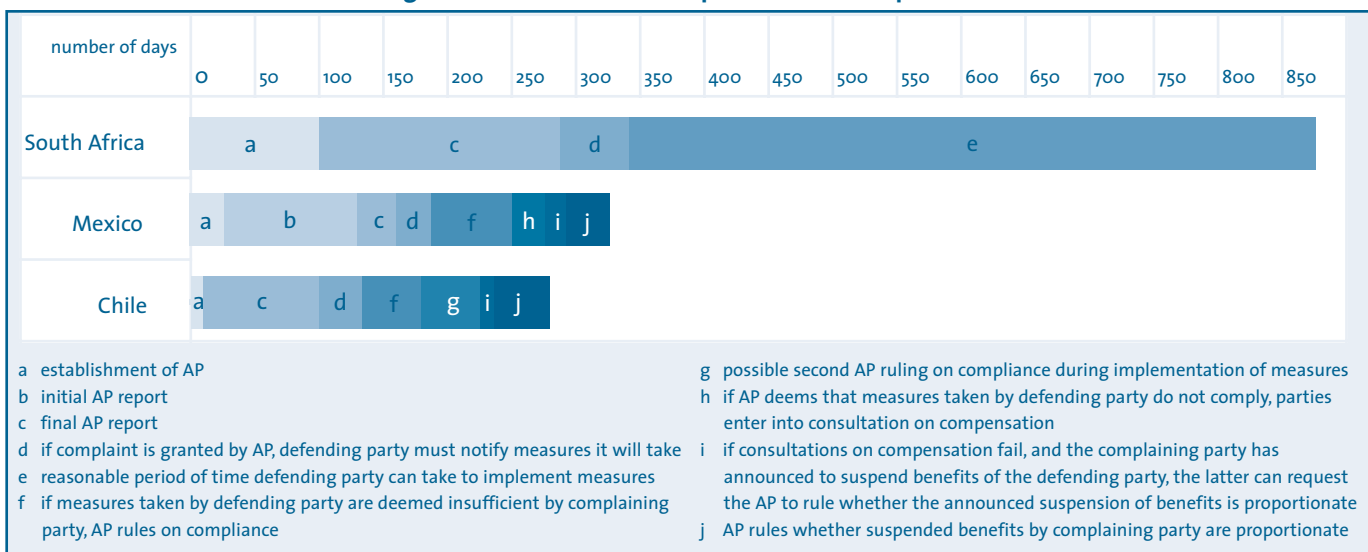
Should the complaining party refer to either of the two above articles, and provided that the AP rules in favour of the complainant, Article 188.6 states that '[...] the complaining Party shall, if no agreement on compensation has been found, be entitled to suspend the application of benefits granted under this Part of the Agreement equivalent to the level of nullification and impairment caused by the measure found to violate this Part of the Agreement.' As in the case of the Global Agreement, the Party that is to suspend benefits should in principle do so in those areas in which the other Party has breached the agreement. However, it may do so in other areas if this is considered not to be 'practicable' or 'effective'. Furthermore, 'in the selection of the benefits to suspend, priority must be given to those which least disturb the functioning of this Agreement' (Art. 188.7). The suspension must be temporary and must be lifted as soon as the other party desists from violating the agreement (Art. 188.8). Within five days after the complaining party has announced the suspension of benefits, the other party may call upon the AP to rule (again, within 45 days) on whether the suspended benefits are tantamount to the nullification and

impairment caused by its own original violation of the agreement. It may also do this at any time when the benefits have already been suspended (Art. 188.10).

As in the TDCA and the Global Agreement, disputes relating to WTO rights and obligations have to be arbitrated according to WTO procedures. Art. 189.4(c) adds that if a violation of the Association Agreement is equivalent in substance to a WTO obligation, preference should be given to WTO rules and procedures over those of the agreement (unless both parties agree otherwise). Furthermore, the provisions on competition (Title VII) are the only ones that remain excluded from the agreement's arbitration procedure.

*In terms of dispute settlement, the Association Agreement with Chile may be considered the most advanced of the bilateral trade agreements concluded by the EU to date. The kind of provisions it includes resemble those of the Global Agreement with Mexico, the main difference being that procedures are more detailed and the dispute settlement process is faster. An important and novel element is that the arbitrators are selected beforehand, thus reducing the risk that politics will delay proceedings once a party has requested the establishment of an AP. In itself, this legalistic character of dispute settlement may help to deter either party from violating the agreement.*

**Figure 2 Time frame in dispute settlement procedures**



### From politics to procedures?

In line with the spirit of the WTO dispute settlement mechanism, all four types of EU FTAs stress the obligation resting on both parties to engage in consultation among either senior officials or ministers (or both), before taking recourse to arbitration. However, the agreements differ considerably in terms of the likelihood of a valid complaint being successful at this initial stage. The MED agreements provide for the establishment of an AP, but since both time frame and procedures are lacking, the defending party might not easily be convinced to concede in the consultation phase. Instead, the party claiming to be damaged by a measure taken by the other party could be deterred from engaging in the arbitration phase because the political costs could be perceived as being higher than the gains that could be derived from arbitration. Under the TDCA, the danger of the outcome being determined by political bargaining power is not as great as under the MED agreements. However, despite the presence of a clear time frame, the AP's credibility is compromised by its inability to actually enforce its decisions. This means that the resolution of a dispute depends mainly on political will (rather than formal procedures), with no independent arbitration and implementation.

In this respect, the latest agreements with Mexico and Chile are much more elaborated. The consultation phase is likely to be more fruitful because retaliation is more imminent

once a dispute is taken to the arbitration panel. Though the decision to resort to arbitration or retaliation remains a political one (as it is one of the parties, rather than the AP, that takes this decision), the procedures in place are of a non-political nature. The detailed procedures and Code of Conduct applying to the operation of the AP help to safeguard the procedural and legal character of the dispute. Especially in the case of Chile, where a fixed board of impartial (and in part non-national) arbitrators are appointed in advance of any dispute, such procedures prevent a dispute from being settled by the mere exertion of political or economic strength. Arguably, this depoliticisation works in favour of a more coherent and thorough enforcement of the terms of the agreement.

On the other hand, the provisions of the agreements with Mexico and Chile are more demanding for the parties in terms of human resources and institutional requirements. Their sophistication requires both parties to be more aware of a dispute's potential legal implications. Furthermore, the increased openness of procedures to the public at large has its own merits and costs. The inclusion of *Amicus curiae* in the Association Agreement with Chile, for example, deserves further analysis. Within the current Doha Round, there is wide disagreement about the possible inclusion of such a provision in a new multilateral Dispute Settlement Understanding. Developing countries fear that third parties

Acronyms	
AP	Arbitration panel
DSP	Dispute settlement procedures
DSU	Dispute settlement understanding
EU	European Union
FTA	Free trade agreement
GATT	General Agreement on Tariffs and Trade
MED	Mediterranean countries
TDCA	Trade Development and Cooperation Agreement
WTO	World Trade Organization

in developed countries are much better resourced to embark on an arbitration process than their counterparts in developing countries. On the other hand, increased transparency and public awareness of disputes involving developing countries could also enhance their political bargaining power when consulting with their trade partners.

**Table 2 Cases excluded from dispute settlement procedures in the agreements**

MED agreements	none
TDCA with South Africa	<ul style="list-style-type: none"> <li>arbitration proceedings relating to parties' WTO rights and obligations</li> </ul>
Global Agreement with Mexico	<ul style="list-style-type: none"> <li>arbitration proceedings relating to parties' WTO rights and obligations</li> <li>antidumping and countervailing measures</li> <li>balance of payment difficulties</li> <li>trade agreements with third parties</li> <li>provisions on intellectual property issues</li> </ul>
Association Agreement with Chile	<ul style="list-style-type: none"> <li>arbitration proceedings relating to parties' WTO rights and obligations</li> <li>provisions on competition issues</li> </ul>

## Selected publications and information sources on dispute settlement

### Publications

- Gallagher, Peter (2002), 'Guide to Dispute Settlement', Kluwer Law International, September 2002.
- Gabilondo, José Luis Pérez (2001), 'Developing Countries in the WTO Dispute Settlement Procedures; Improving Their Participation', *Journal of World Trade*, Vol. 35, No. 4, August 2001.
- Petersmann, E. Ulrich (2003), 'WTO Negotiators Meet Academics: The Negotiations on Improvements of the WTO Dispute Settlement System', *Journal of International Economic Law*, Vol. 6., No. 1, March 2003.
- Roessler, Frieder (2003), 'Special And Differential Treatment Of Developing Countries Under The WTO Dispute Settlement System', ICTSD Occasional paper, February 2003, [www.ictsd.org/dlogue/2003-02-07/Roessler.pdf](http://www.ictsd.org/dlogue/2003-02-07/Roessler.pdf)
- Taylor, J. Michael (2002), 'Dispute Settlement Under the FTAA: An Apparent Melding of WTO, NAFTA and MERCOSUR Approaches', *Journal of International Arbitration*, Vol. 19, No. 5, October 2002.

### Information sources

- [www.acp-eu-trade.org](http://www.acp-eu-trade.org)
- Doha Round Briefing Series: update of Doha Round negotiations, [www.iisd.org/trade/wto/doha\\_briefing.asp](http://www.iisd.org/trade/wto/doha_briefing.asp)
- Foreign Trade Information System (SICE): information database covering dispute settlement in multilateral agreements, as well as regional and bilateral agreements in the American hemisphere, [www.sice.oas.org/cp\\_disp/English/dsm\\_toc.asp#secIV](http://www.sice.oas.org/cp_disp/English/dsm_toc.asp#secIV)
- UNCTAD Project on Dispute Settlement: <http://r0.unctad.org/disputesettlement/index.htm>
- WorldTradeLaw.net: online source for world trade law, [www.worldtradelaw.net/articles.htm](http://www.worldtradelaw.net/articles.htm)
- WTO Dispute Settlement Gateway: [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)

### InBrief series on trade for 2004-2005

The *InBrief* series Comparing EU Free Trade Agreements is aimed at trade negotiators, policy makers, officials and experts in gathering a better technical insight into the evolution of EU trade agreements and the approaches adopted by the EU in negotiating these agreements. This might be of particular interest to actors involved with or interested in the current and forthcoming negotiations on trading agreements with the EU, such as the African, Caribbean and Pacific (ACP) countries with Economic Partnership Agreements (EPAs). A complementary and parallel series on EPAs, called *Economic Partnership Agreement InBriefs*, provides insights into the main issues faced by the ACP, and discusses options for the negotiations with the EU.

Topics included in the ECDPM *InBrief* series on trade for 2004-2005 are:

- Agriculture
- Anti-dumping and Safeguards
- Competition Policy and State Aid
- Dispute Settlement
- Fisheries
- Government Procurement
- Investment
- Rules of Origin
- Sanitary and Phytosanitary Standards (SPS)
- Services
- Special and Differential Treatment
- Technical Barriers to Trade (TBT)
- Trade Facilitation
- WTO Compatibility

The *InBriefs* are available online at [www.acp-eu-trade.org](http://www.acp-eu-trade.org), [www.ecdpm.org](http://www.ecdpm.org) and [www.ileapinitiative.com](http://www.ileapinitiative.com)

This *InBrief* series on trade is an initiative by the European Centre for Development Policy Management (ECDPM), under the editorial supervision of Sanoussi Bilal ([sb@ecdpm.org](mailto:sb@ecdpm.org)) and Stefan Szepesi.

This *InBrief* on dispute settlement has been developed in cooperation with International Lawyers and Economists Against Poverty (iLEAP).

**iLEAP**

INTERNATIONAL LAWYERS AND  
ECONOMISTS AGAINST POVERTY

ILEAP  
180 Bloor Street West  
Suite 904  
Toronto, ON, Canada, M5S 2V6

Tel +1 (0)416 946 3107  
E-mail [ileap@ileapinitiative.com](mailto:ileap@ileapinitiative.com)

Website [www.ileapinitiative.com](http://www.ileapinitiative.com)

*'InBrief' provides summarised background information on the main policy debates and activities in ACP-EC cooperation. These complementary summaries are drawn from consultative processes in which the European Centre for Development Policy Management (ECDPM) engages with numerous state and non-state actors in the ACP and EU countries. The Centre is a non-partisan organisation that seeks to facilitate international cooperation between the ACP and the EC. Information may be reproduced as long as the source is quoted.*

The ECDPM acknowledges the support it receives for the *'InBrief'* from the Department for International Development in the United Kingdom, the Ministries of Foreign Affairs in Sweden, Finland and the Netherlands, the Directorate-General for Development Cooperation in Belgium, the Swiss Agency for Development and Cooperation and the Instituto Português de Apoio ao Desenvolvimento in Portugal.

European Centre for Development Policy Management  
Onze Lieve Vrouweplein 21  
NL-6211 HE Maastricht  
The Netherlands

Tel +31 (0)43 350 29 00 Fax +31 (0)43 350 29 02  
[info@ecdpm.org](mailto:info@ecdpm.org) [www.ecdpm.org](http://www.ecdpm.org)

ISSN 1571-7542