



*European
Commission*

Dispute Settlement

in bilateral trade and economic agreements

DG TRADE – Unit F.2

Dispute Settlement – Generalities

- Dispute: *“a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion by one party is met with refusal, counter-claim or denial by another”*
- Dispute Settlement: Agreed mechanism to resolve divergences concerning the application of treaty rules
- Clarification and enforcement of existing rules – not development of new provisions

Main Diplomatic Means of Dispute Settlement

- Negotiation → absence of a neutral third party which could suggest or even impose a solution
- Good Offices → a neutral third party intervenes to assist the parties in reaching agreement – provisions of “logistical” support
- Conciliation → at the request of one or both disputing parties; direct participation of a third-party in the discussions and negotiations between the parties; the intervention of the outside person is usually put on a formal legal and institutionalized basis (e.g. a conciliation commission)
- Mediation → intervention by a third party -with the consent of the disputing parties- who can formulate non-binding proposals on the basis of existing law but also considerations “*ex aequo et bono*”

Legal Means of Dispute Settlement (1)

- Arbitration: The process of resolving disputes on the basis of respect for law through binding decisions by arbitrators appointed by the parties to hear a particular case

- Arbitration presupposes
 - (A) an agreement among the parties to the dispute, which
 - (B) defines the form of arbitration,
 - (C) the selection of arbitrators,
 - (D) the terms of reference,
 - (E) the basis of the decision, and
 - (F) the effect of the award

Legal Means of Dispute Settlement (2)

- Rule-based system: decisions in conformity with long-term obligations and interests, as defined in mutually agreed legal rules of a permanent nature
- Binding decisions
- Avoidance of the various “risks” of diplomatic dispute settlement: mutual consent, power balance, timescale
- Security and Predictability
- Equitable, fast, effective system

Evolution of EU Practice in Bilateral Agreements(1)

- The “traditional” diplomatic approach
 - Prior to year 2000
 - Decisions by consensus by Inter-Governmental Council
 - Legal adjudication possible through arbitration, but: (a) consensus requirement, (b) no procedure/timetable for selection of arbitrators, (c) no compliance procedures

Evolution of EU Practice in Bilateral Agreements(2)

- Towards a “legalised” model of adjudication:
 - Cotonou Agreement → Article 98: procedure for the appointment of arbitrators
 - EU/South-Africa TDCA → time limits for the appointment of arbitrators/decisions/compliance
- EU/Mexico, EU/Chile FTAs:
 - Quick process, with detailed procedural rules
 - Automatic procedure for the selection of arbitrators
 - Compliance procedures

European Commission's approach to Dispute Settlement in EPAs

- EPAs to follow the general trend towards more “legalised” dispute settlement systems...
- ... While safeguarding the possibility to have recourse to diplomatic means of settlement
- Envisaged revision and upgrade of the Dispute Settlement provisions in the EU/SA agreement

Dispute Settlement Chapters in EU Trade Agreements: Structure and Main Elements

1. Objective and Scope. Relationship with Dispute Settlement in other fora
2. Dispute Prevention → Consultations; Mediation (by mutual agreement)
3. Arbitration procedure
 - a. Appointment of Arbitrators (How many? Which qualifications?)
 - b. The basis of the decision : Applicable Law
 - c. Terms of Reference and Rules of Procedure
 - d. Compliance with the arbitration award (length of implementation period; “compliance” arbitration; temporary compensation; suspension of benefits)

Dispute Settlement and Technical Assistance

- General trend towards rule-based DS systems → Synergies:
 - WTO courses and training
 - UNCTAD workshops
 - Training Programmes organised by the European Commission
 - Regional Centres: e.g. Trade Law Centre for Southern Africa (TRALAC)