



Advisory Centre on WTO Law

Centre Consultatif sur la Législation de l'OMC

Centro de Asesoría Legal en Asuntos de la OMC

# WTO and RTA Dispute Settlement: Implications for EPAs

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- The Advisory Centre on WTO Law (ACWL) is an intergovernmental organization with the objective of providing legal advice, support in WTO dispute settlement proceedings and training on WTO law to developing countries and least-developed countries.
- The ACWL has been involved in one fifth of all disputes in the WTO Dispute Settlement Mechanism since 2001.
- The ACWL is an independent and impartial organization.



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- An objective of the tralac annual conference is to discuss "future strategies of the SADC-7 and ESA groups" in their negotiations of EPAs.
  
- This presentation will examine the important issue (under the heading of "legal and institutional issues") of Dispute Settlement in EPAs and will pose the following questions:
  1. **Would EPA Dispute Settlement benefit SADC-7 and ESA countries ("ESA")**
  2. **Who is the likely demandeur for EPA Dispute Settlement?**
  3. **How does the WTO Dispute Settlement Mechanism interact with RTA/EPA Dispute Settlement Mechanisms?**
  4. **If desired, what form should EPA Dispute Settlement take?**



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## Question 1: Would EPA Dispute Settlement benefit ESA countries?

- In general terms, parties include DS mechanisms in international trade agreements in order to legally secure the results of their negotiations.

*Where a party acts inconsistently with a trade agreement, a complainant can obtain a ruling that the inconsistency be removed or that the complainant be paid compensation or given a right of retaliation.*

- DS achieves 2 results: (1) allows parties to legally enforce their rights; and (2) acts as a mechanism to ensure that parties comply with their obligations.

*The first result is clearly of benefit. The second result may also be of benefit -- it can assist governments in complying with their obligations under the trade agreement (often policies in the national interest) in the face of pressure from minority domestic interest groups.*

Question 1: Would EPA Dispute Settlement benefit ESA countries? (cont.)

- **In an EPA context, DS would legally secure the rights of ESA countries contained in the EPAs.**
- By way of illustration, the right of ACP preferential access into the EU market (which commenced with the Lome Conventions and is currently provided under the Cotonou Agreement) could be legally secured through EPA Dispute Settlement.
- The security of this preferential market access is important as businesses are less likely to make long term investments in the ESA region if that access is not assured.
- This has been recognized by the European Commission:

*"... security [regarding preferential market access] will facilitate the transfer of technology through triggering long term investment."*

*E.g. "European flower traders have expressed an active interest in increasing investment in South East Africa. However, they are now waiting for further information on ... EPA negotiations, as this will have a long-term impact on the security of their investment, both in terms of business environment and duty free access into the EU."*

Source: *EPAs: Means and Objectives (European Commission), pp. 5-6.*



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- EPAs will make preferential market access legally secure from challenge in WTO dispute settlement by *other* WTO Members.

*EPAs consistent with GATT Article XXIV will ensure that trade preferences remain consistent with WTO law after the Doha GATT Article I Waiver lapses at the end of 2007.*

**HOWEVER:**

- EPAs will *not* make the preferential market access legally secure from "internal EU decisions" to reduce or remove those preferences *unless secured through EPA Dispute Settlement*.\* (\*unless bound in the EC schedule)

Therefore, only if there is EPA Dispute Settlement, would it be correct to state:

*"In this [EPA] framework, preferences will not depend on purely internal EU decisions or WTO politics anymore."*

*Source: EPAs: Means and Objectives (European Commission), p. 5.*

- Preferential market access is just one of the many benefits from EPAs that could be legally secured through EPA Dispute Settlement.



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## Question 2: Who is the likely demandeur for EPA Dispute Settlement?

"EPAs ... should no longer be conceived as trade agreements in the conventional sense where both sides are seeking mutual advantage ... The purpose of EPAs is to promote regional integration and economic development"

*Peter Mandelson, European Commissioner for Trade, at LSE on February 2005*

- In legal theory, where an agreement is not to mutual advantage, then the party that gives up more rights has less incentive to seek a dispute settlement mechanism.
- The situation is nuanced in international trade law, where a dispute settlement mechanism may assist governments to counter domestic political pressures to deviate from commitments in EPAs.
- It would appear that if ESA countries want an EPA Dispute Settlement Mechanism, the onus will be on them to push for it in the negotiations.



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### Question 3: How does the WTO Dispute Settlement Mechanism Interact with RTA Dispute Settlement Mechanisms?

The EC and many ESA countries are WTO Members.

- Question: Can Disputes under the EPAs be enforced through the WTO Dispute Settlement Mechanism?
- Answer: Depends on whether the specific provisions of the EPAs overlap with those of the WTO Agreements or not.





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## Situation 1: The provisions of the EPA do not overlap with those of the WTO Agreements (e.g. the margins of trade preferences, competition disciplines, etc.)

- *Mexico – Tax Measures on Softdrinks and Other Beverages* (Appellate Body Report, WT/DS308/AB/R, 6 March 2006)
- The WTO Panel and Appellate Body refused to examine the consistency of the United States' actions with the North American Free Trade Agreement (NAFTA):  
  
"We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes." (para. 56)  
  
Requesting a determination whether NAFTA had been violated would mean that "WTO Panels and the Appellate Body would thus become adjudicators of non-WTO disputes... this is not the function of panels and the Appellate Body as intended by the DSU." (para. 78).

## Situation 2: The provisions of the EPA overlap with those of the WTO Agreements (e.g. National Treatment obligations)

- Unless there are "special features" (such as a choice of forum clause), then the WTO Panel and Appellate Body will examine the issue under the WTO DS even if it is also the subject of RTA DS:

- *Mexico – Tax Measures on Softdrinks and Other Beverages* (Appellate Body Report, WT/DS308/AB/R, 6 March 2006)

Mexico requested that the Panel decline to exercise jurisdiction in WTO dispute settlement "in favour of an Arbitral Panel under Chapter 20 of the NAFTA."

The Panel and Appellate Body held that they "had no discretion to decline to exercise its jurisdiction *in the case before it*." (para. 57)

- *Argentina – Definitive Anti-dumping Duties on Poultry from Brazil* (Panel Report, WT/DS241/R, 22 April 2003)

Argentina requested the WTO Panel to decline to exercise jurisdiction as the matter had already been examined in favour of Argentina in a MERCOSUR Arbitral Tribunal.

The Panel found nothing in the details of the MERCOSUR dispute settlement mechanism (the Protocol of Brasilia) that would restrict Brazil bringing the subsequent proceedings in the WTO.

- WTO jurisprudence leaves open the possibility that certain "special features" / "other circumstances" could allow a WTO panel to decline jurisdiction over a dispute being examined in RTA DS:
  - The Appellate Body in *Mexico – Softdrinks* expressly left open this possibility stating that:

"we express no view as to whether there may be *other circumstances* in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it." (para. 54).
  - The Panel in *Argentina – Poultry* also impliedly left open this possibility.

■ **What could these "other circumstances" / "special features" be?**

➤ A choice of forum clause

E.g. The Exclusion Clause of Article 2005.6 of the NAFTA:

*"Once DS has been initiated under [NAFTA] Article 2007 or WTO DS, the forum selected shall be used to the exclusion of the other, ..."*

E.g. The Choice of Forum Clause of Article 1 MERCOSUR Protocol of Olivos:

*"The Complainant shall choose the choice of forum ... Once selected, that forum shall be used to the exclusion of the other, ..."*

➤ The WTO dispute examines the same matter

- Res judicata ?

- Estoppel ?

*Note: Even if these other features do not preclude WTO jurisdiction, they may result in violations of the RTA.*

## Question 4: What form should EPA Dispute Settlement take?

Some considerations when structuring an EPA Dispute Settlement Mechanism:

- Choice of Forum Clause:

*Do ESA countries want to retain their rights to take disputes to the WTO?*

- Adopt the best elements of the WTO Dispute Settlement System:

*WTO DS allows for political negotiations (e.g. consultations, good offices, mediation), but once these have been exhausted allows the dispute to be resolved legally not politically.*

- Selection of Panellists:

*This should not be controlled entirely by the parties. E.g. in Mexico-Softdrinks, Mexico claimed that the United States had blocked the formation of a NAFTA Panel to hear its claims regarding market access for Mexican sugar by refusing to appoint NAFTA panelists.*

- Generally DS is neutral and therefore there is no need for Special and Differential Treatment. Nonetheless, S&D may be beneficial in relation to:

- Costs
- Forum
- Language
- Legal fees