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Working Paper

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WTO Staff Working Paper, No. ERSD-2006-09

Provided in Cooperation with:

World Trade Organization (WTO), Economic Research and Statistics Division, Geneva

Suggested Citation: Ramírez Robles, Edna (2006) : 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?, WTO Staff Working Paper, No. ERSD-2006-09, World Trade Organization (WTO), Geneva,
<https://doi.org/10.30875/b37fb604-en>

This Version is available at:

<https://hdl.handle.net/10419/72067>

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World Trade Organization
Economic Research and Statistics Division

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IN EUROPEAN UNION FREE TRADE AGREEMENTS**
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Manuscript date: November 2006

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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?

Edna Ramírez Robles*

Abstract: In this paper, interpretation and application dispute settlement provisions of European Union (EU) Free Trade Agreements (FTAs) signed between 1963 and 2006 are analysed. This will be through the two models of Dispute Settlement in International Law: the political and adjudicative. Political elements of dispute settlement mechanisms in Public International Law and General Agreement of Tariffs and Trade (GATT) served to establish those of the EU FTAs. Adjudicative and quasi-adjudicative elements of dispute settlement mechanisms of Public International Law and World Trade Organization (WTO) Law were used as parameters to set up those of the EU FTAs. These parameters also helped to define a new and unique hybrid model. The features of this model were found in Agreements with trade issues other than FTAs. It is possible, however, for future FTAs to incorporate them. The hybrid model is based on an adjudicative framework and includes both political and adjudicative elements. In conclusion, it was found that even though WTO Members incorporated adjudicative elements in the Dispute Settlement Understanding (DSU), the EU did not incorporate them bilaterally for a further five years. Furthermore, since the creation of the DSU in 1995, the EU has established more FTAs based on a political model than on a quasi-adjudicative. Consequently, the quasi-adjudicative dispute settlement model has not represented a clear trend in EU FTAs.

Keywords: Dispute Settlement, Adjudication, European Union, Free Trade Agreements, GATT, WTO.

JEL Classification: - (International Trade Law)

Summary: INTRODUCTION, I. POLITICAL MODELS OF DISPUTE SETTLEMENT. II. POLITICAL MODEL OF DISPUTE SETTLEMENT IN EU FTAs. III. ADJUDICATIVE AND QUASI-ADJUDICATIVE MODELS OF DISPUTE SETTLEMENT. IV. QUASI-ADJUDICATIVE MODEL OF DISPUTE SETTLEMENT IN EU FTAs. V. HYBRID MODEL OF DISPUTE SETTLEMENT IN EU AGREEMENTS WITH TRADE ISSUES. VI. EU FTAs NOT YET IN FORCE: WHAT WILL BE THE TREND FOR FUTURE EU FTAs? CONCLUSION, REFERENCES.

INTRODUCTION

This paper explores whether the EU has followed the trend set by the WTO DSU in adopting a quasi-adjudicative dispute settlement model in its FTAs.¹ It will point out that the quasi-adjudicative model of the DSU influenced dispute settlement provisions in the EU FTAs' until 2000 when the EU-Mexico FTA entered into force.

Public International Law differentiates between political and adjudicative peaceful dispute settlement means.² This division is supported by two criteria; the first is the political or legal basis in which the actors use to solve their disputes. The second is whether or not the decision is binding and definitive.³ According to the principle of "free choice of means", the parties can use these means to solve their disputes by creating their own mechanisms.⁴

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I will like to express my deepest gratitude to Patrick Low, María J. Pereyra Friedrichsen, Gabrielle Marceau and Luis Pérez-Prat Durbán for encouraging the writing of this article and their invaluable comments on the various drafts. My special thanks to Oliver (Sacha) Propper for his extraordinary editorial reviews. I will also like to thank María Verastegui, Sergio Ramírez Robles and Hannah Irfan for their support. Please note, all errors and omissions in this article are solely mine. The opinions expressed in this paper should be attributed to the author. They are not meant to represent the positions or opinions of the WTO and its Members and are without prejudice to Members' rights and obligations under the WTO. An earlier version of this paper was published at <http://www.reei.org>.

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¹ A FTA is a contractual arrangement that encompasses mutual preferential treatment between States, with regard to the trade of goods and/or services originating in such territories, by eliminating duties and other restrictions to commerce. Most contemporary agreements that are titled FTAs include goods and/or services, and frequently cover issues such as investment, government procurement and competition. FTAs also contain provisions like mutual recognition of technical standards, anti-dumping, subsidies, intellectual property, etc. See S. Woolcock, "A framework for assessing regional trade agreements: WTO-plus" in *Regionalism, Multilateralism and Economic Integration, the recent experience*, Gary P. Sampson and Stephen Woolcock (eds.) (Hong Kong, The United Nations University, 2003), pp.18-31.

² See A. Remiro Brotons y R.M. Riquelme Cortado, J. Diez-Hochleitner, E. Orihuela Calatayud y L. Pérez-Prat Durbán, *Derecho Internacional* (Madrid, McGraw-Hill, 1997), p.827; J. A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, novena edición (Madrid, Tecnos, 2003), p. 566; J. G. Merrills, *International Dispute Settlement*, third edition (Cambridge, Cambridge University Press, 1998), p. 1-169; L. Caflisch, *Cent ans de Règlement Pacifique des Différends Interétatiques*, Académie de Droit International de la Haye, 2002, Tome 288 (2001), 467p.

³ See A. Remiro Brotons y R.M. Riquelme Cortado, J. Diez-Hochleitner, E. Orihuela Calatayud y L. Pérez-Prat Durbán, *Derecho Internacional*, supra (note 2), p.831.

⁴ This principle is stated in Article 33 paragraph one of the Charter of the United Nations.

The nature of these mechanisms can be either political or adjudicative, or a combination of both (i.e. quasi-adjudicative).⁵

In the field of Public International Trade Law, at a multilateral level, the CONTRACTING PARTIES of the GATT⁶ designed procedures to solve their disputes. Between 1947 and 1994, the political elements of these provisions evolved towards adjudication. During this time, States also bilaterally designed their own mechanisms to solve disputes of interpretation and application in their FTAs.⁷ In 1995, with the creation of the WTO, a new quasi-adjudicative dispute settlement system was born, i.e. the DSU. The DSU influenced many countries to include quasi-adjudicative models of dispute settlement into their FTAs.⁸ It took, however, a further five years before the EU adopted a similar position.

For almost 40 years the EU included political dispute settlement models in its FTAs. Then, in 2000, a quasi-adjudicative dispute settlement model was introduced through the EU-Mexico FTA. This paper chronologically analyses dispute settlement models of EU FTAs. It explores their evolution from 1963 until the present day negotiations. Furthermore, it classifies EU FTAs as either political or quasi-adjudicative through their dispute settlement models. Lastly, it creates a new classification for a dispute settlement model which is found in Agreements with different levels of economic integration other than FTAs. Due to its adjudicative framework composed of political and adjudicative elements, this paper defines this classification as a hybrid model. The purpose of this paper, therefore, is to identify whether or not the quasi-adjudicative model marked a particular trend or if it should be considered as just another model.

In addition to the introduction, conclusion and references, this article is divided into six chapters. The first recognizes the main characteristics of a political dispute settlement model in Public International Law and GATT Law. The second identifies the political dispute settlement model in EU FTAs signed before and after the WTO was established. The third analyses Public International Law and WTO adjudicative elements of their dispute settlement models. The fourth examines the EU FTAs' quasi-adjudicative model of dispute settlement. The fifth defines a hybrid model of dispute settlement in EU Agreements with trade issues. The sixth identifies the not yet in force EU FTAs that are currently under negotiation.

⁵ For more on procedures of international instruments that differ from the United Nations See *Handbook on the Peaceful Settlement of Disputes between States* (New York, United Nations, 1992), pp.135-154.

⁶ With the establishment of the WTO, the CONTRACTING PARTIES of the GATT became Members of the WTO.

⁷ For the purpose of this article, only interpretation and application provisions of Dispute Settlement in Free Trade Agreements are going to be explored. Provisions of dispute settlement of trade defence measures are not going to be taken into account.

⁸ Canada, United States and Mexico are examples of dispute settlement provisions which are incorporated in Chapter XX of the North American Free Trade Agreement.

I. POLITICAL MODELS OF DISPUTE SETTLEMENT

1. Political model of dispute settlement in Public International Law

This section explores the main elements of a political model of dispute settlement in Public International Law. This model is 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.⁹ Additionally, good offices¹⁰ and consultations¹¹ are also considered as part of this group.¹²

All of these means have their own particular elements. For example, while negotiation is directly in between the parties, for inquiry, mediation and conciliation a third authority intervenes. This is also illustrated when in inquiry, mediation and conciliation a third authority proposes a solution, however, 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.).

This paper will stress the two elements which are common to all. The first is the option for the Parties to solve their disputes without a legal basis through political opportunity. The second is that the issued recommendation becomes compulsory only if the Parties involved agree on it.¹³ Consequently, if these elements are included in a dispute settlement mechanism, it will be considered as a political model of dispute settlement in Public International Law (as illustrated in diagram 1):

⁹ For a deeper knowledge of each one 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; A. Remiro Brotons y R.M. Riquelme Cortado, J. Diez-Hochleitner, E. Orihuela Calatayud y L. Pérez-Prat Durbán, *Derecho Internacional*, supra (note 2), p.864.

¹⁰ 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.

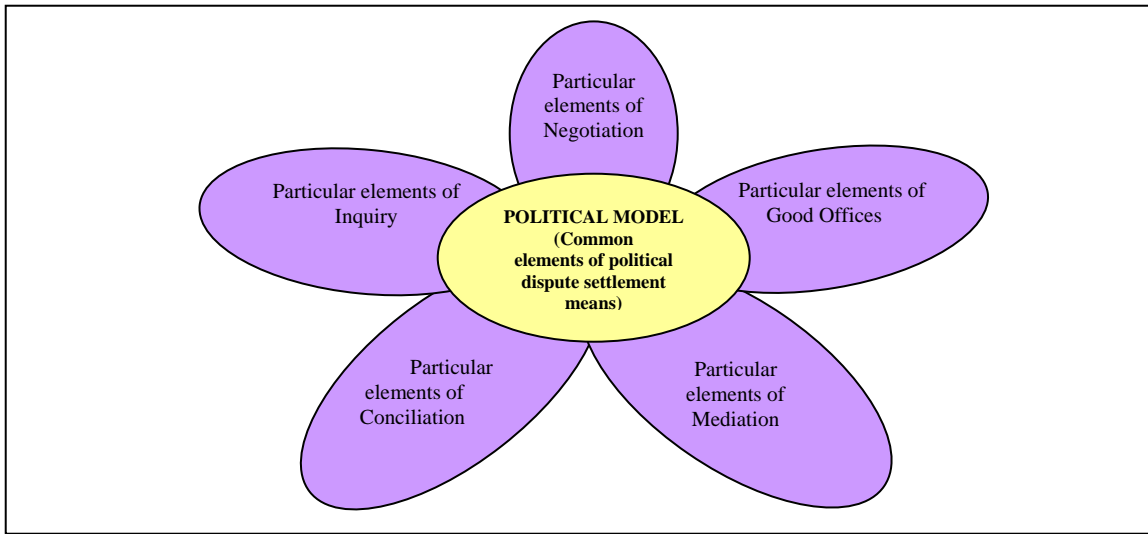
¹¹ Consultations are considered a type of negotiation which have the added value of giving Parties the possibility of gathering information before the dispute starts. See J. G. Merrills, *International Dispute Settlement*, supra (note 2), pp. 3-8.

¹² See *Handbook on the Peaceful Settlement of Disputes between States*, supra (note 9), p. 10.

¹³ See supra (note 2).

POLITICAL & QUASI-ADJUDICATIVE DISPUTE SETTLEMENT MODELS
IN EUROPEAN UNION FREE TRADE AGREEMENTS

Diagram 1. Political Model of Dispute Settlement in Public International Law



Signatory Parties to International Agreements agree on peaceful means as is appropriate to the circumstances and the nature of their dispute.¹⁴ Due to the Public International Law principle of free choice of means¹⁵, countries have designed their own mechanisms to solve disputes. Trade is one of the fields in which the Parties have designed mechanisms at both a multilateral level, as in the GATT and WTO, and at a bilateral level, as in the FTAs.

2. Political model of dispute settlement in GATT Law (1947 to 1994)

In the GATT, between 1947 and 1994, disputes were solved using Articles XXII and XXIII which regulate the consultations and the nullification or impairment of a benefit respectively.¹⁶ The disputes were dealt within the framework of working parties.¹⁷ Later on, for cases when the dispute was not solved through consultative procedures, they also agreed

¹⁴ See *Handbook on the Peaceful Settlement of Disputes between States*, supra (note 9), p. 7.

¹⁵ Article 33 paragraph one of the Charter of the United Nations.

¹⁶ For a deeper analysis of the preparatory work and the survey of practice and procedures of these two articles See J. Jackson, *World Trade and the Law of the GATT* (USA, The Bobbs-Merrill Company, Inc., 1969), pp.166-187.

¹⁷ 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. Despite 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 R. Hudec, *Adjudication of International Trade Disputes* (Great Britain, Trade Policy Research Centre, 1978), pp. 6-7 and 19-20, and also, R. Hudec, *The GATT Legal System and World Trade Diplomacy* (USA, Butterworth Legal Publishers, 1990) Second Edition, pp.77-80.

upon a procedure for a third adjudicative body.¹⁸ The third adjudicative body, whose procedures changed over the years, was named panel on complaints.¹⁹

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 will be possible to recognize the political model of dispute settlement used in the multilateral trading system.

In the GATT 1947, CONTRACTING PARTIES²⁰ solved their own disputes by making decisions on a technical, diplomatic and political basis.²¹ In 1950 a working party was constituted to investigate one of the earliest complaints.²² In 1952 they built up a panel procedure²³ which was adopted in 1958.²⁴ This panel procedure was informal, with vague rulings where the judges and complainants were diplomats and not practising lawyers.²⁵ From the second decade (1960) both the CONTRACTING PARTIES and the policy agenda changed.²⁶ Many modifications towards legalism occurred in the GATT dispute settlement provisions.²⁷

¹⁸ 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.

¹⁹ In 1955 a panel on complaints of seven individuals was composed. See J. Jackson, *World Trade and the Law of the GATT*, supra (note 16), pp.173-174.

²⁰ At that time the CONTRACTING PARTIES consisted of 23 governments.

²¹ See J. Lacarte and F. Pierola, "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.

²² 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 J. Jackson, *World Trade and the Law of the GATT*, supra (note 16), pp.166-187.

²³ See R. Hudec, *Adjudication of International Trade Disputes*, supra (note 17), p.7.

²⁴ See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System* (USA, Butterworth Legal Publishers, 1993), p.11.

²⁵ See R. Hudec, *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 and for this reason 53 disputes were launched during the first decade of the GATT, See R. Hudec, *The GATT Legal System and World Trade Diplomacy*, supra (note 17), pp.75-94.

²⁶ See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (note 17), p.12.

²⁷ For example, in 1962 a panel ruled in the Uruguayan recourse to Article XXII that, if it is demonstrated that there is a *prima facie* violation of any provision of the GATT, the burden of proof shifts to the respondent. Later on, 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 J. Lacarte and F. Pierola, "Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?", supra (note 21), pp.36-38.

At the end of the Tokyo Round in 1979, the CONTRACTING PARTIES created an Understanding of dispute settlement procedures and practices (Understanding 1979). The 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 cooperation for developing countries.²⁸ It also declared that the aim of the GATT dispute settlement system favoured a mutually acceptable solution.²⁹

In the Ministerial Declaration of 1982, the EC led the confirmation of the principle of political commitment (or consensus principle) in the Understanding 1979. This principle articulated that the traditional rights of Parties should participate in consensus decisions. In other words, it allowed the adoption of panel rulings and the authorization of retaliation to be blocked.³⁰ 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.³¹ 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.³²

In 1984 the CONTRACTING PARTIES adopted a decision regarding the selection of panel members.³³ 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.³⁴ In addition, the panel members had the possibility of determining their own working procedures.³⁵

²⁸ See J. Lacarte and F. Pierola, "Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?", *supra* (note 21), p.39.

²⁹ See R.M. Plank-Brumback, "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.

³⁰ See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, *supra* (note 24), pp.164-166.

³¹ See J. Lacarte and F. Pierola, "Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?", *supra* (note 24), p.40.

³² See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, *supra* (note 24), p.167.

³³ This decision was taken because of a Secretariat proposal.

³⁴ See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, *supra* (note 24), p.168.

³⁵ See J. Lacarte and F. Pierola, "Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?", *supra* (note 21), p.41.

In the dispute settlement negotiations of the Uruguay Round³⁶, a central question needed to be answered: should the dispute settlement procedure retain the requirement of consensus in decision making?³⁷ The CONTRACTING PARTIES wanted to retain the power of veto essentially in two Council decisions. The first adopted a panel ruling (making it legally binding) and the second authorized retaliation. Thus, in 1989 the CONTRACTING PARTIES adopted the Midterm Agreement which maintained the consensus principle.³⁸ Moreover, they established most of the timeframes and default procedures in some stages of panel work.³⁹ 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.⁴⁰

Some authors have pointed to the procedural weaknesses of the panel procedure as the primary cause of the GATT's difficulties with dispute settlement.⁴¹ For the purpose of this article, 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.⁴²
- 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.⁴³

³⁶ 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 (1987 and 1988), the increase of disputes reached its highest ranks due to the growing level of confidence in the system. See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System* (USA, Butterworth Legal Publishers, 1993), pp.206-209.

³⁷ See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (note 24), p.231.

³⁸ See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (note 24), p.206.

³⁹ See J. Lacarte and F. Pierola, "Comparing the WTO and GATT Dispute Settlement mechanisms: What was accomplished in the Uruguay Round?", supra (note 21), p.42.

⁴⁰ See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (note 24), p.200.

⁴¹ See R. Hudec, *Adjudication of International Trade Disputes* (Great Britain, Trade Policy Research Centre, 1978), supra (note 17), p.14.

⁴² Public International Law says that a final decision *res judicata* must have qualities, be founded in facts and law and have findings. See Art. 78 of the Convention of the Hague 1907, and 52 of 1899. Art. 55, par 1, of the Statue of ICJ, Art. 8 par 3, of the Convention OSCE.

⁴³ See more about the rule of finality in Public International Law in W. M. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgements and Awards* (New Haven, Yale University Press, 1971), p.185.

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 authorizing retaliation as the defendant Party had to agree with the complainant's retaliatory measures.

c) No pre-established or barely detailed legal stages

- i) Before 1979 there was a lack of clearly defined legal stages 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 and preparation of the panel report, etc.)]. The appellate stage was included only when the 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 time frames. Before 1989, timeframes were not included in the dispute settlement provisions.
- iv) A lack of pre-established procedures.⁴⁴ In 1989 some procedures of the panel work were established by default.

When some or all political model elements are included in a dispute settlement mechanism of International Trade, a political model is formed (see table 1).

⁴⁴ 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 L. Caflisch, Cent ans de Règlement Pacifique des Différends Interétatiques, supra (note 2) p.382.

Table 1. 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 Dispute Settlement Model in GATT (1947 to 1994)
<ul style="list-style-type: none"> - Resolutions made on a political basis by CONTRACTING PARTIES - Pragmatic decisions 	} No final decisions
<ul style="list-style-type: none"> - Political consensus in composing the panel - Political consensus in establishing the panel - Political consensus in adopting the panel ruling - Political consensus in authorizing retaliation 	} Decision making process under consensus
<ul style="list-style-type: none"> - Lack of legal stages - Lack of detailed rules - Lack of time frames - Lack of procedures for each legal stage 	} No pre-established or barely detailed legal stages

At the end of 1991, the Uruguay Round negotiators drafted a new reform proposal which was named Understanding on Dispute Settlement.⁴⁵ It encompassed everything relating to the process of gathering 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.⁴⁶

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

In the multilateral trade arena, the EU has been the main opponent of the development of a dispute settlement mechanism with adjudicative elements. At the same time, the EU has designed dispute settlement provisions at a bilateral level. The following chapter examines these provisions in order to determine when the EU adopted steps to strengthen its bilateral dispute settlement provisions.

⁴⁵ "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).

⁴⁶ See R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, supra (note 24), pp.235-236.

II. POLITICAL MODEL OF DISPUTE SETTLEMENT IN EU FREE TRADE AGREEMENTS

The classification of signed Agreements by the EU⁴⁷ with third countries is varied and mostly depends upon the chosen parameters. The most common classification divides the Agreements according to the level of integration that is intended with the third country. Over the years it has evolved⁴⁸ into the following classifications: Association Agreements, Partnership Cooperation and Development Agreements or Agreements solely for Trade interests by matters.⁴⁹

The most advanced Association Agreements allowed the associated partners to benefit from some of the advantages deriving from the Treaties⁵⁰ by offering countries the prospect of full integration into the EU.⁵¹ Over time, many FTAs signed by the EU have achieved a deeper integration and generated a permanent dynamism within the group of EU FTAs.⁵² For example, every enlargement of the EU diminishes this group⁵³ because these countries become Member States.⁵⁴ It is the intention, however, of Partnership Cooperation and

⁴⁷ This article refers to the European Union although the European Community (EC) or the EC and its Member States (MS) have legal personality for signing agreements with third countries. In the ERTA Case (22/70) the ECJ expresses the competence of the Community to sign agreements with third countries. In the Opinion (1/76) the ECJ has confirmed the competence of the Community in signing agreements with third States. Both Opinion 1/94, 15.11.1994 and the Nice Treaty (Art.133.6) express that the competence regarding trade in aspects of intellectual property rights and services (specifically: cultural, audiovisual, education, social and human health) is *shared* between MS and EC. See R. Leal-Arcas, "Exclusive or Shared competence in the Common commercial Policy: From Amsterdam to Nice" in *Legal Issues of Economic Integration* (Netherlands, Kluwer Law International, 2003), pp.9-14; H.G. Krenzeler and C. Pitschas, "Progress or Stagnation? The Common Commercial Policy after Nice" in *European Foreign Affairs Review* 6 (Netherlands, Kluwer Law International, 2001), pp.291-313; Santos Vara, J., *La participación de la Unión Europea en las Organizaciones Internacionales* (Madrid, COLEX, 2002), 304p.

⁴⁸ In 1971 the existence of four kinds of agreements were considered to which Art. 228 might apply: commercial, association, extension of the Community itself, and relations with international organizations S. Henig, *External Relations of the European Community* (London, Chatam House: PEP, 1971), p.11.

⁴⁹ http://www.europa.eu.int/eur-lex/lex/en/droit_communaire

⁵⁰ Article 310 ECT.

⁵¹ For a deeper understanding about trade aspects of the former Association Agreements (EU Agreements) of some of the new MS of the EU see M.J. Pereyra, *Commercial Defence Measures: The Dark Side of the Europe Agreements* (Brussels, College of Europe, 1997), 132p.

⁵² For more on this subject See AAVV, *L'avenir du libre-échange en Europe: vers un espace économique Européen?*, Olivier Jacot-Guillarmod (ed.), (Zurich, Schulthess Polygraphischer Verlag Zurich, 1990), 574p.

⁵³ See AAVV, Discussion: "Association Agreements as Pre Accession Instruments" in *From Association to Accession, the impact of the Association Agreements on Central Europe's Trade and Integration with the European Union*, Kálmán Mizsei and Andrzej Rudka (eds.) (Prague, IEWS/Windsor Group, 1995), pp.141-181, and Tsoukalis L., *The European Community and its Mediterranean Enlargement* (Boston, George Allen & Unwin, 1981), 273p.

⁵⁴ For more on this subject see Agreements in European Commission DG External Relations, *Annotated Summary of Agreements linking the communities with non-member countries* (Brussels, European Commission 2001), 250p.

Development Agreements to support economic development and poverty reduction in third countries.⁵⁵ In both cases trade issues are normally included.

All the EU Agreements which are covered in this article have one feature in common; i.e. they are all FTAs. EU FTAs⁵⁶ could be just that, but they all include preferences in areas other than trade. This chapter shows that dispute settlement provisions of some EU FTAs reflect identical elements found in political models of dispute settlement of Public International Law and GATT Law. Consequently, it is possible to talk about a political model of dispute settlement in EU FTAs.

The following sections of pre and post WTO EU FTAs show that the quasi-adjudicative DSU did not facilitate the creation of an immediate trend of quasi-adjudicative dispute settlement provisions in EU FTAs.

1. Pre-WTO EU FTAs (1963 to 1995)

Pre-WTO EU FTAs that contain a political dispute settlement model are the Ankara Agreement, the European Economic Area (EEA) and the Europe Agreements – until accession.

A) THE ANKARA AGREEMENT

The Ankara Agreement, signed in Ankara in 1963, is the Association Agreement between the European Economic Community (EEC) and Turkey.⁵⁷ This Agreement includes an article that regulates the settlement of disputes relating to the application or interpretation of the Agreement. This Article provides that, in the first instance, the Council of Association should settle the dispute. If the parties do not find a solution and they agree, they can use other fora to settle disputes besides the FTA itself, i.e. the Court of Justice of the European Communities or any other Court or Tribunal. Arbitration and compliance proceedings⁵⁸ are not considered. The Agreement only mentions and does not specify which necessary measures⁵⁹ must be taken to comply with the rulings.

B) EUROPEAN ECONOMIC AREA

The *European Economic Area (EEA)* is an Agreement that has undergone many changes with regard to the signatory parties. The EEA was signed in 1992⁶⁰ by the EC and European Free Trade Association (EFTA). At that time, the members of EFTA were

⁵⁵ Article 177 ECT.

⁵⁶ The term FTA is not used in *European jargon* due to the fact that trade provisions are included in an Agreement that covers other areas, i.e. political and cooperation.

⁵⁷ 31 December 1977 (OJL 361/1) Agreement establishing an Association between the European Economic Community and Turkey, known as "The Ankara Agreement".

⁵⁸ Article 25 of the "Ankara Agreement".

⁵⁹ No definition of necessary measures is provided in the text.

⁶⁰ The Agreement of the European Economic Area was signed on 2 May 1992 (OJ L 1) 03.01.1994.

Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.⁶¹ Switzerland did not ratify the EEA due to the negative results in its referendum. Consequently, the EEA was modified by the "Adjusting Protocol" in 1993.⁶² Then, in 1995, Austria, Finland and Sweden acceded to the European Union, a fact that did not generate any alteration in the text of the Agreement.⁶³

It is possible to settle disputes concerning interpretation and application of provisions of the Agreement, which are identical in substance to corresponding rules of two European Treaties⁶⁴, and the acts adopted in the application of these two Treaties.⁶⁵ These disputes should be launched before the Joint Committee. If a solution is not reached, and the Parties agree, the dispute could be sent to the European Court of Justice.⁶⁶ Applying safeguard measures⁶⁷ is possible and only disputes concerning their scope or duration could be solved through arbitration procedures that are regulated in Protocol 33.⁶⁸

C) EUROPE AGREEMENTS

The *Europe Agreements* established associations between the EU and Central and Eastern European countries.⁶⁹ Afterwards these countries became accession candidates to the EU⁷⁰ and, in 2004, all except Romania and Bulgaria joined. For all countries that are EU Members, the Europe Agreements are no longer valid. However, the *Europe Agreements*

⁶¹ See F. Weiss, "The European Free Trade Association after Twenty-five Years" in *Yearbook of European Law*, num.5 (London, Clarendon Press-Oxford, 1986), pp.287-323.

⁶² Adjusting Protocol, 17 March 1993 (OJ L 1) 03.01.1994, p.572.

⁶³ WT/REG138/1, "European Economic Area" in *Committee on Regional Trade Agreements*, World Trade Organization, 4 October 2002.

⁶⁴ The Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community.

⁶⁵ Chapter 3, section 3, Article 111.

⁶⁶ Chapter 3, section 3, Article 111.3.

⁶⁷ Chapter 4 Articles 112, 113 and 114 regulate the Safeguard Measures of the European Economic Area.

⁶⁸ Chapter 3, section 3, Article 111.4.

⁶⁹ Malta (OJ L 61 of 14.03.1971) p.1, Cyprus (OJ L 133 of 21.05.1973) p.1, Hungary (OJ L 347 of 31.12.1993) p.2, Poland (OJ L 348 of 31.12.1993) p.2, Romania (OJ L 357 of 31.12.1994) p.2, Bulgaria (OJ L 358 of 31.12.1994) p.3, Czech Republic (OJ L 360 of 31.12.1994) p.2, Slovak Republic (OJ L 359 of 31.12.1994) p.2, Latvia (OJ L 26 of 02.02.1998) p.3, Lithuania (OJ L 51 of 20.02.1998) p.3, Estonia (OJ L 68 of 09.03.1998) p.3, Slovenia (OJ L 51 of 26.02.1999) p.2. The last four Agreements were established after the WTO, but they are classified as pre-WTO because they follow the model of the Europe Agreements which was designed pre-WTO.

⁷⁰ See more about this subject in AAVV, *From Association to Accession, the impact of the Association Agreements on Central Europe's Trade and Integration with the European Union*, supra (note 53), pp.1-14.

with Romania⁷¹ and Bulgaria⁷² are in force until the accession of these two countries into the EU.⁷³ This is scheduled to take place on January 1st 2007.⁷⁴

Despite the fact that most Europe Agreements are no longer in force, they all followed a similar model of dispute settlement. Thus, it is interesting to review the dispute settlement provisions of interpretation and application⁷⁵ which are barely regulated in each Agreement.

The authority that, in first instance, settles the disputes with binding decisions is the Association Council which is composed of the Parties. This allows the respondent party to block the decisions. Arbitration is feasible, however, there are two possibilities for the respondent party to block the composition of the panel. The first is that the respondent names the second arbitrator which allows it to delay the composition of the panel or, even worse, halt it. The second is that both conflicting parties must agree to appoint the third arbitrator. Moreover, the decisions of the panel are not binding, there are no compliance procedures and retaliation is through appropriate measures which are not specified (see table 2).

⁷¹ Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Romania, of the other part, 31.12.94 (OJ L/357).

⁷² Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, 31.12.94 (OJ L/358).

⁷³ 21 June 2005 (OJ L 157/10), Notice concerning the entry into force of the Treaty of Accession of Romania and Bulgaria.

⁷⁴ Available at http://ec.europa.eu/commission_barroso/president/focus/bulgaria_romania_en.htm (04.10.2006).

⁷⁵ For more information on the trade defence measures in these agreements see M.J. Pereyra, *Commercial Defence Measures: The Dark Side of the Europe Agreements*, supra (note 51), 132p.

POLITICAL & QUASI-ADJUDICATIVE DISPUTE SETTLEMENT MODELS
IN EUROPEAN UNION FREE TRADE AGREEMENTS

Table 2. Dispute Settlement in Europe Agreements (pre-accession)

Substantive & Adjective Rules	CE- Republic of Estonia OJ L 026 02.02.1998	CE- Republic of Poland OJ L 348 31.12.1993	CE-Czech Republic OJ L 360 31.12.1994	CE-Slovak Republic OJ L 359 31.12.1994
Authority	Association Council: Formed by the Parties In the first instance, it may settle the dispute with a decision (Art. 112.2)	Association Council: Formed by the Parties In the first instance, it may settle the dispute with a decision (Art. 105.2)	Association Council: Formed by the Parties In the first instance, it may settle the dispute with a decision (Art. 107.2)	Association Council: Formed by the Parties In the first instance it may settle the dispute with a decision (Art. 107.2)
Composition of panels	Three arbitrators Each party appoints a panellist. Complainant names one, the other is named within the following two months by the respondent (allows blockage) and Association Council names the third by consensus (allows blockage) (Art. 112.4)	Three arbitrators Each party appoints a panellist. Complainant names one, the other is named within the following two months by the respondent (allows blockage) and Association Council names the third by consensus (allows blockage) (Art. 105.4)	Three arbitrators Each party appoints a panellist. Complainant names one, the other is named within the following two months by the respondent (allows blockage) and Association Council names the third by consensus (allows blockage) (Art. 107.4)	Three arbitrators Each party appoints a panellist. Complainant names one, the other is named within the following two months by the respondent (allows blockage) and Association Council names the third by consensus (allows blockage) (Art. 107.4)
Decisions non binding or binding under consensus	Decisions of the panel are non-binding (not stated). Decisions of the Association Council are binding (Art.111)	Decisions of the panel are non-binding (not stated). Decisions of the Association Council binding (Art.104)	Decisions of the panel are non-binding (not stated). Decisions of the Association Council binding (Art.106)	Decisions of the panel are non-binding (not stated). Decisions of the Association Council binding (Art.107)
Compliance procedures	None Each party shall take the required steps to implement the decision of the arbitrators (Art. 112.4)	None Each party shall take the required steps to implement the decision of the arbitrators (Art. 105.4)	None Each party must take the required steps to implement the decision of the arbitrators (Art. 107.4)	None Each party must take the required steps to implement the decision of the arbitrators (Art.107.4)
Retaliation	If either Party considers that the other has failed to fulfil an obligation under the Agreement, it may take appropriate measures . Before doing so, it shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to both Parties (Art. 122.2)	If either Party considers that the other has failed to fulfil an obligation under the Agreement, it may take appropriate measures . Before doing so, it shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to both Parties (Art. 115.2)	If either Party considers that the other has failed to fulfil an obligation under the Agreement, it may take appropriate measures . Before doing so, it shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to both Parties (Art. 117.2)	If either Party considers that the other has failed to fulfil an obligation under the Agreement, it may take appropriate measures . Before doing so, it shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to both Parties (Art. 117.2)
Cases Published	None	None	None	None

2. Post-WTO EU FTAs (1995 to 2006)

EU FTAs with political dispute settlement provisions signed after the creation of the WTO are the EUROMED, the Stabilization and Association Agreements with the Balkans and the Agreement with South Africa.

A) EURO-MEDITERRANEAN AGREEMENTS

The *Euro-Mediterranean* Partnership started in 1995 with the Barcelona Process. The Barcelona Declaration established a framework of political, economic and social relations

between the EU and some Southern Mediterranean Partners.⁷⁶ These Partners were Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, the Palestine Authority, Syria, Tunisia and Turkey. Since then, some changes concerning contracting parties have occurred, i.e. Libya achieved observer status in 1995 and Cyprus and Malta joined the EU with the enlargement to 25 Member States in 2004. Today there are 25 Member States from the EU and 10 Mediterranean partners which collectively are known as EUROMED.

The Barcelona Declaration has, as one of its main objectives, the establishment of the Euro-Mediterranean Free Trade Area by 2010. The means of achieving this Free Trade Area will be through Association Agreements concluded between the EU and the Mediterranean Partners jointly with FTAs among the Mediterranean Partners themselves. FTAs between the EU and the Mediterranean Partners are replacing the Cooperation Agreements signed in 1970.⁷⁷ Until now only the Tunisia⁷⁸, Israel⁷⁹, Morocco⁸⁰, Jordan⁸¹ and Egypt⁸² Agreements have been ratified and are in force. For Lebanon, the Palestinian Authority and Algeria the trade matters are in force⁸³ through Interim Agreements.

In the EUROMED already in force, the subject of dispute settlement is barely regulated and is similar in each Agreement. There are provisions both for the interpretation and the application of the Agreement and also for the Protocol on rules of origin (Protocol). In general, the provisions are included only in one Article of each agreement, i.e. EUROMED with Tunisia (Article 86 and 34 of the Protocol), Israel (Article 75 and 33 of the Protocol), Morocco (Article 86 and 34 of the Protocol), Jordan (Article 97 and 32 of the Protocol) and Egypt (Article 82 and 33 of the Protocol).

⁷⁶ See AAVV, *Regional Partners in Global Markets: limits and possibilities of the Euro-Med Agreements*, ed. Ahmed Galal and Bernard Hoekmand (London, ECES, 1997), 317p.

⁷⁷ Available at: http://europa.eu.int/comm/external_relations/euromed/med_ass_agreements.htm

⁷⁸ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, (OJ L 97/2) signed on 17.07.95 and entered into force 1.03.98.

⁷⁹ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, (OJ L 147/3) signed on 20.11.95 and entered into force 01.06.00.

⁸⁰ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, (OJ L 70/2) signed on 26.02.96 and entered into force 01.03.00.

⁸¹ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Jordan, of the other part, (OJ L 129/3) signed on 24.11.97 and entered into force 15.05.02.

⁸² Agreement in the form of an exchange of letters concerning the provisional application of the trade and trade-related provisions of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, (OJ L 345/115) signed on 25.06.01 and entered into force 01.01.04.

⁸³ Available at: http://europa.eu.int/comm/external_relations/euromed/free_trade_area.htm (04.10.06).

POLITICAL & QUASI-ADJUDICATIVE DISPUTE SETTLEMENT MODELS
IN EUROPEAN UNION FREE TRADE AGREEMENTS

The Association Council is formed by the parties and aims to solve the disputes with binding decisions before the arbitrators. This leaves the possibility open for the respondent party to block any decision taken by the Association Council. For the composition of the panel there are two possibilities of blockage from the respondent party and the award is non binding. Furthermore, there are no compliance procedures and retaliation can be taken through appropriate measures without being specified in the agreement. As is shown in the following table, the provisions for each agreement are similar to each other and also with those of the Europe Agreements.

Table 3. Dispute Settlement in EUROMED

Substantive & Adjective Rules	CE-Morocco OJ L 070 18.03.2000	CE-Israel OJ L 147 21.06.2000	CE-Jordan OJ L 129 15.05.2002	CE- Egypt OJ L 345 31.12.2003
Authority	Association Council: Formed by the Parties In the first instance, it may settle the dispute with a decision (Art.86.2)	Association Council: Formed by the Parties In the first instance, it may settle the dispute with a decision (Art. 75.2)	Association Council: Formed by the Parties In the first instance, it may settle the dispute with a decision (Art.97.2)	Association Council: Formed by the Parties In the first instance, it may settle the dispute with a decision (Art.82.2)
Composition of the panel	Three arbitrators Each party appoints an arbitrator Complainant names one, the other is named within the following two months by the respondent (allows blockage) and Association Council names the third by consensus (allows blockage) (Art. 86.4).	Three arbitrators Each party appoints an arbitrator Complainant names one, the other is named within the following two months by the respondent (allows blockage) and Association Council names the third by consensus (allows blockage) (Art. 75.4)	Three arbitrators Each party appoints an arbitrator Complainant names one, the other is named within the following two months by the respondent (allows blockage) and Association Council names the third by consensus (allows blockage) (Art. 97.4)	Three arbitrators Each party appoints an arbitrator Complainant names one, the other is named within the following two months by the respondent (allows blockage) and Association Council names the third by consensus (allows blockage) (Art. 82.4)
Decisions non binding or binding under consensus	Decisions of the panel are non-binding (not stated) Decisions of the Association Council are binding (Art. 83)	Decisions of the panel are non-binding (not stated) Decisions of the Association Council are binding (Art. 72.1)	Decisions of the panel are non-binding (not stated) Decisions of the Association Council are binding (Art. 94.2)	Decisions of the panel are non-binding (not stated) Decisions of the Association Council are binding (Art. 79.2)
Compliance procedures	None Each party shall take the steps required to implement the decision of the arbitrators (Art.86.4)	None Each party shall take the steps required to implement the decision of the arbitrators (Art.75.4)	None Each party must take the steps required to implement the decision of the arbitrators (Art.97.4)	None Each party must take the steps required to implement the decision of the arbitrators (Art.82.4)
Retaliation	If either Party considers that the other has failed to fulfil an obligation under the Agreement, it may take appropriate measures . Before doing so, it shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to both Parties. (Art. 90.2)	If either Party considers that the other has failed to fulfil an obligation under the Agreement, it may take appropriate measures . Before doing so, it shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to both Parties. (Art. 79.2)	If either Party considers that the other has failed to fulfil an obligation under the Agreement, it may take appropriate measures . Before doing so, it shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to both Parties. (Art. 101.2)	If either Party considers that the other has failed to fulfil an obligation under the Agreement, it may take appropriate measures . Before doing so, it shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to both Parties. (Art. 86.2)
Cases Published	None	None	None	None

B) STABILIZATION AND ASSOCIATION AGREEMENTS WITH THE BALKANS

The *Stabilization and Association Agreements with the Balkans* (SAAs)⁸⁴ were signed with Bosnia & Herzegovina, Croatia and the former Yugoslav Republic of Macedonia. The Agreements with Albania and Serbia and Montenegro are currently under negotiation. These Agreements have two main purposes, the first is to foster respect for democratic principles and the second is to reinforce the links of this region with the EC single market. These Agreements intend to create a Free Trade Area⁸⁵ in the areas of competition, state aid and intellectual property which will allow the economies of the region to begin to integrate with that of the EU.⁸⁶

The SAAs dispute settlement provisions are designed under one model. This similarly occurred when the rest of the EU FTAs signed with a particular block of countries, i.e. Europe Agreements, EUROMED, etc. Thus, the dispute settlement provisions of the EU-Croatia FTA will be analyzed as a model of the SAAs.⁸⁷ In this FTA the Stabilisation and Association Council is the sole instance that solves disputes between the Parties⁸⁸ and its decisions are binding.⁸⁹ There are Committees⁹⁰ and the possibility of subcommittees plus Parliamentary Committees. There is no possibility of arbitration and the Parties are allowed to use appropriate measures if one of them fails to fulfil an obligation under the Agreement.⁹¹

C) SOUTH AFRICA

South Africa is one of the contracting parties of the EU-African Caribbean Pacific (ACP) Partnership Agreement, but it is excluded from trade and development finance co-operation because South Africa has signed a bilateral FTA with the EU. The Trade, Development and Cooperation Agreement (TDCA)⁹² between South Africa and the EU was signed in 1999,

⁸⁴ These Agreements are part of the Stabilisation and Association Process (SAP) which is the framework to support the domestic reform process and is based on aid, trade preferences, dialogue, technical advice and contractual relation.

⁸⁵ Council Regulation (EC) No 2007/2000 of 18 September 2000 introducing exceptional trade measures for countries and territories participating in or linked to the European Union's Stabilisation and Association process, amending Regulation (EC) No. 2820/98, and repealing Regulations (EC) No. 1763/1999 and (EC) No. 6/2000. (OJ L 240) 23.09.2000.

⁸⁶ Available at: http://europa.eu.int/comm/external_relations/see/index.htm

⁸⁷ Council and Commission Decision concerning the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, (OJ L 026) p.001, 2005.

⁸⁸ Article 113 EU-Croatia FTA.

⁸⁹ Article 112 EU-Croatia FTA.

⁹⁰ Article 114 EU-Croatia FTA.

⁹¹ Article 120.2 EU-Croatia FTA.

⁹² Council Decision of 29 July 1999 concerning the provisional application of the Agreement on Trade, Development and Cooperation between the European Community and its Member States of the one part, and the Republic of South Africa, of the other part (OJ L 311) vol. 42, 4 December 1999.

the ratification process by each MS is still ongoing. However, trade matters have been applied through an Interim Agreement since 2000. The settlement of disputes of this TDCA resembles the EUROMED Agreements; nonetheless, there are some additions in this provision that regulate its interpretation and application.

A legal provision (Article 104.9) encompasses a set of rules in which the arbitration stage is more detailed than in the EUROMED Agreements. However, the award is not binding, consensus is required to establish the panel⁹³, compliance measures are not specified⁹⁴ and there is no retaliation procedure.⁹⁵ In urgent cases, retaliation could take place only through appropriate measures⁹⁶, even without having previous consultations.⁹⁷ Nevertheless, there are some innovations, i.e. more time limits are established⁹⁸, the obligation to establish the working procedures for arbitration⁹⁹ and a reasonable period of time to comply (also through consensus). Issues relating to each Party's WTO rights and obligations can be referred to the FTA arbitration proceeding only if the parties agree.

Earlier it was mentioned that weaknesses in the panel procedure are considered as the first cause of difficulties in a dispute settlement system. For this reason this paper will identify and classify the common weaknesses of the EU dispute settlement provisions into different groups. Consequently, due to the political nature of these weaknesses, these groups are considered as elements of the political model of dispute settlement in EU FTAs. These elements are: no final decisions, decision making process under consensus, no pre-established or barely detailed legal stages and unilateral decisions.

a) No final decisions

i) Resolutions are made on a political basis by an authority composed of the Parties. At the first stage, an authority conformed by the parties may settle the dispute. It can be named Council of Association, Joint Committee, Cooperation Council or, for that matter, any other

⁹³ Article 104.9(b) FTA EU-South Africa. "The Cooperation council shall appoint a third arbitrator within 60 days of the appointment of the second arbitrator".

⁹⁴ Article 104.7 FTA EU-South Africa. "Each Party to the dispute must take the steps required to implement the decision of the arbitrators".

⁹⁵ Article 3.1. FTA EU-South Africa. "If either Party considers that the other has failed to fulfil an obligation under this Agreement, it may take appropriate measures".

⁹⁶ Article 3.4. FTA EU-South Africa. The term "circumstances of particular urgency" means a case of the material breach of the Agreement by one of the Parties. A material breach of the Agreement consists of: (i) repudiation of the Agreement not sanctioned by the general rules of international law, or (ii) violation of the essential element of the Agreement, as described in Article 2". Article 2 states: "...violation of Human Rights or rule of law".

⁹⁷ Article 3.3. FTA EU-South Africa. "In circumstances of particular urgency, appropriate measures may be taken without prior consultations...".

⁹⁸ Article 104.9(a) states that 30 days are required for the appointment of the second arbitrator, Article 104.9 (c) mentions that no later than six months arbitrators shall submit their findings and decisions.

⁹⁹ Article 104.8 FTA EU-South Africa.

name the Parties agree upon. This authority issues binding decisions (i.e. Ankara Agreement, EEA, Europe Agreements, SAAs, EUROMED and South Africa).

b) Decision making process under consensus

- i) Consensus is required for choosing another forum. If in the first stage the dispute is not solved, only by consensus can it go to another forum for the second stage to be settled. This is the case of the Ankara Agreement and EEA where the European Court of Justice, or another Court or Tribunal, can be used as a second forum. The requirement of consensus allows the respondent party to block the second stage. In the agreement with South Africa, the WTO is the other forum that exists to settle in the first stage the disputes. The WTO is the only logical possibility if either party decides to launch a dispute. This is because the arbitration procedure for this Agreement does not consider issues relating to each Party's WTO rights and obligations unless the Parties decide to do it by consensus.
- ii) Political consensus in the composition of the panel. Arbitration is feasible with blocking possibility in the composition of the panel. This can occur either because the respondent names the second arbitrator or the third is named by consensus (i.e. Europe Agreements, EUROMED and South Africa).
- iii) No binding awards. If arbitration is included, the arbitrators' decisions are not binding (i.e. Europe Agreements, EUROMED and South Africa).

c) No pre-established or barely detailed legal stages

- i) Lack of legal stages. The procedures are not detailed (i.e. Ankara Agreement and SAAs) or barely detailed [i.e. EEA (safeguard measures), Europe Agreements, EUROMED, South Africa (composition of the panel)]. Some FTAs (i.e. Ankara A., EEA¹⁰⁰ and SAAs) do not have arbitration stages.
- ii) Lack of detailed rules. In the dispute settlement provisions, most of the rules are vague and not rule-based.
- iii) Lack of time frames. In some cases no time frames are included (i.e. Ankara A., SAAs) whereas others have only a few [i.e. EEA (to proceed to the second stage or take a safeguard measure), Europe Agreements and EUROMED (composition of the panel), South Africa [composition of the panel (30 days for the second and 60 for the third), issuing of the decision (six or three months), for the concerned Party to inform within 60 days its intentions to implement the decision, the reasonable period of time for implementing the decision shall not exceed 15 months)].
- iv) No pre-established procedures. Not every legal stage has pre-established procedures (i.e. consultations, composition of the panel, interim review, rules of procedure, code of conduct, etc). Almost no legal stage in the process is regulated, for example, there are no compliance procedures and the Parties have the freedom of taking the *required steps* to comply with the rulings (i.e. Ankara Agreement, Europe Agreements, South Africa and EUROMED).

¹⁰⁰ Asking for arbitration is possible only for disputes that concern the scope or duration of safeguard measures (Article 111.4 EEA).

POLITICAL & QUASI-ADJUDICATIVE DISPUTE SETTLEMENT MODELS
IN EUROPEAN UNION FREE TRADE AGREEMENTS

d) Unilateral Decisions

The Parties are allowed to take some unilateral decisions. For example, for retaliation the Parties have the flexibility of taking appropriate measures which, in most cases, should be notified to the Council (i.e. Europe Agreements, SAAs, EUROMED and South Africa).

Table 4. Political model of dispute settlement in EU FTAs

Procedural weakness of the EU FTAs dispute settlement provisions	Elements of the Political dispute settlement model in EU FTAs
- Resolutions made on a political basis by an authority composed by the Parties	} No final decisions
- Consensus required to choose another forum as a second instance	
- Political consensus in composing the panel	} Decision making process under consensus
- No binding awards	
- Lack of legal stages	} No pre-established or barely detailed legal stages
- Lack of detailed rules	
- Lack of time frames	
- Lack of procedures for each legal stage	
- Compliance with the rulings through required steps	} Unilateral decisions
- Retaliation with appropriate measures	

There are two common elements in these three political models of dispute settlement [i.e. Public International Law, GATT (1947 to 1994) and EU FTAs]. Firstly, the resolution that settles the dispute can be made on a non legal basis and, secondly, it is not binding. Consequently, these two elements act as the pillars of any political model of dispute settlement.

In addition to these two elements, more are found in the political models of Public International Trade Law. One of the elements includes the weakness of the requirement of consensus in the decision making process to adopt resolutions. Another element is not having pre-established legal stages or, if they have, they are barely detailed. In addition, in the EU FTAs, the parties can take unilateral decisions, particularly with regard to compliance of recommendations and retaliation. The following table summarizes the three political models of dispute settlement analyzed above.

Table 5. Main elements of political models of dispute settlement

Public International Law	GATT (1947 to 1994)	EU FTAs
Resolutions could be on a non legal basis	No final decisions	No final decisions
Resolutions are binding only under consensus	Decision making process under consensus	Decision making process under consensus
	No pre-established or barely detailed legal stages	No pre-established or barely detailed legal stages
		Unilateral decisions

III. ADJUDICATIVE AND QUASI-ADJUDICATIVE MODELS OF DISPUTE SETTLEMENT

1. Adjudicative dispute settlement means in Public International Law and their common elements.

This section contains the key elements which comprise an adjudicative model of Dispute Settlement in Public International Law. This model was reflected in two peaceful dispute settlement means which were stated in the United Nations Charter, Article 33.¹⁰¹ The adjudicative means for solving disputes are arbitration and judicial settlement.

Briefly recall that both means have particular features which make them different from each other.¹⁰² For example, whereas in arbitration the Parties constitute a panel appointing arbitrators of their own choice, in judicial settlement the Parties rely on pre-established tribunals or courts.¹⁰³ Also, in arbitration the procedures are not pre-established because, in the arbitral commitment, the Parties decide on them whereas in the judicial settlement they are already pre-established.¹⁰⁴

Two common elements between them are; first, the decision is binding and second, a third authority intervenes with the Parties' consent to solve the dispute with a decision issued on the basis of law.¹⁰⁵ These two elements compose the adjudicative model in Public International Law (see diagram 3).

¹⁰¹ These adjudicative means came along with the political means.

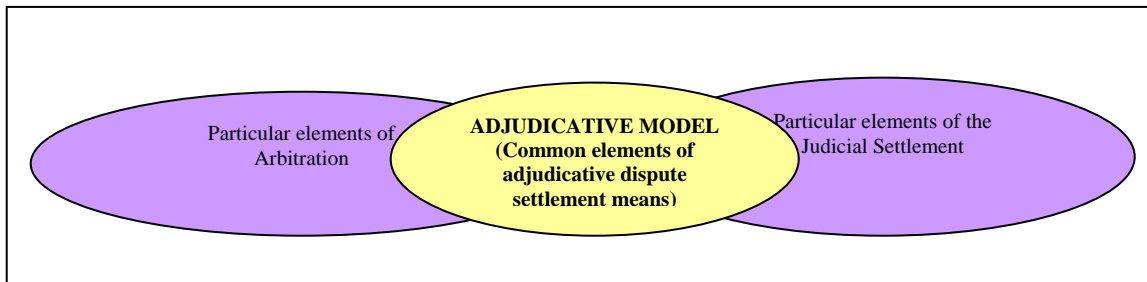
¹⁰² For a deeper knowledge of these means, see *Handbook on the Peaceful Settlement of Disputes between States*, supra (note 9), pp.55-97; J. G. Merrills, *International Dispute Settlement*, third edition (Cambridge, Cambridge University Press, 1998), supra (note 2), pp. 88-169; Remiro Brotons A., Riquelme Cortado, R.M., Diez-Hochleitner J., Orihuela Calatayud, E. y Pérez-Prat Durbán, L., *Derecho Internacional*, supra (note 2), pp.852-870.

¹⁰³ See *Handbook on the Peaceful Settlement of Disputes between States*, supra (note 9), p. 55.

¹⁰⁴ See supra (note 2).

¹⁰⁵ A. Remiro Brotons, R.M. Riquelme Cortado, J. Diez-Hochleitner, E. Orihuela Calatayud y L. Pérez-Prat Durbán, *Derecho Internacional*, supra (note 2), p.831.

Diagram 3. Adjudicative Model of Dispute Settlement in Public International Law



As with the DSU, the above elements have been incorporated between States at either a bilateral or multilateral level in numerous dispute settlement mechanisms.

2. Adjudicative elements of the quasi-adjudicative model of WTO Dispute Settlement Understanding

The DSU encompasses stages in the process of dispute settlement such as consultations¹⁰⁶, a panel review process¹⁰⁷ and an appellate stage.¹⁰⁸ These last two stages embody the adjudicative nature of the system and will now be analysed.

The panel review process includes detailed rules, procedures and timeframes.¹⁰⁹ 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 Parties 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 for the adoption of Appellate Body reports (Article 17). It also includes provisions for both the panel and the Appellate Body in relation to the confidentiality character of the Parties' communications (Article 18). Issues concerning the recommendations of the panels and the Appellate Body (Article 19) are also considered.

¹⁰⁶ Article 4 of the DSU.

¹⁰⁷ Articles 6.2 to 16 of the DSU.

¹⁰⁸ See G. Abi-Saab, "The WTO Dispute Settlement and General International Law" in *Key Issues in WTO Dispute Settlement: The First Ten Years*, R. Yerxa & B. Wilson (eds.) (Cambridge, WTO/CUP, 2005), p.9.

¹⁰⁹ For a greater perspective of the panel process see G. Marceau, "Consultations and the Panel Process in the WTO Dispute Settlement System" in *Key Issues in WTO Dispute Settlement: The First Ten Years*, R. Yerxa & B. Wilson (eds.) (Cambridge, WTO/CUP, 2005), pp.32-45.

Within the DSU are procedures which have been greatly influenced by particular adjudicative elements of arbitration and judicial settlement respectively. Arbitration influenced the panel review process since the adjudicator is appointed by the Parties. However, it cannot be considered arbitration since the Director General has also the possibility to appoint the members of the panel. The same happens with the arbitration that establishes a reasonable period of time for implementing recommendations and rulings.¹¹⁰ If the Parties do not agree on appointing an arbitrator within 10 days, the Director General will appoint one, who until now has been an Appellate Body Member. The arbitration that objects the level of suspension of concessions proposed 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.¹¹¹ In this last arbitration the Parties do not designate their adjudicator and thus cannot be considered arbitration. The only pure arbitration is the one stated in the 25.1 of the DSU, as an alternative mean of dispute settlement to the panel process. The judicial settlement influenced the appellate stage since the adjudicator of the decision is a pre-constituted¹¹² permanent body, giving a quasi-judicial nature to the system.

The DSU is also influenced by the common elements found in arbitration and judicial. In the panel review and appellate stage the decisions are binding and the third authority that solves the dispute does it on the basis of law.

The strengths of the panel review procedure have often been considered responsible for the success of the WTO. For the purpose of this article, 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 of the Dispute Settlement Body for all of the Members. This means that if a Member brings a dispute against another, the respondent Party cannot refuse to be judged by a panel and the Appellate Body.¹¹³

b) Final decisions

i) Independent bodies (i.e. panel and Appellate Body) made the reports on a legal basis.

¹¹⁰ The Article 21.3 (c) of the DSU.

¹¹¹ Article 22.6 of the DSU.

¹¹² See G. Abi-Saab, "The WTO Dispute Settlement and General International Law" in *Key Issues in WTO Dispute Settlement: The First Ten Years*, supra (note 107), p.10.

¹¹³ See G. Marceau, "Consultations and the Panel Process in the WTO Dispute Settlement System", supra (note 108), p. 30.

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.¹¹⁴ The arbitrations contemplated in the DSU (Articles 21.3, 22.6 or 25.1) have in common that their awards cannot be appealed, consequently they 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

This element encompasses the following strengths, which due to the negative consensus is possible:

i) The quasi-automatic adoption of the panel and Appellate Body rulings, making them binding.¹¹⁵

ii) Not blocking the establishment of a panel.¹¹⁶

iii) The quasi-automatic authorization of retaliation.

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) Time frames for the procedures are included in the legal stages. Almost every stage of the procedure has precise time frames to comply with.

iv) Pre-established procedures. Examples are the working procedures for the panel and Appellate Body (see table 6).

¹¹⁴ For more on the principle of finality, *res iudicata* and controls on international decisions See G. Sacerdoti, "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*, Ernst-Ulrich Petersman (ed.) (London, Kluwer Law International, 1997), pp.249-250.

¹¹⁵ See G. Marceau, "Consultations and the Panel Process in the WTO Dispute Settlement System", *supra* (note 108), pp. 29-30.

¹¹⁶ Article 6.1 of the DSU.

Table 6. Quasi-adjudicative model of dispute settlement in WTO

Procedural Strengths of the WTO dispute settlement system	Elements of the WTO quasi-adjudicative dispute settlement model
- Consultations	} Consultations
- Compulsory jurisdiction	
- Resolutions made on a legal basis by a third authority	} Final decisions
- Appellate stage	
- Consistent interpretations	
- Quasi-automatic adoption of the panels and Appellate Body rulings	} Decision making process under negative consensus
- Quasi-automatic establishment of the panel	
- Quasi-automatic authorization of retaliation	
- Precise legal stages	} Pre-established and detailed procedures
- Precise and detailed rules	
- Time frames in the stages of the procedure	
- Procedures for each legal stage	

Consequently, 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 followed their own models of mechanisms for dispute settlement in their FTAs, undoubtedly the DSU marked an important influence towards adjudication for them. At a bilateral level the EU took its first steps towards adjudication with the implementation of a quasi-adjudicative model in the FTA with Mexico.

IV. QUASI-ADJUDICATIVE MODEL OF DISPUTE SETTLEMENT IN EU FREE TRADE AGREEMENTS

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 with Mexico, a country which, since it agreed to be part of NAFTA, only had quasi-adjudicative dispute settlement models in its FTAs.

1. Two EU FTAs with quasi-adjudicative models similar to the DSU

There are only two countries with quasi-adjudicative models of dispute settlement in their FTAs with the EU and they are Mexico and Chile. It has not been straightforward for all EU FTAs to enter into force. This was the case for the EU-Mexico and Chile FTAs which had to pass through an Interim Agreement before they fully implemented trade subjects.

A) MEXICO

The EU-Mexico relation was established in two Agreements¹¹⁷ along with a Final Act signed in 1997.¹¹⁸ The Global Agreement¹¹⁹ includes political, economic and trade areas of shared competences of the EC and its Member States. The Interim Agreement (no longer in force) used to cover trade matters of exclusive EC's competences.¹²⁰ The FTA EU-Mexico entered into force on 1st July 2000 through Decision 2/2000¹²¹ of the Joint Council.¹²² This Decision established a Free Trade Area for goods. The following year, on 1st March 2001, the Decision 2/2001 entered into force and established a Free Trade Area for services.¹²³

The Global Agreement requires the Joint Council to decide on the establishment of a compatible dispute settlement procedure with the WTO.¹²⁴ The dispute settlement rules are shaped with detailed rules and specific time frames. It encompasses, the stages of the procedure (consultations plus arbitration), the appointment of arbitrators, the content of the panel reports (interim and final)¹²⁵ and how to implement the final report.¹²⁶ It also includes rules of procedure¹²⁷ and a code conduct¹²⁸ for the arbitrators.

¹¹⁷ The first move towards the signature of these Agreements was in 1975 with a Cooperation Agreement between Mexico and the Economic European Community. It was substituted in 1991 with another Cooperation Agreement but of the third generation. Then, in 1995 with a Joint Declaration, both parties stated their interest to deepen their relationship. To learn more about these Agreements See E. Ramírez Robles, *Solución de Controversias en los acuerdos celebrados entre México y la Comunidad Europea* (Guadalajara, Universidad de Guadalajara, 2003), pp. 85-104.

¹¹⁸ See J. Reiter, "The EU-Mexico Free Trade Agreement: Assessing the EU approach to regulatory issues" in *Regionalism, Multilateralism and Economic Integration, the recent experience* Gary P. Sampson and Stephen Woolcock (eds.) (Hong Kong, The United Nations University, 2003), p.66.

¹¹⁹ Economic Partnership, Political Co-ordination and Co-operation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part (OJ L276/45) 28.10.2000.

¹²⁰ The Interim Agreement established the objectives of the negotiation in trade liberalization 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 was in force until being superseded by the Global Agreement.

¹²¹ 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>

¹²² Highest Authority at a Ministerial level for both contracting Parties.

¹²³ Available at: http://europa.eu.int/comm/external_relations/mexico/intro/index.htm. Decision 2/2001 (OJ L70) 12.03.2001.

¹²⁴ Article 50 of the Global Agreement EU-Mexico.

¹²⁵ The arbitral award is binding.

¹²⁶ Title VI, Article 46 of the Decision 1/2000 and Title V, Article 42 of the Decision 2/2001.

¹²⁷ Annex III with reference of the Article 43 of the Decision 2/2001.

¹²⁸ Appendix I of the Decision 2/2001.

B) CHILE

Negotiations for the Agreement of Association EC Chile¹²⁹ began in 2000, and the trade provisions (FTA EC-Chile) entered into force on an interim basis in February 2003. The settlement of disputes is regulated in depth in the consultations¹³⁰, arbitral and compliance stage.¹³¹ Arbitration stage contains rules about the appointment of arbitrators, their technical advice, the arbitration panel ruling¹³², the model rules of procedure¹³³ and a code of conduct.¹³⁴

In order to identify the quasi-adjudicative model within EU FTAs, the strengths of their dispute settlement Titles will be classified into different groups. For the purposes of this article, these groups are considered to be elements of the adjudicative part in the EU FTAs' quasi-adjudicative model of dispute settlement. These elements are: final decisions, decision making process by a third authority and detailed and pre-established procedures.

Before the adjudicative part of this model is explained, the importance of the consultative part in the dispute settlement procedure will be mentioned. The consultations are held by the authority which is formed by the Parties and may settle the dispute in first stage (i.e. The Association Council). This authority issues non binding decisions (i.e. Mexico and Chile FTAs), whereas, in the political models, the decisions taken by the Parties were binding.

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 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 FTA).
- iii) Determine in retaliation whether or not the level of suspension is equivalent to the level of nullification (i.e. EU-Chile FTA).

¹²⁹ Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (OJ L 352) 30.12.2002.

¹³⁰ Article 183 FTA EU-Chile.

¹³¹ Article 188 FTA EU-Chile. The measures, a reasonable period of time and a proposal of temporary compensation to comply with the arbitral award will be notified. If the Parties do not agree they may request arbitration. The Party affected has the right to suspend concessions under certain conditions. The use of arbitration to establish the level of the suspension of concessions is also allowed.

¹³² Article 184 to 187 FTA EU-Chile.

¹³³ Model Rules of procedure for the conduct of Arbitration panels. Annex XV referred to Article 189.2 FTA EU-Chile.

¹³⁴ Code of Conduct for Members of Arbitration Panels, Annex XVI.

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 FTA).
- iii) Time frames 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) (see table 7).

Table 7. Quasi-adjudicative model of dispute settlement in EU FTAs

Procedural strengths of EU FTAs dispute settlement provisions	Elements of the quasi-adjudicative model of EU FTAs dispute settlement provisions
- Third authority that may settle the dispute in the first stage is formed by the Parties and issues non binding decisions	} Consultations
- Resolutions made on a legal basis by the panel	
- Decision that settles the dispute is binding	} Binding Decisions
- Decision of conformity with implementing measures	
- Decision to retaliate	
- Decisions for the RPT	
- Precise legal stages	} Pre-established and detailed legal stages
- Precise and detailed rules (no blocking of the panel only in EU-Mexico)	
- Time frames for each stage of the procedure	
- Pre-established procedures	

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 with the GATT. Some weaknesses still exist but they will be analyzed at a later date.¹³⁵

Important weaknesses were found in the FTA EU-Mexico. Although it is not possible for procedures to concurrently take place¹³⁶, one of the weaknesses is the possibility of

¹³⁵ My PhD thesis will explore in depth these flexibilities of dispute settlement provisions in the EU-Mexico FTA.

¹³⁶ Article 47.4 second phrase EU-Mexico FTA (Decision 2/2000).

choosing two fora to settle the dispute for the same matter.¹³⁷ The alternative forum to the panel procedures that are found in this FTA to settle disputes at the second stage is the WTO.¹³⁸ In addition, the panel procedures of the FTA will not consider issues relating to each Party's WTO rights and obligations.¹³⁹ 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.¹⁴⁰

In the FTA with Chile, the possibility of blocking the composition of the panel is an obvious weakness. This occurs because the list of individuals who can serve as arbitrators must be made by consensus through the Association Council.¹⁴¹ The practice shows that, despite the specific time frame of six months to constitute this list after the FTA enters into force, more than three years have passed and this list has still not been created.¹⁴²

Although both quasi-judicative dispute settlement mechanisms are very similar they have some differences in their provisions. For example, in the choice of forum, transparency, amicus curiae, composition of the panel and in the interim review stage. In addition, some differences are in time frames, implementation of panel reports, compliance procedures and retaliatory measures (refer to table 8).

¹³⁷ A similar provision was also found in the EU-South Africa FTA.

¹³⁸ Article 47.4 first phrase and third phrase EU-Mexico FTA (Decision 2/2000). For a deeper knowledge on this subject see K. Kwak and G. Marceau "Overlaps and conflicts of jurisdiction between the WTO and RTAs" in Canadian Yearbook of International Law, Vol. XLI (Canada, CYIL, 2003), pp. 83-152.

¹³⁹ Article 47.3 EU-Mexico FTA (Decision 2/2000).

¹⁴⁰ 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 information to reach a mutual agreed solution within 30 days. Appropriate measures will be those that disturbs the Agreement the least.

¹⁴¹ Article 185 FTA EU-Chile.

¹⁴² Article 185.2 FTA EU-Chile.

POLITICAL & QUASI-ADJUDICATIVE DISPUTE SETTLEMENT MODELS
IN EUROPEAN UNION FREE TRADE AGREEMENTS

**Table 8. Main Differences in the Dispute Settlement Mechanisms of
EU-Mexico and EU-Chile FTAs**

LEGAL PROVISIONS	EU-MEXICO FTA OJ L157/26 of 30.06.2000	EU-CHILE FTA OJ L353 of 30.12.2002
Forum Exclusion	The fora are: WTO and the procedures of the FTA, they are not mutually exclusive but the proceedings can not be concurrent (Art. 47.4)	The fora are: WTO and the procedures of the FTA, but one excludes the other (Art. 189.4 c)
Transparency	Is not regulated	Contact points and exchange of information, cooperation on increased transparency, publication (TITLE IX , Art.190 to 192)
Rules of Procedure	Hearings: They could be only Arbitrators and their assistants , representatives and advisers of the Parties, and administrative personal (interpreters, translators) (Rule 25) <i>Amicus curiae:</i> Not ruled.	Hearings: Opportunity for the Parties to have partly open hearings (Rule 23) <i>Amicus curiae:</i> submissions are allowed to be presented and the arbitration panel shall not be obliged to address them in its ruling (Rule 35 to 37)
Establishment of the Panel (timeframes)	To be established within 45 days (Art.43 and 44)	Within 3 days of the request for the establishment of the arbitration the panel shall be constituted (Art. 185)
Composition of the Panel	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 fail to propose an arbitrator or choose the chair, they will be chosen by lot (Art. 44)	A roster to be established by Association Committee (blocking possibility) no later than 6 months after the agreement enters into force (Art.185.2) Panel composed of 3 arbitrators by lot, from a roster of 15 persons (5 EU, 5 Chile, 5 non nationals) (Art.185.2) The lot day will be the day the panel is constituted (Art.185.4)
Interim review stage	Initial Report will be issued in 3 or 5 months after the constitution of the panel. Decisions are by majority (Art.45.1)	No initial report
Panel examination	Final Report shall be issued within 30 days from the presentation of the initial report (Art.45.2) (Initial + Final = 4 or 6 months).	Final report will be issued within 3 or 5 months from the constitution of the panel. Decisions are by majority (Art.187.1)
Implementation of the panel reports	The Party concerned shall notify: The measures adopted in order to implement the final report before the expiry of the reasonable period of time (RPT) previously determined (either by agreement of the parties or by arbitration, the ruling should be given within 15 days)	The Party complained against will notify : The measures required to comply, a reasonable period of time (RPT) for doing so, and a concrete proposal for temporary compensation until full implementation (Art. 188.3). In case there is disagreement with any of the 3 previous issues, there is the possibility to ask for arbitration. If the Party does not agree with the notification, it could ask the original Panel to review it within the next 45 days (Art.188.4) The Party will notify the other and the Association Committee of the measures that it will take to comply before the expiration of the RPT. The other Party could ask the original panel to issue an award of conformity of the measures that the Party will take to comply (within 45 days) (Art.185.5)
In cases of non implementation parties -Panel of compliance -Negotiate compensation	Upon notification any of the Parties may request an arbitration panel to rule on the conformity of those measures, the award should be issued within 60 days (Art.46.5). If the concerned party fails to notify, or the arbitration panel considers that the measures to implement the report are inconsistent, the complaining party has the possibility to enter into consultations with the other party to agree a mutually acceptable compensation (Art.46.6)	

World Trade Organization
Economic Research and Statistics Division
Working Paper ERSD-2006-09

LEGAL PROVISIONS	EU-MEXICO FTA OJ L157/26 of 30.06.2000	EU-CHILE FTA OJ L353 of 30.12.2002
Retaliation - Possibility of arbitration	If such an agreement has not been reached within 20 days from the request of consultations, the complaining Party shall be entitled to suspend benefits (Art.46.6)	If the Party does not notify the RPT or the award finds that the measures to comply are incompatible with the Agreement, the Party is allowed to suspend benefits (Art. 188.6) The suspension will be in the same sector (Art. 188.7) The complainant will notify the other Party and the Committee the benefits that will be suspended. The defendant could ask for arbitration within 5 days to determine that the level of suspension is similar to the nullification. In the next 45 days the award must be issued (Art. 188.8) The suspension will be temporary until the application of the measure. By request of any of the Parties, the original panel should issue within 45 days an award about the conformity of the measures of execution after the suspension of benefits (Art. 188.9)
Cross retaliation	Allowed under certain circumstances (Art. 46.7)	Not mentioned

There are two common elements in the adjudicative and quasi-adjudicative models of dispute settlement [i.e. Public International Law, WTO and EU FTAs]. Firstly, the resolution that settles the dispute is made on a legal basis by a third authority and secondly the decisions are binding. Consequently, these two elements act as the pillars of any political model of dispute settlement.

In addition to these two adjudicative elements an additional one was found in the quasi-adjudicative models of Public International Trade Law. These models have the element of pre-established and detailed legal stages. Table 9 summarizes the three adjudicative models of dispute settlement analyzed above.

Table 9. Main elements in Adjudicative and Quasi-Adjudicative models of dispute settlement

Public International Law	WTO-DSU	EU DS-FTAs
Resolutions on a legal basis	Final resolutions	Resolutions on a legal basis
Binding decisions taken by a third authority	Binding decisions taken by a third authority	Binding decisions taken by a third authority
	Pre-established and detailed legal stages	Pre-established and detailed legal stages
Many Cases	Many Cases	No cases

V. HYBRID MODEL OF DISPUTE SETTLEMENT IN EU AGREEMENTS WITH TRADE ISSUES

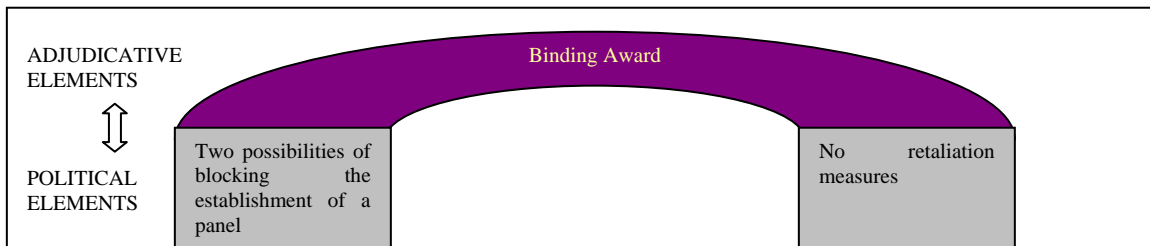
Other EU Agreements with trade issues different than FTAs include dispute settlement provisions (as in the case of the Customs Union with Turkey and the Cotonou Agreement). Here they are reviewed to illustrate a different kind of dispute settlement model that is not purely political or adjudicative. This is the hybrid model where arbitration is included for both political and adjudicative elements.

The EU-South Africa dispute settlement mechanism does not belong to this category despite arbitration being included. Instead, it was considered to have a political model because predominantly its dispute settlement provision is composed of elements from this model. The same criterion, but from the other extreme, was used with the EU-Chile FTA that includes the possibility of blocking the establishment of the panel. It was considered to have a quasi-adjudicative model, and not a hybrid, since its dispute settlement mechanism is also mostly composed of elements from this model.

A) CUSTOMS UNION WITH TURKEY

The *Customs Union*¹⁴³ with Turkey came into force in 1995¹⁴⁴ as a further phase of the FTA established in the Ankara Agreement. All except two issues of the provision to solve disputes of the Ankara Agreement were incorporated in this Customs Union. Consensus was required in the rules for arbitration or to initiate a judicial procedure. Instead, the Customs Union makes the award binding¹⁴⁵ although the panel could be composed only through consensus. Thus, the blockage possibility is still there¹⁴⁶ and no retaliation procedures were established either. Due to the two previous weaknesses, it can only be considered as a first approach of a dispute settlement adjudicative model in EU FTAs (see diagram 3).

Diagram 3. Dispute Settlement Mechanism in the Customs Union EU-Turkey



B) COTONOU AGREEMENT

This Agreement was signed in Cotonou between African, Caribbean and Pacific (ACP) countries and the EU and is therefore known as the Cotonou Agreement. It is formed by five pillars¹⁴⁷ and was established for a twenty-year period from 2000 to 2020.¹⁴⁸ The Cotonou

¹⁴³ A Customs Union includes, as in a FTA, mutual preferential treatment but it goes further, by constituting of a common external tariff. See Dictionary of Trade Policy Terms, World Trade Organization, ed. Goode, W., (United Kingdom, Cambridge University Press, 2003) fourth edition, p.90.

¹⁴⁴ 22 December 1995 (OJ L 96/142/EC) Decision No. 1/95 of the EC – Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union.

¹⁴⁵ "...The arbitration award shall be binding on the Parties to the dispute". Second phrase, Article 61 of the EU-Customs Union.

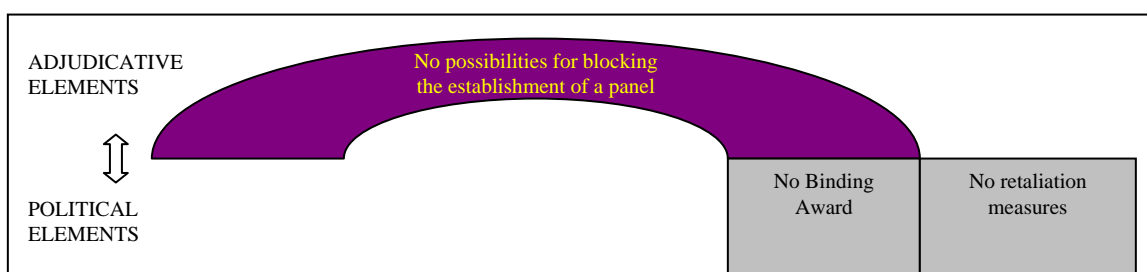
¹⁴⁶ Articles 61 to 64 EU-Turkey Customs Union.

¹⁴⁷ These pillars are: political dimension, increased participation, new economic and trade partnerships, cooperation focusing on poverty reduction and financial cooperation.

Agreement entered into force in 2003 and stated that trade preferences for the ACP countries¹⁴⁹ are non-reciprocal for an interim period (2001-2007).¹⁵⁰

Its mechanism for the settlement of disputes¹⁵¹ is innovative, i.e. the option for a multi-party dispute is incorporated, arbitration is possible after consultations where the second and/or third arbitrator is not designated by the defendant party, either party can ask the Secretary General of the Permanent Court of Arbitration to appoint one. However, the award is not binding, there are no rules for compliance and retaliation could be taken through appropriate measures.¹⁵² Arbitration procedures of the Permanent Court of Arbitration for International Organisations and States are optional (see diagram 4).

Diagram 4. Dispute Settlement Mechanism in the Cotonou Agreement



VI. EU FTAs NOT YET IN FORCE: WHAT WILL BE THE TREND FOR FUTURE EU FTAs?

The EU is still negotiating FTAs all over the world. Negotiations are currently in progress with MERCOSUR (Argentina, Uruguay, Paraguay and Brazil) and the Gulf Cooperation Council (GCC). This is also the case with the Economic Partnership Agreements (EPAs), and with the updating of the Euro-Mediterranean Agreements (negotiations on agriculture, services, investments and dispute settlement).

¹⁴⁸ The Cotonou Agreement replaces the Lomé Convention which governed the relations between the EU and ACP countries from 1975 until 2000.

¹⁴⁹ Except for South Africa that has its own FTA.

¹⁵⁰ The Cotonou Agreement is under a WTO waiver approved at the Doha Ministerial Meeting and expires on 31 December 2007. See WT/MIN(01)/15 of 14 November 2001.

¹⁵¹ Article 98 of the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part. ACP/CE/en 1.

¹⁵² See Commission Européenne DG Direction Général du Développement, *Accord de Partenariat ACP-CE signé à Cotonou le 23 juin 2000* (Brussels, European Commission 2001) 167p.

A) MERCOSUR

EU and MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) seek to create a free trade area through an Association Agreement. Both blocks concluded the last round of negotiations in 2004.

B) GULF COOPERATION COUNCIL

The Gulf Cooperation Council (GCC) is made up of six Arab countries: Saudi Arabia, Kuwait, Bahrain, Qatar, United Arab Emirates and Oman. In 1998 they signed a Cooperation Agreement which covered economic and cooperation activities. Based on this, the Commission is now negotiating a FTA with the GCC which not only includes goods but also services, government procurement and intellectual property rights.¹⁵³

C) ECONOMIC PARTNERSHIP AGREEMENTS

The *Economic Partnership Agreements (EPAS)* are one of the five pillars of the Cotonou Agreement.¹⁵⁴ These Agreements are being negotiated between the EU and the African Caribbean Pacific (ACP) countries (6 regions with 76 countries).¹⁵⁵ In 2008, reciprocal preferences for trade will begin under the results of the current negotiations.

D) UPDATE OF EURO-MEDITERRANEAN AGREEMENTS

Update of Euro Mediterranean Agreements. Under the current Mediterranean Agreements, both parties are currently increasing negotiations on agriculture, services and investments. These negotiations are part of the European Neighbourhood Policy which also includes new rules of dispute settlement.

CONCLUSION

The outcome of a negotiation relies exclusively on the signatory Parties involved in the Agreement. After reviewing the different models of dispute settlement (political, quasi-adjudicative and hybrid) that the EU has incorporated for over 40 years into both its FTAs and agreements with trade issues, some conclusions can be made regarding future trends in EU FTAs.

It is coherent that if throughout the history of the GATT dispute settlement, the EU was the main opponent of including adjudicative elements and, during the same period, all its FTAs contained political elements. However, the EU kept the same policy of not incorporating adjudicative elements in its bilateral trade relations since the WTO dispute settlement system was born. Surprisingly, the EU adopted and continues to adopt, this policy despite being the second biggest player and having more than ten years of DSU experience.

¹⁵³ Available at : http://europa.eu.int/comm./external_relations/gr/

¹⁵⁴ This pillar refers to a new economic and trade partnership.

¹⁵⁵ Available at : http://europa.eu.int/comm/development/body/cotonou/index_en.htm

Perhaps, for these historical reasons, the EU is still trying to prove that its multilateral dispute settlement position during the GATT DSU negotiations works even at a bilateral level.

It is evident that the EU has not followed a clear trend towards a quasi-adjudicative model like the one of the DSU. This is illustrated by the establishment and entering into force of more Post-WTO FTAs with political models of dispute settlement than FTAs with quasi-adjudicative or hybrid dispute settlement models. The Post-WTO FTAs with political models were established with Latvia, Lithuania, Estonia, Slovenia, Bosnia & Herzegovina plus Croatia and the former Yugoslav Republic of Macedonia, Tunisia, Israel, Morocco, Jordan, Egypt, Lebanon, Palestinian Authority, Algeria and South Africa. Post-WTO FTAs with quasi-adjudicative models were only established with Mexico and Chile. The hybrid model was found only in Agreements with trade issues and at different levels of economic integration than FTAs. It is possible, however, that it can be incorporated into FTAs as well.

The EU incorporated political models in its FTAs before, during and after the WTO dispute settlement system was created. Consequently, it appears highly possible that the incorporation into FTAs of any of the three models examined in this paper will constitute a trend to be followed. A trend that gives the quasi-adjudicative model of dispute settlement no more importance than the others and treats it as just another model.

This article highlights that, despite there being three models of dispute settlement in the EU Agreements, none have ever been used. There has not been a single dispute under any of the studied Agreements. One reason for this could be that there was an absence of adjudicative elements in certain FTAs. This was the explanation for the GATT's lack of cases between 1947 and 1994. However, since 2000 and 2002 with the EU Mexico and Chile FTAs respectively, the EU has introduced adjudicative elements into its dispute settlement provisions and still no disputes have been launched. Consequently, it is important to review the rules that are included in the quasi-adjudicative model of EU FTAs.¹⁵⁶

¹⁵⁶ For further insight into the rules of the quasi-adjudicative model of EU FTAs, please refer to my PhD thesis.

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Economic Research and Statistics Division
Working Paper ERSD-2006-09

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