POLITICAL & QUASI-ADJUDICATIVE DISPUTE SETTLEMENT MODELS IN EUROPEAN UNION FREE TRADE AGREEMENTS
IS ADJUDICATION A TREND OR IS IT JUST ANOTHER MODEL?

Edna Ramírez Robles*

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. THE HYBRID MODELS 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.

INTRODUCTION.

This paper will identify if the EU has followed the same adjudicative trend in its FTAs'[1] dispute settlement mechanisms as in the DSU of the WTO. It will point out that the quasi-

*PhD Candidate in European Law (Ortega y Gasset University Institute in Madrid), Scholar of the Universidad de Guadalajara, Mexico and Visiting Scholar at the World Trade Organization and Institut Universitaire de Hautes Études Internationales in Geneva. A follow up of the ideas reflected in this article will appear in my Doctoral thesis which studies the flexibility in a quasi-adjudicative Dispute Settlement Mechanism, the case of the EU-Mexico FTA. Edna.Ramirez@wto.org or ednarr@hotmail.com .
I will like to express my deepest gratitude to Luis Pérez-Prat Durbán, Patrick Low, María J. Pereyra Friedrichsen and Gabrielle Marceau 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 would also like to thank Sergio Ramírez Robles and Hannah Irfan for their support. Please note all errors and omissions in this article are solely mine.

[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.

adjudicative DSU of the WTO influenced EU FTAs' dispute settlement provisions until 2000 when the EU Mexico FTA entered into force. It will also explore if this first EU FTA quasi-adjudicative model was a factor in influencing succeeding FTAs signed with third countries.

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] The nature of these mechanisms can either be 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 GATT[6] designed procedures to solve their disputes. Between 1947 and 1994, the political elements of these provisions evolved towards adjudication. During this time States bilaterally also 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 model was introduced through the EU-Mexico FTA. This article 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

---

S. Woolcock, "A framework for assessing regional trade agreements: WTO-plus" in *Regionalism, Multilateralism and Economic Integration, the recent experience* ed. Gary P. Sampson and Stephen Woolcock (Hong Kong, The United Nations University, 2003), pp.18-31.

[2] 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.

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

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

[5] To know more about procedures of international instruments that differs 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 purposes 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 in account.

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

creates a new classification of a dispute settlement model, which was found in Agreements with trade issues other than FTAs. This article defines this classification as a hybrid model due to its adjudicative framework composed of political and adjudicative elements. 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 and conclusion this article is divided into six chapters. The first recognizes the main characteristics of political dispute settlement provisions 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 mechanisms. The fourth examines the EU FTAs' adjudicative model of dispute settlement. The fifth defines a hybrid model of dispute settlement in EU Agreements with trade issues. This model has both political and adjudicative elements in the adjudicative part of its mechanism. The hybrid model was found in Agreements which have different levels of economic integration than FTAs. The sixth identifies the not yet in force EU FTAs that are currently under negotiation and considers the future trend in these EU FTAs.

I. POLITICAL MODELS OF DISPUTE SETTLEMENT

1. Political elements in Dispute Settlement Means of Public International Law

This section expresses 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 as political: negotiation, inquiry, mediation and conciliation.[9] Additionally, good offices[10] and consultations[11] are considered as part of this group.[12]

All of the means mentioned above have their own particular elements; this paper will stress the two 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]

---

[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*, third edition (Cambridge, Cambridge University Press, 1998), p. 354 and A. Remiro Brotons y R.M. Riquelme Cortado, J. Diez-Hochleitner, E. Orihuela Calatayud y L. Pérez-Prat Durbán, *Derecho Internacional , op. cit* (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), *op.cit.* (note 9), p. 7.

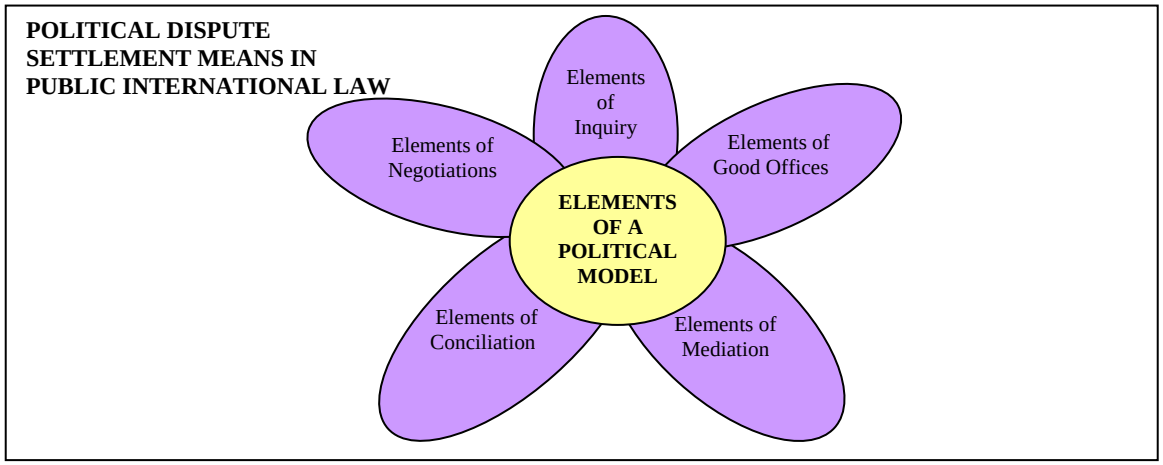
[11] Consultations are considered a type of negotiation which has the added value of giving Parties the possibility to gather information before the dispute starts. *See* J. G. Merrills, *International Dispute Settlement*, *op. cit* (note 9), pp. 3-8.

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

[13] *Ibid (*note 3).

Consequently, if these elements are included in a dispute settlement mechanism, it will be considered as political models of dispute settlement in Public International Law (as illustrated in diagram 1):

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 means[15], States 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 elements in GATT Dispute Settlement Provisions

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

[14] *See* Handbook on the Peaceful Settlement of Disputes between States, *op. cit.* (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 they had no third-party decision/making power. In spite of its consultative nature, the working party was invested with adjudicatory power. This was the case when the United States asked a working party for an "advisory ruling" to find whether Canada's agricultural trade restrictions violated Article XI. The neutral members of the working party (except 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**,** Hudec, R., *The GATT Legal System and World Trade Diplomacy* (USA, Butterworth Legal Publishers, 1990) Second Edition, p.77-80.

they also agreed upon a procedure for a third adjudicative body, for cases when the dispute was not solved through consultative procedures[18]. The third adjudicative body was named panel on complaints[19] and its procedures changed over the years.

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. With 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 PARTIES[20] 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 procedure[23] 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, p.2-3.

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

[20] At that time the CONTRACTING PARTIES were 23 governments at that time.

[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 of a fertilizer of Australia. The working group was composed by five nations, two were the parties in the dispute and three were nations. For further information *See* J. Jackson, *World Trade and the Law of the GATT* (USA, The Bobbs-Merrill Company, Inc., 1969) pp.166-187.

[23] *See* R. Hudec, *Adjudication of International Trade Disputes, op. cit.* (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, op.cit.* (note 24), p.12. The CONTRACTING PARTIES were pleased with this panel procedure 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*, *op.cit.* (note 17), pp.75-94.

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

[27] For example, in 1962 a panel ruled in the Uruguayan Recourse to Article XXII, stating that if there is a *prima facie* violation of any provision of the GATT which is demonstrated, 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?", *op.cit.* (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 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?", *op.cit.* (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), ed. Miguel Rodriguez, Patrick Low and Barbara Kotschwar (Virginia, Organization of American States, 1999), p.368.

[30] *See* R. Hudec**,** *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System, op.cit.* (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?", *op.cit.* (note 24), p.40.

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

[33] This decision was taken thanks to a Secretariat proposal.

[34] *See* R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System, op.cit.* (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?", *op.cit.* (note 21), p.41.

In the dispute settlement negotiations of the Uruguay Round[36], 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] Furthermore, they established most of the deadlines 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 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 under consensus and non detailed and pre-established procedures.

a) No final decisions.

During the first decade of the GATT, the resolutions were not final because they were made by the CONTRACTING PARTIES and not by a third authority and on a political basis instead of on a legal basis[42]. Moreover the resolutions were pragmatic, on a case by case basis and they not did not refer to past decisions or serve as a projection for future decisions[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 started in 1986 and 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), p.206-209.

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

[38] *See* R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, *op.cit.* (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?", *op.cit.* (note 21), p.42.

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

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

[42] Public International Law considers that a final decision *res judicata* must have qualities, must be founded in facts and law and must have findings. S*ee* 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 Revisión: The Review and Enforcement of International Judgements and Awards* (New Haven, Yale University Press, 1971) p.185.

b) Decision making under consensus.

This element encompasses the weaknesses of: i) political consensus in adopting the panel ruling: because the defeated party could always opposed 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 composed, it needed the approval of all the Parties (including the respondent) for its establishment. This situation allowed the blockage of the panel and iv) political consensus in authorizing retaliation because the defendant Party had to agree with the complainant's retaliatory measures.

c) Non detailed and pre-established procedures[44].

i) Before 1979 there was a lack of clearly defined legal stages. It was only after this date that they were introduced (i.e. notification, consultation, establishment and composition of the panel, third party rights and panel report). The appellate stage was included only when the DSU entered into force, ii) there was a lack of detailed rules. Even if some stages were established, they were not rule-based, some advances were however made in 1982 (i.e. panel mandates, conclusions, surveillance and compliance) and in 1984 (i.e. rules for the panel members), iii) there was a lack of time frames. Before 1989, timeframes were not included in the dispute settlement provisions, iv) there was a lack of pre-established procedures. Only in 1989 were the procedures for the panel work established (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. To know in deep procedural aspects of all dispute settlement means in Public International Law, *See* L. Caflisch, Cent ans de reglement pacifique des différends interétatiques, Acaémie de Droit International de la Haye, 2002, Tome 288 (2001), 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)
- Resolutions made on a political basis by CONTRACTING PARTIES - Pragmatic decisions	No final decisions
- 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 under consensus
- Lack of legal stages - Lack of detailed rules - Lack of time frames - Lack of procedures for each legal stage - Lack of compliance procedures	Non detailed and pre-established procedures

At the end of 1991, the Uruguay Round negotiators drafted a new reform proposal which was named Understanding on Dispute Settlement. It encompassed everything related to the process[45] plus the GATT elements mentioned above (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, the CONTRACTING PARTIES adopted the DSU within the framework of the WTO Agreements. The DSU removed most of the political elements of the GATT (1947 to 1994) and strengthen it by replacing them with adjudicative elements. When some or all political model elements are included in a dispute settlement mechanism of International Trade, a political model is formed.

In the multilateral trade arena, the EU has been the main opponent of developing an adjudicative dispute settlement mechanism. 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 which steps the EU used 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, op.cit.* (note 24), pp.235-236.

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

The classification of signed Agreements by the EU[47] with third countries is varied and mostly depends on 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 evolved[48] into the following classification: Association Agreements, Partnership Cooperation and Development Agreements or Agreements just for Trade interests by matters.[49]

The most advanced Association Agreements allowed the associated partners to benefit of some of the advantages deriving from the Treaties[50] 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 group[53] 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. In the Opinion 1/94, 15.11.1994 and in the Nice Treaty (Art.133.6) is expressed 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_communautaire

[50] Article 48 EUT.

[51] To have a deeper view about trade aspects of the former Association Agreements (EU Agreements) of some of the new MS of the EU s*ee* M.J. Pereyra, Commercial Defence Measures: The Dark Side of the Europe Agreements (Brussels, College of Europe, 1997) 132p.

[52] *See* more 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 ed. Kálmán Mizsei and Andrzej Rudka (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] *See* more 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, however, is 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. The EU FTAs[56] could be just that, but they all include preferences in areas other than simply 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 division between pre and post WTO shows that the quasi-adjudicative DSU did not facilitate the creation of an immediate trend of quasi-adjudicative dispute settlement provisions in the EU FTAs.

1. Pre-WTO (1963 to 1995)

Pre-WTO agreements which 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" is the Association Agreement between the European Economic Community (EEC) and Turkey which was signed in Ankara in 1963.[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 proceedings[58] are not considered. The Agreement only mentions and does not specify which necessary measures[59] must be taken to comply with the rulings.

B) European Economic Area.

[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.

The *European Economic Area* (*EEA)* is an Agreement that has undergone many changes with regard to the signatory parties. The EEA was signed in 1992[60] by the EC and European Free Trade Association (EFTA). At that time, the members of EFTA were Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.[61] Switzerland did not ratify the EEA due to the negative results in their 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 Treaties[64], 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 safeguards measures[67] is possible and, the disputes concerning their scope or duration, could be solved though 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 EU[70] 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 *European Agreements with Romania[71] and Bulgaria[72]* are in force *until the accession* of these two countries into

[60] The Agreement of the European Economic Area was signed on, 2 May 1992 (OJ L 1) 03.01.1994.
[61] *See* F. Weiss, "The European Free Trade Association after Twenty-five Years" *in Yearbook of European L*aw, 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, Rumania (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.
[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, *op.cit.* (note 53), pp.1-14.
[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).

the EU. This fact will take place on January 1st 2007[73]. Currently, the Treaty of Accession[74] is in the process of being ratified by each Member State.

Despite the fact that most of all 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 application[75] 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 again two possibilities for the respondent party to block the composition of the panel. The first is that the respondent names the second arbitrator which means that it can delay the composition of the panel or, even worse, halt it. The second is that both parties in conflict must agree to name 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).

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

[74] 21 June 2005 (OJ L 157/10) Notice concerning the entry into force of the Treaty of Accession of Romania and Bulgaria.

[75] To get a deeper knowledge of the trade defence measures in this agreements *See* M.J. Pereyra, Commercial Defence Measures: The Dark Side of the Europe Agreements, *op.cit.* (note 51), 132p.

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 chooses 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 chooses 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 chooses 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 chooses 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 non binding (**not stated**). Decisions of the Association Council binding (Art.111)	Decisions of the panel non binding (**not stated**). Decisions of the Association Council binding (Art.104)	Decisions of the panel non binding (**not stated**). Decisions of the Association Council binding (Art.106)	Decisions of the panel non binding (**not stated**). Decisions of the Association Council binding (Art.107)
Compliance procedures	**None** Each party shall take the steps required to implement the decision of the arbitrators (Art. 112.4)	**None** Each party shall take the steps required to implement the decision of the arbitrators (Art. 105.4)	**None** Each party must take the steps required to implement the decision of the arbitrators (Art. 107.4)	**None** Each party must take the steps required 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 (1995 to 2006).

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

A) Stabilization and association agreements with the Balkans.

The *Stabilization and Association Agreements with the Balkans (SAAs)*[76] were signed with Bosnia & Herzegovina, Croatia and the former Yugoslav Republic of Macedonia. The Agreements with Albania and Serbia and Montenegro are currently under negotiations. 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 Area[77] 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.[78]

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.[79] In this FTA the Stabilisation and Association Council is the sole instance that solves disputes between the Parties[80] and its decisions are binding.[81] There are Committees[82] 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.[83]

B) 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.[84] 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

[76] 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.
[77] 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.
[78] http://europa.eu.int/comm/external_relations/see/index.htm
[79] 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, 2005, (OJ L 026) p.001.
[80] Article 113 EU-Croatia FTA.
[81] Article 112 EU-Croatia FTA.
[82] Article 114 EU-Croatia FTA
[83] Article 120.2 EU-Croatia FTA
[84] *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.

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. The FTAs between the EU and the Mediterranean Partners are replacing the Cooperation Agreements signed in 1970.[85] Until now only the Tunisia[86], Israel[87], Morocco[88], Jordan[89] and Egypt[90] Agreements have been ratified and are in force. For Lebanon, the Palestinian Authority and Algeria the trade matters are in force[91] 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).

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 retaliatory measures can be taken through appropriate measures without being specified in the agreement. As is shown

[85] http://europa.eu.int/comm/external_relations/euromed/med_ass_agreements.htm
[86] 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, 1998, (OJ L 97/2) signed on 17.07.95, entry into force 1.03.98.
[87] 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, 2000, (OJ L 147/3) signed on 20.11.95, entry into force 01.06.00.
[88] 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, 2000, (OJ L 70/2) signed on 26.02.96, entry into force 01.03.00.
[89] 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, 2002, (OJ L 129/3) signed on 24.11.97, entry into force 15.05.02.
[90] 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, 2003, (OJ L 345/115) signed on 25.06.01, entry into force 01.01.04.
[91] http://europa.eu.int/comm/external_relations/euromed/free_trade_area.htm

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 non binding (**not stated**) Decisions of the Association Council binding (Art. 83)	Decisions of the panel non binding (**not stated**) Decisions of the Association Council binding (Art. 72.1)	Decisions of the panel non binding (**not stated**) Decisions of the Association Council binding (Art. 94.2)	Decisions of the panel non binding (**not stated**) Decisions of the Association Council 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**

C) South Africa.

South Africa is one of the contracting parties of the EU-Asian 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, the ratification process by each MS is still ongoing. However, trade matters are 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 panel[93], compliance measures are not specified[94] and there is no retaliation procedure.[95] I in urgent cases, retaliation could take place only through appropriate measures[96], even without having previous consultations.[97] Nevertheless, there are some innovations; i.e. more time limits are established[98], the obligation to establish the working procedures for arbitration[99] 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.

This article already earlier mentioned that weaknesses in panel procedure are considered as the first cause of difficulties in a dispute settlement system. Consequently this article will identify and classify the common weaknesses of the EU dispute settlement provisions into different groups. Due to the political nature of these weaknesses, this article will consider these groups as the elements of the political model of dispute settlement in the EU FTAs. These elements are: no final decisions, decision making under consensus, and unilateral decisions, non or barley detailed procedures.

a) No final decisions

[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.
[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 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 EU-South Africa

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

b) Decision making 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 decide 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) Non or barley detailed procedures.

i) Lack of legal stages. The procedures were not detailed (i.e. Ankara Agreement and SAAs) or barley detailed [i.e. EEA (safeguards measures), Europe Agreements, EUROMED, South Africa (composition of the panel)]. No arbitration stages are found in some FTAs (i.e. Ankara A., EEA[100] and SAAs).
ii) Lack of time frames. In some cases none were included (i.e. Ankara A., SAAs) and in some others only a few [i.e. EEA (to proceed to 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 Party concerned 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)].
iii) 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. No Compliance Procedures

[100] Ask for arbitration is possible only for disputes that concern the scope or duration of safeguard measures. Article 111.4 EEA.

[i.e. Ankara A., EEA, Europe Agreements, SAAs, EUROMED, South Africa (each party must take steps required to implement the decision of the arbitrators)].*d) Unilateral Decisions*

The parties were allowed to take some unilateral decisions. 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). For retaliation, the parties again have the flexibility of taking appropriate measures which should be notified to the Council (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 - No binding awards	Decision making under consensus
- Lack of legal stages - Lack of detailed rules - Lack of time frames - No procedures for each legal stage	No detailed and pre-established procedures
- Compliance with the rulings through required steps - Retaliation with appropriate measures	Unilateral decisions

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 requirement of consensus in the decision making process for resolutions other than the one that settles the dispute. For example, the resolution that chooses another forum as a second instance, composes the panel and authorizes retaliation. A further element is not having detailed and pre-established procedures. In addition the parties can take unilateral decisions, particularly with regard to compliance 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	EU FTAs
Resolutions could be in a non Legal Basis	No final decisions	No final decisions
Resolutions are binding only under consensus	Decision Making under Consensus	Decision making under consensus
	Non detailed and pre-established procedures	No detailed and pre-established procedures
		Unilateral Decisions

III. ADJUDICATIVE AND QUASI-ADJUDICATIVE MODELS OF DISPUTE SETTLEMENT

1. Adjudicative Dispute Settlement Mechanisms and their common elements in Public International Law.

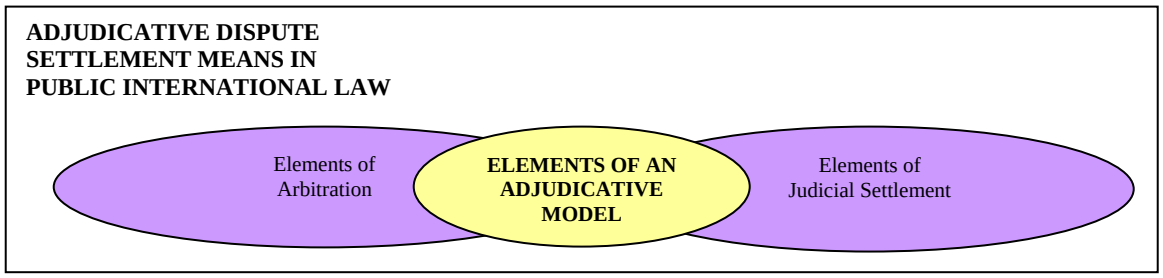
This section contains the key elements which comprise an adjudicative model of Dispute Settlement in Public International Law. This model was reflected in two peaceful dispute settlement means which were stated in the United Nations Charter, Article 33.[101] The adjudicative means for solving disputes are arbitration and judicial settlement.

Remember briefly that both means have particular features which make them different from each other.[102] 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]

Two common elements between them are; first, the decision is binding and the judicial settlement is also final and definitive and second, a third authority intervenes with the Parties consent to solve the dispute with a decision issued on the basis of law.[104] These two elements compose the adjudicative model in Public International Law which is illustrated in the 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, *op.cit.* (note 9), pp.55-97, J. G. Merrills, *International Dispute Settlement*, third edition (Cambridge, Cambridge University Press, 1998), *op.cit.* (note 9), pp. 88-169 and Remiro Brotons A., Riquelme Cortado, R.M., Diez-Hochleitner J., Orihuela Calatayud, E. y Pérez-Prat Durbán, L. , *Derecho Internacional*, *op.cit.* (note 2), pp.852-870.
[103] *See* Handbook on the Peaceful Settlement of Disputes between States, *op.cit.* (note 9), p. 55.
[104] A. Remiro Brotons, R.M. Riquelme Cortado, J. Diez-Hochleitner, E. Orihuela Calatayud y L. Pérez-Prat Durbán, *Derecho Internacional, op.cit.* (note 9), 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 three stages in the process of dispute settlement: consultations[105], a panel review process[106] and an appellate stage[107]. These last two stages embody the adjudicative nature of the system and will therefore be analysed in this section. The panel review process includes detailed rules, procedures and timeframes[108]. The DSU regulates the establishment of the panels, (Article 6), their terms of reference of the panels (Article 7), their composition of the panels (Article 8), procedures for multiple complainants (Article 9), third Parties (Article 10), function of the panels (Article 11), panel procedures (Article 12), right to seek information (Article 13), confidentiality (Article 14), interim review stage (Article 15) and 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 review 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.

The panel process is very influenced by arbitration, but the pure arbitration is included in the DSU at different stages of the process. Arbitration is considered one way of establishing

[105] Article 4 of the DSU
[106] Articles 6.2, to 16 of the DSU.
[107] *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 (Ed.) (Cambridge, WTO/CUP, 2005), p.9.
[108] 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 (Ed.) (Cambridge, WTO/CUP, 2005), pp.32-45.

a reasonable period of time when implementing recommendations and rulings[109]. The Member concerned with arbitration can object to the level of suspension of concessions proposed[110]. This Member, also through arbitration, could claim that the principles or procedures on suspending concessions in the same sector[111], or in other sectors under the same covered agreement[112] or under another[113] have not been followed[114]. In addition, arbitration as an alternative means of dispute settlement is stated in the 25.1 of the DSU as well.

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, detailed and pre-established procedures.

a) Compulsory jurisdiction.

There is a compulsory jurisdiction of the Dispute Settlement Body (DSB) for all 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.[115]

b) Final decisions

i) Independent bodies, rather than the Members, adjudicate the decisions on a legal basis, ii) the report takes a final and definitive nature when it reaches the Appellate Stage[116]. This gives the system a quasi-judicial nature due to the pre-constituted[117] permanent body, iii) the decisions of the panel and Appellate Body are used valuable interpretations for future cases.

[109] Article 21.3 (c) of the DSU.
[110] Article 22.6 of the DSU.
[111] Article 22.3 (a) of the DSU.
[112] Article 22.3 (b) of the DSU.
[113] Article 22.3 (c) of the DSU.
[114] Article 22.6 of the DSU.
[115] *See* G. Marceau, "Consultations and the Panel Process in the WTO Dispute Settlement System", *op.cit.* (note 108), p. 30.
[116] 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.
[117] *See* G. Abi-Saab, "The WTO Dispute Settlement and General International Law" in *Key Issues in WTO Dispute Settlement: The First Ten Years, op.cit.* (note 107), p.10.

c) Decision making process under negative consensus.

The decision making process under the negative consensus element encompasses these weaknesses: i) due to negative consensus, the quasi-automatic adoption of the panel and Appellate Body rulings is possible and becomes binding[118], ii) due to negative consensus there is no possibility of blocking the establishment of a panel[119], iii) due to negative consensus the quasi-automatic authorization of retaliation is possible.

d) Detailed and pre-established procedures

i) Many precise legal stages have been established, 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 included in the legal stages. Almost every stage of the procedure has precise time frames, iv) lack of pre-established procedures. Examples are the working procedures for the panel and Appellate Body (see table 6).

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

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

[118] *See* G. Marceau, "Consultations and the Panel Process in the WTO Dispute Settlement System", *op.cit.* (note 108), pp. 29-30.
[119] Article 6.1 of the DSU.

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

Even though the States 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 the Adjudicative Model of Public International Law in the Customs Union with Turkey.

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 join 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 FTA's to enter into force. This was the case for the EU-Mexico and Chile FTAs which passed through an Interim Agreement before it fully implemented trade subjects.

A) México.

The *EU-Mexico* relation was established in two Agreements[120] along with a Final Act signed in 1997.[121] The Global Agreement[122] includes political, economic and trade areas of shared competences of EC and its Member States. The Interim Agreement (no longer in

[120] 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. *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.

[121] *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 ed. Gary P. Sampson and Stephen Woolcock (Hong Kong, The United Nations University, 2003), p.66.

[122] 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.

force) used to cover trade matters of exclusive EC's competences.[123] The FTA EU-Mexico entered into force on the 1st July 2000 through Decision 2/2000[124] of the Joint Council.[125] 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.[126]

The Global Agreement obliges the Joint Council to decide on the establishment of a compatible dispute settlement procedure with the WTO.[127] The set of rules of the dispute settlement is shaped with detailed norms and specific time frames. It encompasses, the stages of the procedure (consultation plus arbitration), the appointment of arbitrators, the content of the panel reports (interim and final)[128] and the way to implement the final report.[129] It also includes rules of procedure[130] and a code of conduct[131] for the arbitrators.

B) Chile.

Negotiations for the *Agreement of Association EC Chile*[132] 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 consultations[133], arbitral and compliance stage.[134] This second stage contains rules about the appointment of arbitrators, their technical advice, the arbitration panel ruling[135], the model rules of procedure[136] and a code of conduct.[137]

[123] 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 as related to trade and trade related issues. This Interim Agreement entered into force in July 1998, and was in force until begin superseded by the Global Agreement.
[124] Decision 2/2000, was published 30 June 2000, OJ L157 of 30 June 2000 and the annexes were published in OJ L245 of 29 September 2000. http://www.economia-bruselas.gob.mx/ls23al.php?s=501&p=4&l=2
[125] Highest Authority at a Ministerial level for both contracting Parties.
[126] *See* http://europa.eu.int/comm./external_relations/mexico/intro/index.htm. Decision 2/2001 OJ L70, 12 March 2001.
[127] Article 50 of the Global Agreement.
[128] The arbitral award is binding.
[129] Title VI, article 46 of the Decision 1/2000 and Title V, Article 42 of the Decision 2/2001.
[130] Annex III with reference of the article 43 of the Decision 2/2001.
[131] Appendix I of the Decision 2/2001.
[132] 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. 30.12.2002 OJ L 352.
[133] Article 183 FTA EU-Chile.
[134] Article 188 FTA EU-Chile. The measures, a reasonable period of time (RPT) 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.
[135] Article 184 to 187 FTA EC-Chile.
[136] Model Rules of procedure for the conduct of Arbitration panels. Annex XV referred to in Article 189.2
[137] Code of Conduct for Members of Arbitration Panels. Annex XVI.

In order to identify the quasi-adjudicative model within the 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 the 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 the model is explained, the importance of the consultative part as a strength in the dispute settlement procedure will be mentioned. The consultations are held by the authority which may settle the dispute in first stage (i.e. The Association Council) and conformed by the Parties. This authority issues non binding decisions (i.e. Mexico and Chile), whereas, in the political models, the decisions taken by the Parties were binding.

a) Final decisions.

i) An independent body, the panel, rather than the Members, adjudicate the decisions on a legal basis.

b) Binding Decisions.

The panel is the third authority that adjudicates decisions which are binding, particularly: i) to settle the dispute, ii) regarding the conformity of the measures that the loosing Party will take to comply with the ruling (i.e. Mexico), iii) in retaliation to determine whether the level of suspension is equivalent to the level of nullification (i.e. Chile).

c) Detailed and pre-established procedures.

i) Many precise legal stages have been established, 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 are shorter than in the DSU and are included in almost all legal stages of the procedures, iv) there are pre-established procedures (i.e. model rules of procedure for the panel), v) due to the detailed rules, there is no possibility of blocking the establishment of a 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 first stage is conformed by the Parties and issues non binding decisions.	Consultations
- Resolutions made on legal basis by a third authority (panel)	Final decisions

- Decision that settles the dispute is binding - Decision of conformity with implementing measures - Decision to retaliate - Decisions for the RPT	Binding Decisions
- Precise legal stages - Precise and detailed rules (no blocking of the panel) - Time frames in the stages of the procedure - Procedures for each legal stage (compliance and retaliatory)	Detailed and pre-established procedures

Despite the incorporation of the previously mentioned adjudicative elements in the dispute settlement EU FTAs' provisions, no bilateral cases have been launched yet. 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[138].

Important weaknesses were found in the FTA with Mexico. Although it is not possible for procedures to concurrently take place[139], one of the weaknesses is the possibility of choosing two fora to settle the dispute for the same matter.[140] The alternative forum to the panel procedures that are found in this FTA to settle disputes at the second stage is the WTO[141]. In addition, it is important to mention to mention that the panel procedures of the FTA will not consider issues relating to each Party's WTO rights and obligations.[142] A further weakness found in this FTA and similarly occurring in EU dispute settlement political models is that appropriate measures are also included in the Global Agreement.[143]

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[144]. The practice shows that, despite the specific time frame of six months to constitute this list after the entry into force of this FTA, more than three years have passed and this list has still not been created[145].

[138] My PhD thesis will explore in depth these flexibilities of the dispute settlement provisions in the EU Mexico FTA.
[139] Article 47.4 second phrase EU-Mexico FTA (Decision 2/2000).
[140] A similar provision was also found in the EU-South Africa FTA.
[141] Article 47.4 first phrase and third phrase EU-Mexico FTA (Decision 2/2000).
[142] Article 47.3 EU-Mexico FTA (Decision 2/2000).
[143] 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. The appropriate measures will be those that disturbs the Agreement the least.
[144] Article 185 FTA EU-Chile.
[145] Article 185.2 FTA EU-Chile.

Although both quasi-adjudicative 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, as is stated in the following table.

Table 8. Main Differences in the Dispute Settlement Mechanism FTAs EU-Mexico and EU-Chile

LEGAL PROVISIONS	EU-MEXICO 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) *Amicus curiae*: Is not ruled.	Hearings: Opportunity to the Parties to have partly **open hearings** (Rule 23) ***Amicus curiae*: 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 in **45 days** (Art.43 and 44)	Within **3 days** of the request for the establishment of the arbitration the panel shall by constituted (Art. 185).
Composition of the Panel	Panel composed of 3 arbitrators. Each Party appoint 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 arbitrator or in choosing the chair, they will be choose by lot (Art. 44)	A roster to be established by Association Committee no later than 6 months after entry into force of agreement (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 of constitution of the panel (Art.185.4).
Interim review stage	**Initial Report** will be issued in 3 or 5 months from 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 form the presentation of the initial report (Art.45.2) (Initial + Final = **4 or 6 months**)	Final report will be issued in **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 complained against party will notify : The measures required to comply, a reasonable period of time **(RPT)** for doing so, and a concrete proposal for a **temporary compensation** until full implementation (Art. 188.3). In case of disagreement of any of the 3 previous issues, there is the possibility to ask arbitration. If the party doesn't agree with the notification, could ask the original Panel to determinate about it in the next **45 days** (Art.188.4) The Party will notify the other Party and the Association Committee the measures that will be taken 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 is going to take to comply (**within 45 days**) (Art.185.5)
In cases of non implementation parties -Panel of	Upon the 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).	

compliance -Negotiate compensation	If the concerned party fails to notify or the arbitration panel considers that the measures to implement the report are inconsistent, the complaining party have the possibility to enter into consultations with the other party to agree a **mutually acceptable compensation** (Art.46.6).	
Retaliation - Possibility of arbitration	If such agreement has not been reached within 20 days form the request of consultations, the complaining Party shall be entitled to suspend benefits (Art.46.6)	If the Party doesn't 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 arbitration within the 5 days, to determinate 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 in 45 days an award about the conformity of the measures of execution after the suspension of benefits. (Art. 188.9)
Cross retaliation	**Is allowed** under certain circumstances (Art. 46.7)	Is 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 is was found in the quasi-adjudicative models of Public International Trade Law. This element has detailed and pre-established procedures. The 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	Resolutions on a legal basis	Resolutions on a legal basis
Binding decisions taken by a third authority	Binding decisions made by a third authority	Binding decisions made by a third authority
	Detailed and pre-established procedures	Detailed and pre-established procedures
Many Cases	Many Cases	No cases

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

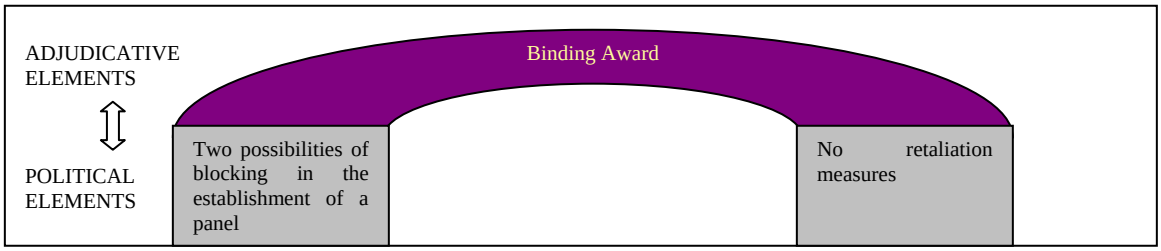
Other EU Agreements with trade issues different than FTAs include dispute settlement provisions (as in the case of the Customs Union with Turkey and the Cotonou Agreement). They are studied to illustrate a different kind of dispute settlement model that is not purely political or adjudicative. This is the hybrid model were arbitration is included with both political and adjudicative elements[146].

It was considered that the Agreement with South Africa does not belong to this category despite the arbitral were arbitration is included

A) Customs Union with Turkey.

The *Customs Union*[147] *with Turkey* came into force in 1995[148] 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 binding[149] although the panel could be composed only through consensus. Thus, the blockage possibility IS still there[150] 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. The mechanism could is depicted in the diagram 3.

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



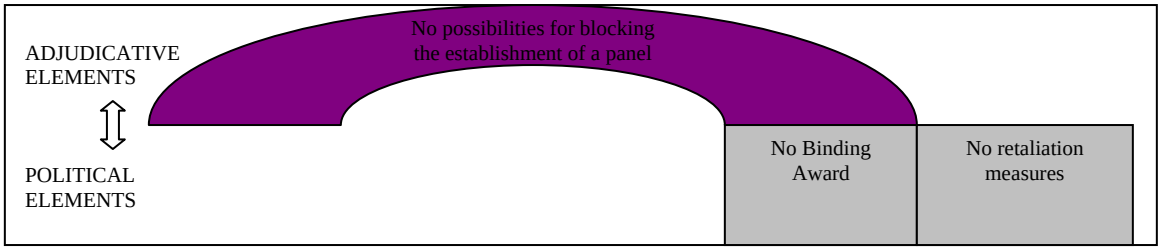
[146] The Agreement with South Africa is not included in this category because in spite of the arbitration included in the Article that regulates the settlement of disputes.
[147] A Customs Union includes, as in a FTA, mutual preferential treatment, but it goes further, due to the constitution of a common external tariff. *See* Dictionary of Trade Policy Terms, World Trade Organization, ed. Goode, W., (United Kingdom, Cambridge University Press, 2003) fourth edition, p.90.
[148] 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.
[149] "...The arbitration award shall be binding on the Parties to the dispute". Second phrase, Article 61 of the EU-Customs Union.
[150] Articles 61 to 64 EU-Turkey Customs Union.

B) Cotonou Agreement.

This Agreement was signed in Cotonu between African, Caribbean and Pacific (ACP) countries and the EU and is therefore known as the Cotonu Agreement. It is formed by five pillars[151] and was concluded for a twenty-year period from 2000 to 2020.[152] The Cotonou Agreement entered into force in 2003 and stated that trade preferences for the ACP countries[153] are non-reciprocal for an interim period (2001-2007).[154]

Its mechanism for the settlement of disputes[155] 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.[156] Arbitration procedures of the Permanent Court of Arbitration for International Organisations and States are optional. This mechanism is represented in diagram 4.s

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?

Indeed, 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

[151] These pillars are: political dimension, increased participation, new economic and trade partnerships, cooperation focusing on poverty reduction and financial cooperation.
[152] The Cotonou Agreement replaces the Lomé Convention which governed the relations between the EU and ACP countries from 1975 until 2000.
[153] Except for South Africa that has its own FTA.
[154] 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.
[155] 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
[156] *See* Commission Européenne DG Direction Général du Développement, *Accord de Partenariat ACP-CE signé a Cotonou le 23 juin 2000* (Brussels, European Commission 2001) 167p.

Cooperation Council (GCC). This is also the case with the Regional Economic Partnership Agreements (REPAS), and there is an update of the Euro-Mediterranean Agreements (negotiations on agriculture, services, investments and dispute settlement).

A) MERCOSUR.

a) 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 6 Arab countries: Saudi Arabia, Kuwait, Bahrain, Qatar, United Arab Emirates and Oman. In 1998 they signed a Cooperation Agreement which covers economic and cooperation activities. Based on this, the Commission is now negotiating an FTA with the GCC, which not only includes goods but also services, government procurement and intellectual property rights. This FTA will be signed once the internal GCC Customs Union enters into force.[157]

c) Economic Partnership Agreements

Economic Partnership Agreements (EPAS). The EPAS are one of the five pillars of the Cotonou Agreement.[158] These Agreements are being negotiated between the EU and the African Caribbean Pacific (ACP) countries (6 regions with 76 countries).[159] 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 of the Agreement. However, after reviewing the different models of dispute settlement that the EU has incorporated for over 40 years into both its FTAs and agreements with trade issues, some

[157] *Available at :* http://europa.eu.int/comm./external_relations/gr/
[158] This pillar refers to a new economic and trade partnerships.
[159] *Available at :* http://europa.eu.int/comm/development/body/cotonou/index_en.htm

conclusions can be made. These dispute settlement models have been political, quasi-adjudicative and hybrid

It is coherent that throughout the history of the GATT dispute settlement, the EU was the main opponent of adjudicative elements and, during the same period, all its FTAs contained political elements. 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. 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 more Post-WTO FTAs with political models of dispute settlement being established and entering into force than quasi-adjudicative or hybrid models. The Post-WTO FTAs with political models were signed 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. The Post-WTO FTAs with quasi-adjudicative models were 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. The cases studied in this article were the Customs Union with Turkey and the Cotonou Agreement.

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 article 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 has been ever used. There has not been a single dispute under any of the studied Agreements. One reason for this could be the 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 no disputes have yet been launched. Consequently, it is important to review the rules that are included in the quasi-adjudicative model of EU FTAs[160].

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