DISPUTE RESOLUTION STRATEGIES IN TRADE AGREEMENTS ENDORSED BY THE EU: CEFTA Experience

By

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[draft – please do note cite]

INTRODUCTION

The proliferation of regional trade agreements (RTAs)[1] in the past fifty years has triggered numerous studies in various disciplines, law being one of them, seeking to explain why the process of bilateral and regional cooperation is accelerating and how this trend influences cooperation in multilateral trade. The prospect of closer political and economic integration and/or the need for national security, coupled with social, historical, cultural, and even linguistic ties among the nations of a particular region, are the reasons that normally prompt countries to join together. Sharing the same legal culture and history and having similar external economic policies could make it easier not only to reach an agreement on mutually beneficial trade actions but also to comply with such an agreement. In addition, the WTO's lack of progress in multilateral trade negotiations has

* Assistant Professor, Faculty of Law, UBC. This paper is a part of a large interdisciplinary research project on Regional Trade Agreements conducted by Professor Armand de Mestral, Faculty of Law, McGill University, as the principal investigator and funded by the Social Sciences and Humanities Research Council. The research is also partly funded by the Jean Monnet Module Grant awarded by the European Commission in 2005. I am grateful to Hayane Dahmen, 2nd year LL.B student at the Faculty of Law, UBC, and the following M.A. students of the Institute for European Studies, UBC: Michael Eddy, Thorbern Dorn and Zsuzsana Suba. However, all errors and omissions are only my own.

[1] The term "regional trade agreement" in this article is used to include preferential trade agreements as well, including trade agreements between countries that are not within the same geographic region. The term "plurilateral" regional trade agreement is used to indicate that more than two countries are party to the agreement.

prompted many countries to move toward regionalism in order to achieve closer economic integration and benefit from trade liberalization.

As the world economy becomes more integrated as a result of numerous rounds of trade negotiations under GATT and the WTO, various regions are also achieving a higher degree of integration, moving from "shallow" to "deep" integration, or from the reduction or elimination of trade barriers to the harmonization of laws and macroeconomic, and tax policies to the creation of economic or/and monetary unions with full internal mobility of people and capital.[2] Many of these regional agreements are bilateral agreements between developed and developing countries and it is noteworthy that all of the WTO members, except Mongolia, are involved in such integration.[3] About 50 per cent of world trade is currently managed under RTAs.[4] There are more than 300 in force, although not all of them are functioning fully and effectively or have been notified to the WTO. From its inception until September 15, 2006, the WTO has received notifications of 211 RTAs.[5] More than 80% of the RTAs in force and notified to WTO are free trade agreements (FTAs) and only about 8% are customs unions.[6] Since the establishment of GATT, the

[2] The trend towards deepening regional integration is usually seen as a transition from "old regionalism" to "new regionalism". But see J-A. Crawford & R.V. Fiorentino, "The Changing Landscape of Regional Trade Agreements", Discussion Paper no.8, WTO, 2005, at 3.

[3] See the WTO web site at http://www.wto.org. According to Jo-Ann Crawford and Roberto V. Fiorentino, RTAs are mostly bilateral (75% of all notified RTAs and 90% of those under negotiation) and rarely plurilateral. See J-A. Crawford & R.V. Fiorentino, *ibid*. at 4.

[4] See the WTO web site at http://www.wto.org.

[5] Available at http://www.wto.org/english/tratop_e/region_e/summary_e.xls (last accessed on November 12, 2006.

[6] J-A. Crawford & R.V. Fiorentino, "The Changing Landscape of Regional Trade Agreements", *supra* note 2 at 3. Free trade agreements are bilateral or plurilateral agreements among states concluded to eliminate restrictions to trade by establishing mutual preferential treatment with regard to the trade in goods and/or services originating from the territories of the FTA's member states. Some FTAs could include provisions related to investment, government procurement and competition. See S. Woolcock, "A Framework for Assessing RTAs: WTO-plus" in G. Sampson & S Woolcock, eds., *Regionalism, Multilateralism and Economic Integration, The Recent Experience* (Hong Kong: The United Nations University, 2003) 18.

entity that has been most active in concluding and in notifying it of RTAs has been the European Union[7](EU).[8] The EU has concluded various forms of agreements with third countries, such as association agreements, partnership and trade agreements or simple trade agreements, depending of the level of integration that it intends to achieve with that country.[9] In addition, the EU, itself a unique RTA, has emerged as one of the most prominent models of integration for other countries and as the facilitator of regional economic integration among developing countries.[10]

As studies into the growth of RTAs have emerged, parallel studies have been conducted into the agreements' dispute resolution mechanisms (DRMs) in order to facilitate a better understanding of compliance with the norms and rules of the agreements, to categorize them and to analyze their decision making processes and enforcement regimes as well as to hypothesize on the possibility of transplanting a DRM that works efficiently in a particular RTA into other RTAs. For example, Jackson has pointed out that, since the end of World War II and the development of international institutions, DRMs have been evolving from power-oriented to rule-oriented systems. [11]

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[7] In this article the terms European Union and European Community (EC) will be used interchangeably even thought the author acknowledges that they are usually used to indicate two different forms of actorness and that only the EC has an explicitly recognized legal personality.

[8] See the chart produced by the WTO on March 1, 2007 available online at http://www.wto.org/english/tratop_e/region_e/status_e.xls (last accessed on April 15, 2007).

[9] E. R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", WTO Economic and Research Statistics Division, Staff Working Paper ERSD-2006-09, November 2006 at 11.

[10] See the European Parliament Resolution on the Commission Communication on EC Support for Regional Economic Integration Efforts Among Developing Countries, 1997 O.J. (C132) 316.

[11] J. H. Jackson, *The World Trading System,* 2nd ed., (Cambridge: The MIT Press, 1997) at 110-111. In brief, non-adjudication based methods such as conciliation, negotiation, and mediation are usually called "diplomatic" means of peaceful settlement of disputes and are often perceived in international law as power-based DRMs. The power-based DRM addresses disputes through government-to-government negotiations and often results in a political settlement rather than in a determination based on the merits of

Other authors claim that adjudication based methods, such as supranational courts and arbitral panels are becoming the main dispute resolution methods because they result in a binding decision that is imposed upon the parties to a dispute, while negotiation (and conciliation and mediation) merely suggest solutions that the parties are not bound to accept.[12]

In addition to noting the current proliferation of institutionalized international tribunals and the increased acceptance of their compulsory jurisdiction, studies usually point out several important reasons for the dynamic development of international DRMs: "(1) the increased density, volume and complexity of international norms, which require correspondingly sophisticated dispute-settlement institutions to guarantee the smooth operation of these norms and their accurate interpretation; (2) greater commitment to the rule of law in international relations, at the expense of power-oriented diplomacy; (3) the easing of international tensions, in particular transformation of socialist and centralized economies into market economies; and (4) the positive experience with some international courts and tribunals (e.g., the Court of Justice of the European Communities or the ECJ and the European Court of Human Rights or the ECHR)".[13]

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the case. See R. Brewster, "Rule-Based Dispute Resolution in International Trade Law" (2006) 92 Va. L. Rev. 251 at 254-256.

[12] See M. A. R. Lemmo, "Study of Selected International Dispute Resolution Regimes, With an Analysis of the Decision s of the Court of Justice and the Andean Community" (2002) 19 Arizona J. Int'l L. 863 at 863.

[13] See Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003) at 3-4 and G. W. Coombe, Jr., "The Resolution of Transnational Commercial Disputes: A Perspective From North America" (1999) 5 Ann. Surv. Int'l & Comp. L. 13. Coombe argues that the global political and economic change reflected in transition from socialism to capitalism or to some form of a market economy in many parts of the world (from Eastern Europe to the Pacific Asia and South America) is also leading to the expansion of the human rights and individual freedoms, the intensification of trade relations and the increasing complexity of international trade and should be credited for the development of DRMs and in particular an expansion in the use of adjudicative techniques in many non-Western parts of the world.

This article examines the development of the DRM in the Central European Free Trade Agreement (CEFTA), concluded in 1992 among the so-called Visegrád countries (Hungary, Poland, the Czech Republic and Slovakia).[14] The EU's support was instrumental in the creation of CEFTA and in the facilitation of the further economic integration of the region during the pre-accession process leading to the EU membership. The EU encouraged and inspired CEFTA, indirectly, by providing an institutional model for integration, and directly, by concluding special association agreements to establish free trade areas with CEFTA countries.

Until the late 1990s, most of the association agreements concluded between the EU and third countries included a DRM clause based on political dispute settlement model preferred by the EU.[15] Since the late 1990s, however, starting with its FTA with Mexico[16], the EU has been negotiating RTAs with a more elaborate and juridicialized DRM clause. This new model was included, with some variations, in a number of FTAs that the EU subsequently concluded with third countries, and it inspired the most

[14] *Central European Free Trade Agreement* (1995) 34 I.L.M. 8, signed in Krakow on 21 December 1992 and entered into force on 1 March 1993. The term Visegrad group comes from the Visegrad Summit Declaration signed in February 1991 by Poland, Czechoslovakia and Hungary. After Czechoslovakia split into two countries, the Czech Republic and Slovakia, the group became known as V4. The Visegrad group discussed similarities of their main political goals and concerns and the possibility of closer cooperation. See M Vachudova, "The Visegrad Four: No Alternative to Cooperation?" RFE/RL Research Report Vol. 2 No. 34, August 27, 1993 at 38.

[15] I. G. Bercero, "Dispute Settlement in European Union Free Trade Agreements: Lesson Learned?" in L. Bartels & F. Ortino, *Regional Trade Agreements and the WTO System* (Oxford: Oxford University Press, 2006) 383 at 383 and E. R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9 at 3.

[16] *Economic Partnership, Political Co-operation and Co-operation Agreement (Global Agreement*) signed in Brussels on 8 December 1997, entered into force on 1st October 2000 (O.J. L276 of 28 October 2000). Decision 2/2000 of the EU-Mexico Joint Council of 23 March 2000 (2000/415/EC) (OJ L 157, 30/6/2000 p. 10-28) establishes a free trade area in goods, and Decision 2/2001 of the EU-Mexico Joint Council of 27 February 2001 implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement (2001/153/EC) (OJ L070, 12/3/2001 p. 7-50) establishes a free trade area in services.

important amendment made in 2006 to CEFTA. The model is often called quasi-adjudicative because it involves arbitration in addition to bilateral consultations and consultation within the joint committee or the joint council of the RTA.[17]

This article seeks to resolve questions about the effectiveness of the DRMs utilized by the EU, and show how they relate to other international dispute resolution fora. Also, by focusing on the evolution of CEFTA's DRM, it examines the transferability of a DRM that works successfully in one RTA into others. Prior to this analysis, a brief note will be made on the importance of DRMs.

1. The Role of DRMs in the Development of International Law

The way in which an international treaty ensures that its signatories actually comply with their treaty obligations is one of the critical factors determining the effectiveness and efficiency of the treaty.[18] The classical arguments are that an efficient DRM is the most important component of international cooperation[19] and that it is capable of reducing the number of economic and political disputes that could lead to military conflict.[20] In addition to this preventive value, DRMs are seen as an important

[17] Since two recent FTAs concluded with Mexico and Chile in 2000 and 2001 introduced a quasi-judicial model of adjudication several authors argued that the EU is shifting towards juridicialization of DRMs. See, for example, I. G. Bercero, "Dispute Settlement in European Union Free Trade Agreements: Lesson Learned?", *supra* note 15 and E.R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9 at 3.

[18] Some compliance theories emphasize the importance of dispute resolution mechanisms (DRMs) and the establishment of international enforcement bodies. See A. Chayes & A. Handler Chayes, *The New Sovereignty; Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995) at 2-3.

[19] A. K. Schneider, "Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations" (1999) 20 Mich. J. Int'l L. 697 at 699.

[20] E.D. Mansfield & B.M. Pollins (eds.), *Economic Interdependence and International Conflict: New Perspectives on an Enduring Debate* (Ann Arbur: University of Michigan Press, 2003) at 222.

tool to ensure an authoritative interpretation of the rules and norms of a treaty.[21] Thus, DRMs "contribute towards the convergence of globalized commercial law concepts."[22] Another important function of a well-tailored and efficient DRM that is independent, neutral and capable of producing a binding decision is to enhance the legitimacy of the international treaty and international organization to which it is aligned[23] and to "enhance the credibility of international commitments in specific multilateral contexts."[24]

RTAs in general, and their DRM provisions in particular, are seen as a means by which developed countries to export their laws or transplant them into the other countries that are party to the RTA and that need legal reform.[25] For example, arbitration as the form of adjudication is often seen as a wagon for transportation of a developed country's social and legal norms to developing countries, especially when the prospect of granting

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[21] A. Chayes & A. Handler Chayes, *The New Sovereignty, supra* note 18 at 24.

[22] R. C. Wolf, *Trade, Aid and Arbitrate; The Globalization of Western Law* (Aldershot: Ashgate, 2004) at 35.

[23] F. J. Garcia, "New Frontiers in International Trade: Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance" (1997) Mich. J. Int'l L. 357 at 365-367. Honorable Sir David Simmons also argues, relying on the Report of the 1992 Ramphal Commission that initiated the creation of the Caribbean Court of Justice in 2001, that the existence of an independent DRM is fundamental to the process of economic integration itself as it facilitates a deeper and wider integration by providing an institutional framework of regional jurisprudence to develop and increase access to justice by members of the RTA. See D. Simmons, "Caribbean Court of Justice: A Unique Institution of Caribbean Creativity" (2005) 29 Nova L. Rev. 171 at 177.

[24] L. Helfer & M.-A. Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93 Calif. L. Rev. 899 at 904 and 914.

[25] R.C. Wolf, *Trade, Aid and Arbitrate; supra* note 22 at 9-14. See also M.M. Baker, "No Country Left Behind; Exporting of U.S. Legal Norms Under the Guise of Economic Integration" (2005) 19 Emory Int'l L. Rev. 1321 at 1324. Baker argues that the United States is using its enormous economic power over the other parties to impose its norms, rules and interpretations on the Central American Free Trade Agreement (CAFTA), whose other party governments are likely to accept the foreign standards, particularly if their own systems have none. In his view, the fact that those countries need legal reform facilitates the legal transplantation of the US laws and leads not to the creation of a system of shared norms but to the extended application of the system of norms of the developed and economically superior partner. He makes similar arguments with respect to the enlargement and economic integration of the European Union. See Baker, *ibid*, at 1324-1325.

aid to the developing countries is linked to those countries' implementation of international arbitration as the primary method of dispute settlement.[26]

In sum, the increased economic and political integration of states has led to an increase in the number of DRMs that today facilitate the resolution of trade disputes. Two trends in international trade dispute settlement have been emerging over the past two decades. The first trend is towards juridicialization of the DRM or a shift from "diplomatic" DRMs toward adjudication-based DRMs or at least multi-tier DRMs that combine the two methods. The second trend is the shift from the optional and consultative jurisdiction to the compulsory jurisdiction of international tribunals.

Some authors emphasize that, due to the above mentioned trends, the DRMs in RTAs challenge the coherence of international jurisprudence. Studies into the relationship between the WTO, a form of global (multilateral) economic integration, and RTAs often lead to an examination of the relationship between the WTO dispute resolution mechanisms and those employed by the RTAs, suggesting that difficulties arise out of the overlap and conflicts of jurisdiction between the two forms of economic integration and between their DRMs.[27] For example, Kwan and Marceau provide a detailed analysis of the issue of the horizontal allocation of judicial jurisdiction between the RTAs' dispute settlement mechanisms and those of the WTO. Their comprehensive study concludes that there is a greater potential for jurisdictional overlap in situations

[26] "Resulting from these activities is the invisible hand of legal globalization, diffusing social norms, harmonizing cultural differences, suggesting model forms and clauses, insisting on legislation before aid is granted..." See Wolf, *supra* note 22 at 23.

[27] K. Kwan and G. Marceau, "Overlaps and Conflicts of Jurisdiction Between the World Trade Organization and Regional Trade Agreements" (2003) Vol. XLI Can. YB Int'l Law 83. For a general analysis of conflicting jurisdictions of international tribunals see Y. Shany, *The Competing Jurisdiction, supra* note 13. Shany identifies two conditions that bring two or more sets of proceedings into competition. The first is that the multiple proceedings involve "the very same parties" and the second is that they are the proceedings over the same issues. See Y. Shany, *The Competing Jurisdictions*, *supra* note 13 at 26 and 27.

where an RTA provides for the compulsory jurisdiction of a regional standing (or permanent) tribunal than when such jurisdiction is non-compulsory. Similarly, Romano argues that a shift in international treaty regimes, from the consensual to the compulsory jurisdiction of international tribunals, causes the unsatisfactory situation of concurrent jurisdiction and opens the door to parallel proceedings on the same dispute in different fora.[28]

Petersmann predicts that the trend towards overlapping jurisdictions in international trade law will continue not only because of the increasing number of international courts and tribunals but also because of the overlap between their jurisdiction and that of the domestic courts, the increasing number of new international agreements that overlap with the WTO agreements and the lack of a formal hierarchy of the different international courts.[29] He sees the trend towards an increase in the number of international dispute settlement fora as a positive development "reflecting an enhanced

[28] C. Romano, "From the Consensual to the Compulsory Paradigm in International Adjudication: Elements of a Theory of Consent" (2006) New York University Public Law and Legal Theory Working Papers, Paper no. 20. Several judges of International Court of Justice have also warned of "the danger of fragmentation in the law, and the serious risk of inconsistency within the case law" and that "the proliferation of international courts may jeopardize the unity of international law". See, for example, an address to the Plenary Session of the General Assembly of the UN by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, 26 October 2000, and the speech of 30 October 2001, available online at http://library.lawschool.cornell.edu/cijwww/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_GA56_20011030.htm (last accessed on January 5, 2007). See also S. Oda, "Dispute Settlement Prospects in the Law of the Sea" (1995) 44 Int'l & Comp. L.Q. 863.

[29] E-U. Petersmann, "Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade"(2006) 27 U. Pa. J. Int'l Econ. L. 273. Petersmann lists ten reasons for the increasingly overlapping jurisdictions and forum shopping in public international trade law and he argues that, because of the growing number of bilateral, regional and multilateral economic agreements, it is important for every government to choose the right dispute resolution mechanism and a policy that would lead toward the coordination of concurrent jurisdictions. See Petersmann, *ibid*. at 287-298 and at 352.

willingness by governments to strengthen the rule of law in transnational relations" and as a means to "help governments to limit power politics."[30]

The development of the DRMs for CEFTA and several FTAs included in this study reflects the two trends referred to earlier: they have all established adjudicative mechanisms with detailed rules of procedure and their jurisdiction is mandatory. In the next two parts of this article these DRMs will be analyzed in the context of their economic, political, social and legal surroundings, and their relationship with other international treaties and fora will be explained.

2. The Success and Effectiveness of DRMs: Possible Points of Analysis

The type(s) of dispute resolution regime chosen by the parties to an international treaty are usually seen as reflective of the depth of integration that the treaty intends; that is, reflective of the economic and political goals that underpin the integration (including the level of internal or domestic support for the agreement in each participating state), the relationship between the parties to the RTA, and the parties' attitudes towards the role of international institutions and towards the institutions' DRMs.[31] It is often said also that states that are more powerful economically and politically choose to resolve their trade disputes by negotiation, which allows them to benefit from their bargaining power and

[30] Petersmann, "Justice as Conflict Resolution", *ibid*. at 358. Similar arguments are made by M. Koskenniemi & P. Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 Leiden J. Int'l L. 553 and P.S. Rao, "Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation" (2004) 25 Mich. J. Int'l L. 929.

[31] C. O'Neal Taylor, "Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR" (Winter 1996/Spring 1997) 17 NW. J. Int'l L. & Bus. 850 at 851. Similar arguments regarding the governments' choice between power-oriented negotiations and rule-oriented adjudications are provided by Petersmann, who says that the choice may depend not only on government policy and interests but also on "private interests and factual, legal and financial inputs from private actors involved in the economic disputes. See Petersmann, "Justice as Conflict Resolution", *supra* note 20 at 340. See also A. K. Schneider, "Getting Along", *supra* note 10 at 702 and F. Garcia, "New Frontiers in International Trade" *supra* note 14 at 381-382.

thus attain resolutions advantageous to themselves.[32] A corresponding assumption is that a rule-based or judicialized DRM that relies on the adjudication of disputes by an independent, impartial and unbiased third party in a transparent procedure supplemented by an enforcement mechanism[33] is beneficial to a developing country that lacks international economic, political and legal influence.[34]

In some cases, the complexity of the relationship between member states and the scope and objectives of their economic integration have led to the development of new forms of DRM. For example, the *North Atlantic Free Trade Agreement* (NAFTA)[35], with its wide diversity of trade issues and supplemental agreements on labour and the environment, is often referred to as the treaty with multiple, innovative DRMs, such as its Chapter 11, which provides for arbitration of investment disputes.[36] If the treaty is more

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[32] J. H. Jackson, *The World Trading System, supra* note 11 at 109.

[33] See J.H. Jackson, *The World Trading System, supra* note 11. See also A. K. Schneider, "Getting Along" *supra* note 19 at 704-705.

[34] See W. M. Reisman & M. Wiedman, "Contextual Imperatives of Dispute Resolution Mechanisms; Some Hypotheses and Their Application in the Uruguay Round and NAFTA" (1995) 29:3 J. World T. 5 at 9. See also T. Broude, "From *Pax Mercatoria* to Pax *Europea*: How Trade Dispute Procedures Serve the EC's Regional Hegemony", The Israeli Association for the Study of European Integration, Working Paper 4/04 at 4-5 (on file with the author).

[35] *North American Free Trade Agreement*, December 11-17, 1992, US-Canada-Mexico, chs 1-9, 32 I.L.M. 289; chs 10-22, 32 I.L.M. 605.

[36] For example, Armand de Mestral identifies seven forms of DRM in NAFTA: "(1) Chapter 20, the residual procedure based on the GATT panel model; (2) Chapter 14 on financial services disputes, which adopts the same approach as Chapter 20, but which provides for panels made up of financial experts; (3) Chapter 19 which provides a recourse to challenge domestic decisions imposing anti-dumping and countervailing duties (AD/CV) before a bi-national panel; (4) Chapter 11 B which deals with investment disputes under Chapter 11 A; (5) Article 2002 envisages recourse to the GATT/WTO procedures where they might lie under both agreements; (6) Article 2022 envisages the possibility of recourse to arbitration and other alternative means of dispute resolution between the Parties and (7) the "side agreements" on environmental and labour cooperation provide both for a private party complaints procedure before the respective Commissions…" See A.L.C. de Mestral," NAFTA Dispute Settlement: Creative Experiment or Confusion?" in L Bartels & F. Ortino, eds., *Regional Trade Agreements and the WTO Legal System, supra* note 15, 359 at 361. Cherie O'Neil Taylor distinguishes five major DRMs: Chapter 20, or the main DRM for all general disputes arising under the terms of the NAFTA, Chapter 19 for the review of anti-dumping and countervailing duty determinations, Chapter 11 for investment disputes; and for labour and environment disputes on the basis of subsidiary agreements (the North American Agreement on Labour

comprehensive and intended to lead to a deeper integration of the parties, then the optimal dispute resolution mechanism is likely be the one that is more supranational, centralized, and capable of producing enforceable decisions.[37] However, as has been noted by several scholars such as Helfer & Shaughter[38], Reisman & Wiedman[39], Taylor[40] and Schneider[41], to name but a few, even when RTAs choose the same DRM, they achieve very different levels of efficiency because of a number of factors: economic (such as the goals and functions of economic integration, and the scope of economic exchange within the RTA); political (such as each state's concerns regarding sovereignty, any internal opposition to the RTA that might exist within a state, perceptions in the various states of the role of international institutions and international law, and the independence of tribunals and courts); and social and legal factors (such as the legal

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Cooperation and the North American Agreement on Economic Cooperation). See C. O'Neil Tayler, "Dispute Resolution as a Catalyst for Economic Integration" *supra* note 31 at 845.

[37] W. M. Reisman & M. Wiedman, "Contextual Imperatives of Dispute Resolution Mechanisms", *supra* note 34 at 11.

[38] L. Helfer & M-A. Slaughter, "Towards a Theory of Effective Supranational Adjudication" (1997) 107 Yale L. J. 273. Helfer and Slaughter suggest, based on their analysis of the functioning of the European courts—that is, the Court of Justice of the European Communities (ECJ) and the European Court of Human Rights (ECHR) that the following clusters of factors affect the success and effectiveness of supranational adjudication: "factors within the control of the states party to the treaty regime (the composition of the tribunal, the caseload and functional capacity of the court, independent fact finding capacity, and the legal status of treaties and the tribunal's decisions); factors within the control of the supranational tribunal itself (its awareness of audience, neutrality and demonstrated autonomy from political interests, its incrementalist style of decision making, the quality of its legal reasoning, its dialogue with other supranational tribunals, and the form of its opinions); and factors often beyond the control of both states and jurists (the nature of the violations to be monitored by the tribunal, autonomous domestic institutions committed to the rule of law, and the cultural and political homogeneity of the states subject to the supranational tribunal)."

[39] See W.M Reisman & M. Wiedman, "Contextual Imperatives of Dispute Resolution Mechanisms", *supra* note 34 at 10.

[40] C. O' Neil Taylor, "Dispute Resolution as a Catalyst for Economic Integration" *supra* note 31 at 851.

[41] See A.K. Schneider, "Getting Along", *supra* note 19 at 727-730. Similarly, William Davey argues that even though many of the DRMs in RTAs are modeled after the WTO's DRM, they do not seem to be as successful as the WTO's DRM. See W. Davey, "Dispute Settlement in the WTO and RTAs" in L. Bartels & F. Ortino, eds., *Regional Trade Agreements and the WTO Legal System*, *supra* note 15 at 354.

culture of the society in general and its legal profession in particular and the people's commitment to the rule of law and to liberalism and democracy).

An analysis of the above factors, according to Helfer and Slaughter, provides the starting point for determining the effectiveness of any model of supranational adjudication and for finding out how it might be possible, if it is at all possible, to transplant a DRM that has worked well in one setting or within the framework of an RTA concluded by a group of countries in a particular geographical region, into an RTA concluded by a different group of countries in a different geographical region.[42]

3. The Features of CEFTA:

Since its inception in 1992 CEFTA,[43] a unique form of subregional, top-down integration in preparation for yet another enlargement of the EU, has been the subject of numerous academic studies.[44] Those studies suggest that CEFTA was an interim agreement established "to serve a basic market integration function as a part of the EU pre-accession process,"[45] parallel and supplementary to the conclusion of association

[42] L. Helfer & M.-A. Slaughter, "Theory of Supranational Adjudication", *supra* note 38 at 276.

[43] As previously stated CEFTA was signed in 1992 by Czechoslovakia, Hungary and Poland and it came into force in 1993. See *supra* note 14.

[44] See, for example, M. Dangerfield, *Subregional Economic Cooperation in Central and Eastern Europe: The Political Economy of the CEFTA* (Northampton: Edward Elgar Publishing Ltd., 2000), "CEFTA: Between the CMEA and the European Union" (2004) 26 European Integration 309, "Subregional Integration and EU Enlargement: Where Next for CEFTA?" (2006) 44 JCMS 305, H. Hartnell, "Subregional Coalescence in European Regional Integration" (1997) 16 Wis. Int'l L. J. 115, M. Uvalic, "Regional Cooperation and the Enlargement of the European Union: Lessons Learned?" (2002) 23 Int'l Pol. Sci. Rev. 319, J. Zysman & A. Schwarzt, "Reunifying Europe in an Emerging World Economy: Economic Heterogeneity, New Industrial Options and Political Choices (1998) 36 JCMS 405, I. Mile, "The Central European Free Trade Agreement (CEFTA): A Step Towards EU Membership or Genuine Cooperation" in: C. Paraskevopoulos, A. Kintis & A. Kondonassis (eds.), *Globalization And the Political Economy of Trade Policy*, Chapter 12, (Toronto: APF Press, 2001) at 3.

[45] M. Dangerfield, "Subregional Integration and EU Enlargement: Where Next for CEFTA?", *supra* note 38 at 309. Dangerfield calls CEFTA "a fitness centre for the CEECs in the pre-accession process". See M.

agreements between the EU and Hungary, Poland, Czechoslovakia, and later with Slovenia, Romania and Bulgaria,[46] and that it was "a horizontal extension at subregional level of the regime established by the Europe Agreements[47], which in turn replicate the basic structure of the EC Treaty."[48] The studies further suggest that the EU sponsored the creation of CEFTA as a "proof of [the] political and organizational maturity"[49] of the candidate countries of Central and Eastern Europe, and that, unlike the European Free Trade Association (EFTA),[50] CEFTA was not an alternative to the EU membership but rather an interim pre-accession training program.

It is possible to distinguish at least two phases in the evolution of CEFTA, the first phase being from its establishment until the 2004 enlargement of the EU, at which point it began the current phase of revitalization, enlargement, modification and modernization in several ways that will be discussed below. Even though the Visegrad group's initial negotiations in 1992 had not contemplated the possibility of enlargement

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Dangerfield, "Subregional Cooperation in Central and Eastern Europe: Support or Substitute for the 'Return to Europe'?" (2001) 2 Perspectives on European Politics and Society 55 at 67.

[46] M. Farrell, "The EU and Inter-Regional Cooperation: In Search of A Global Presence" in E. Jones & A. Verdun, eds., *The Political Economy of European Integration: Theory and Analysis* (New York: Routledge, 2005) 128 at 141.

[47] A Europe Agreement (EA) is a bilateral agreement, a specific type of association agreement concluded between the EU and the Central and Eastern European countries, candidates for EU membership. The EA is based on respect for human rights, democracy, the rule of law and the market economy, requires that the candidates for membership harmonize their national legislation with the EU law and covers a political dialogue between the parties as well as establishment of their trade relations and social, cultural and development cooperation. See more at http://europa.eu/scadplus/glossary/europe_agreement_en.htm .

[48] H. Hartnell, "Subregional Coalescence In European Regional Integration", *supra* note 44 at 183. Harntell found that the rules regarding movement of goods, state monopolies, state aids and competition "is identical throughout the entire web of treaties". See *ibid*, footnote 300. See also M. Dangerfield, "Suregional Integration and EU Enlargement: Where Next for CEFTA?", *supra* note 44 at 310.

[49] I. Mile, "The Central European Free Trade Agreement (CEFTA): A Step Towards EU Membership or Genuine Cooperation", *supra* note 44.

[50] *Convention Establishing European Free Trade Association,* signed at Stockholm on 4 January 1960, in force 3 May 1960, S.R. 0.63.31. More on EFTA see in A. R. Ziegler, "The EFTA Experience" in L. Bartels & F. Ortino, *Regional Trade Agreements and the WTO System, supra* note 15 at 407-419.

of CEFTA, four other candidates for EU membership accessed to the agreement between 1995 and 2003. There were Slovenia (1995), Romania (1997), Bulgaria (1999) and Croatia (2003).

The major characteristics of CEFTA in its first phase were that it was a free trade agreement concluded between the potential candidates for EU membership, that it was compliant with Article XXIV of GATT,[51] was transitional in nature[52] since it would last only until its members acceded to the EU, that its provisions had to be compatible with the association agreements signed between the EU and each of the CEFTA members[53] and, ultimately, the *Treaty Establishing the European Community* (the *EC Treaty*).[54] CEFTA is also seen as a result of the EU's desire to reconnect former members of the Council for Mutual Economic Assistance (CMEA)[55] and to "integrate them into GATT structured and market oriented economies."[56]

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[51] Article 1(1) CEFTA expressly refers to its compatibility with Article XXIV of the GATT.

[52] The original CEFTA Article 1(1) had provided for a transitional period ending on 1 January 2001.

[53] However, the first association agreements signed with the Visegrad group did not call for the establishment of subregional cooperation between these Central and Eastern European countries. Dangerield finds first such call in the Europe Agreement concluded with Slovenia. See M. Dangerfield, "CEFTA: Between the CMEA and the European Union", *supra* note 44 at 323.

[54] *Treaty Establishing the European Community* (consolidated version of the *Treaty Establishing European Union and of the Treaty Establishing European Community*), O.J. C 321 E of 29 December 2006, available online at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf (last accessed on March 18, 2007).

[55] CMEA was a form of trade cooperation of the socialist bloc of countries organized by the Soviet Union that functioned as a tariff-free area and a market at which pricesw were set administratively, and which led to specialization of production within the Central and Eastern European countries that facilitated primarily needs of the Soviet market. See I. Mile, "The Central European Free Trade Agreement (CEFTA): A Step Towards EU Membership or Genuine Cooperation", *supra* note 44, at 2.

[56] M. Dangerfield, "CEFTA: Between the CMEA and the European Union", *supra* note 44 at 312. See also a recent speech by Peter Mandelson, the EU Trade Commissioner, at the Launch of renewed CEFTA expansion negotiations, given in Bucharest on April 6, 2006, available at http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm093_en.htm (last accessed on April 28, 2007). Mandelson remarked that "[T]rade is at the very heart of both the EU Stabilization and Association process and the European Neighbourhood Policy. Trade liberalisation can, under the right conditions, make a huge contribution to economic development and, in turn, provide the foundations for political stability. That is why this agreement is a particularly welcome step forward in a region which has

CEFTA membership was initially limited to WTO member countries that signed a Europe Agreement (EA) with the EU. The consent of all other CEFTA members was an additional requirement for membership. Article 1 of the CEFTA treaty stated that its main objectives were to gradually establish a free trade area among its member states and to: "a. foster… the advance of economic activity, the improvement of living and employment conditions, and increased productivity and financial stability; b. provide fair conditions of competition for trade…; c. contribute…by [the] removal of barriers to trade, to the harmonious development and expansion of world trade."[57] However, the 1992 treaty did not exclude the possibility for its member states to establish other forms of integration (such as customs unions) among themselves.[58]

As suggested earlier, certain substantive provisions of CEFTA mirrored those of the EAs concluded between the EU and each of the CEFTA member states. CEFTA addressed the area of movement of industrial goods and, to a limited extent, agricultural products, and one of its aims was to liberalize the movement of capital, but it did not provide for the free movement of people or services. In that respect, therefore, the CEFTA provisions were closer to those of the WTO than of the EC Treaty since the latter provides for free movement of goods, persons, services and capital.[59] CEFTA also

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known recent tragedies…Closer economic integration with the EU and the development of closer trade links within your region should be seen as mutually reinforcing objectives. They are not in contradiction. Regional integration is a natural objective between neighbours. It is also essential in strengthening the performance of your economies, and in preparing for the competitive impact of participating in the EU's single market. This is why the European Commission has always offered strong political and technical support for trade opening in this region."

[57] 1992 CEFTA Article 1(2).

[58] 1992 CEFTA Article 33: Evolutionary Clause.

[59] M. Dangerfield, "CEFTA: Between the CMEA and the EU", *supra* note 44, at 318. Dangerfield emphasizes that V4 lacked any desired to establish free movement of labour due to great difference in unemployment levels among the members and concern that they should not be undertaking measures that

regulated in a broad manner the protection of intellectual property, government procurement and state aid.

The institutional structure of CEFTA mirrored the institutional structure of the EAs and FTAs concluded between the EU and the third countries, with the exception of the agreement between the European Union and the EFTA on the establishment of the European Economic Area (EEA).[60] The institutional framework of most of the EU FTAs is limited to the Joint Committee or Joint Council, which is a rather intergovernmental than supranational body and which has very limited legislative functions. CEFTA's Joint Committee is no exception to that practice. It is composed of representatives of the CEFTA members and is more a forum for the exchange of information and for consultation among the parties of the Agreement than a decision making body.[61] The Committee meets whenever necessary and requested by one or more of the parties the, but at least once a year,[62] and it makes decisions by consensus.[63] It cannot act as a dispute settlement body.[64]

It is usually suggested that this weak institutional structure and limited law making power of the Joint Committee is the result of a combination of factors such as the fact that CEFTA has been modeled on the EAs, the sour experience its members had had in dealing with the bureaucracy of the CMEA, and members' concerns over the potential

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would not be coordinated with their relations toward the EU. Lack of progress in liberalization of movement of labour resulted in lack of progress in liberalization of services. M. Dangerfield, *ibid*, at 319.

[60] See G. Bercero, "Dispute Settlement in European Union FTAs: Lesson Learned?", *supra* note 15 at 385.

[61] 1992 CEFTA Article 34.

[62] 1992 CEFTA Article 35(1).

[63] 1992 CEFTA Article 35(2).

[64] 1992 CEFTA Article 31(3).

loss of national sovereignty.[65] Certainly, considering the fact that the EA model strongly emphasized the requirement for national laws to approximate the EC laws as a pre-condition to EU membership, the Visegrad group did not find it necessary to enable the CEFTA Joint Committee with the legislative power and mandate to harmonize the laws of the CEFTA members.

When the V4 countries and Slovenia became EU members in 2004, CEFTA became a free trade area of only three countries—Bulgaria, Romania and Croatia—and it faced a possible dissolution because Bulgaria and Romania were scheduled to join the EU in 2007.[66] However, CEFTA did not dissolve but instead grew bigger and more complex. In November 2004, at its summit in Bulgaria, proposals were made to expand trade issues covered by CEFTA to include cross-border investments, joint infrastructure projects and measures to develop tourism. In April 2006, in Bucharest, a year after Macedonia joined, a decision was made to allow further enlargement of the area by accepting Albania, Bosnia and Herzegovina, Moldova, Montenegro, Serbia and the UN Interim Administration Mission in Kosovo as members. Finally, on December 19, 2006, in Bucharest, the two "old" CEFTA members, Croatia and Macedonia, and the six new members signed the *Agreement on Amendment of and Accession of the CEFTA* (CEFTA 2006).[67] The member states have undertaken the obligation to establish a free trade area

[65] Both Hartnell and Dangerfield point out that deepening CEFTA could lead to overlapping arrangements with the EU and CEFTA's member states as articulated in EAs. See H. Hartnell, *supra* note 44 at 183-184 and M. Dangerfield, "CEFTA: Between the CMEA and the European Union", *supra* note 44 at 316.

[66] But see H. Hartnell, *supra* note 44 at 212-213. As early as in 1997, Professor Helen Hartnell envisioned the increasing role of CEFTA in regional integration and EU enlargement and suggested that as the process of enlargement slows down, CEFTA would be a valuable experience in cooperation for the potential candidates for EU membership and a counterweight to the EU's influence in the region

[67] Consolidated Version of the CEFTA (CEFTA 2006) is available online at www.stabilitypact.org/trade/ANNICEFTA%202006%20Final%20Text.pdf as Annex 1 to the Agreement

by December 31, 2010.[68] The new CEFTA is to continue indefinitely and any country that becomes an EU member will automatically withdraw from it at the latest on the day before its EU membership takes effect.[69]

The new enlargement of CEFTA was made possible by a change in the conditions of membership that allowed non-WTO members to join. It is noteworthy that the new candidates for CEFTA membership were countries involved not only in the EU bilateral association agreement-type integration initiatives (called Stabilization and Association Agreements or SAAs[70]) but also in the multilateral integration initiative, the Stability Pact for South Eastern Europe (SP).[71] The EU initiative to integrate the Western Balkan countries into CEFTA and to offer them the prospect of EU membership is an attempt to bring cooperation to a region that has had no history of such cooperation and that has had numerous violent conflicts that ended in the establishment of trade barriers and various

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on Amendment of and Accession to the Central European Free Trade Agreement (last accessed on April 18, 2007).

[68] CEFTA 2006 Article 1(1).

[69] CEFTA 2006 Article 51.

[70] However, this EU association initiative does not include Moldova. Stabilization and Association Agreements are means of the Stabilisation and Association Process launched at the Zagreb Summit in November 2000. SAP articulates the EU policy towards the countries of the Western Balkans (Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, and Serbia, including Kosovo). The goal of the process is to "ensure peace and stability in the region by providing support for the strengthening of democracy and the rule of law and the development of a market economy." Stabilization and Association Agreements are to establish special bilateral relations between the EU and each country of the region and to harmonize their laws with those of the EU and thus to prepare the Western Balkan countries for potential EU membership. For more on SAP and SAAs see http://europa.eu/scadplus/leg/en/s05055.htm .

[71] On complexities of bilateral and multilateral approaches to regional integration see P. Spassova, "Regional Cooperation in the Balkans as an Essential Step Towards EU Membership; Lessons of Visegrad," Working paper no. 148, December 2004, Institute for World Economics of the Hungarian Academy of Science. M. Dangerfield, "Subregional Integration and EU Enlargement: Where Next for CEFTA?", *supra* note 44 at 312-313. The Stability Pact is an international response to the war and crises in the South Eastern Europe, initiated in 1999 by the EU and gathering more than 40 partner countries and organizations around the world in a common effort to restore peace and security in the region and achieve democracy, economic development and respect for human rights in the area. For more on the SP see http://www.stabilitypact.org/about/default.asp.

other obstacles to cross-border activities.[72] The Stability Pact is a similar joint initiative of the EU and more than 40 other partners (countries and international organizations).[73]

The second important change brought by CEFTA 2006 is that its Article 4 required all new member states to abolish their existing bilateral trade agreements.[74] Thus, 31 bilateral trade agreements were superseded by CEFTA which then becomes the only FTA in the region. In that way CEFTA becomes a multilateral free trade framework for the whole region rather then "spaghetti ball" of bilateral agreements.[75]

The third change is related to the scope and substantive provisions of CEFTA 2006. As amended, the treaty sets out more detailed provisions regarding free movement of goods, the protection of intellectual property, services and competition, and it includes

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[72] P. Spassova, "Regional Cooperation in the Balkans as an Essential Step Towards EU Membership; Lessons of Visegrad," *ibid*. at 3.

[73] The Stability Pact is an international response to the war and crises in the South Eastern Europe, initiated in 1999 by the EU and gathering more than 40 partner countries and organizations around the world in a common effort to restore peace and security in the region and achieve democracy, economic development and respect for human rights in the area. For more on the SP see http://www.stabilitypact.org/about/default.asp. It is important to note that the Stability Pact's Working Group on Trade has helped CEFTA to develop and implement strategies for economic development. This Group consists of senior trade policy officials from the EU's Trade Directorate, WTO, World Bank, Germany, Hungary, Norway, Slovenia, Sweden, Switzerland, Turkey, UK and USA. The Trade Working Group recommended that Ministers of Economy of SEE countries pursue a single FTA through the enlargement and amendment of CEFTA. See the CEFTA background documents at http://www.stabilitypact.org/trade/documents/DBSP%20TWG%20and%20the%20Single%20FTA.pdf (last accessed on April 28, 2007).

[74] Annex 2 to the Agreement on Amendment of and Accession to the Central European Free Trade Agreement, available online at http://www.stabilitypact.org/trade/ANNEX%202%20TO%20AGREEMENT%20RE%20BILATERAL%20FTAs%20TO%20BE%20TERMINATED.pdf (last accessed on April 18, 2007)

[75] See remarks at the launch of CEFTA expansion negotiations given by Peter Mandelson, the EU Trade Commissioner, in Bucharest on April 6, 2006 which summarizes benefits of having one FTA: "You have already achieved impressive results through the conclusion and implementation of more than 30 bilateral Free Trade Agreements… Today, you are taking and important step forward, in agreeing to start negotiations to extend and improve CEFTA, and thereby replace the current network of FTAs with one economically efficient, integrated and modern agreement… The potential benefits are huge. As one large, integrated market the region will attract more investment. In consolidating and making more transparent regional trade rules trade rules you will give a boost to businesses within the regions.." Available online at http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm093_en.htm (last accessed on April 28, 2007).

some completely new sections, such as those on investments (Chapter 6B), transparency (Article 44) and arbitration as a means of dispute settlement (Article 43). It also makes more direct references to the *EC Treaty*[76] and the relevant GATT and WTO disciplines.[77]

However, CEFTA 2006 has not empowered its Joint Committee with broader law-making powers nor has it changed its intergovernmental rather than supranational nature.[78] Thus, the Joint Committee remains a body with limited decision making power whose primary function is to provide a forum for the exchange of information and for consultations among its member states and it still makes decisions by consensus. What is new is that the amended CEFTA has provided for the Joint Committee to be supported by a permanent secretariat located in Brussels.[79]

4. CEFTA DRMs: Institutional and Jurisdictional Issues

"This agreement should modernize and improe CEFTA by:

- Including clear and effective procedures for dispute settlement and a mechanism to improve compliance by all parties both to the agreement and to WTO rules, including for those parties not yet members of the WTO…"

[76] For example, Article 20(1): Rules of Competition Concerning Undertakings copies Article 81(1) of the EC Treaty while Article 20(2) mirrors similar provisions in EAs and it mandates that any anti-competitive practice that infringes CEFTA Article 20 be "assessed on the basis of the principles of the competition rules applicable in the EC, in particular Articles 81, 82 and 86 of the *Treaty Establishing the European Community*."

[77] For example, see CEFTA Article 2(4) Basic Duties, Article 6 Customs Fees, Article 11(1) Concessions and Agricultural Policies, Article 12 Sanitary and Phytosanitary Measures, Article 13 Technical Barriers to Trade, Article 19 State Monopolies and State Trading Enterprises.

[78] See CEFTA 2006 Articles 40-41.

[79] CEFTA 2006 Article 40(2).

Joint Declaration by Prime Ministers[80]

4.1 EU practice with respect to DRM models: Preliminary issues

It has already been argued that CEFTA's institutional and legal framework was shaped by the EU's experience in establishing association (and free trade) agreements with third countries. Accordingly, CEFTA incorporated DRM modalities that had earlier been utilized by the EU. Bercero and Robles recently analyzed all dispute settlement clauses in the EU FTAs and found that the development of those DRMs over time confirms two general trends of DRM evolution in international law— the proliferation of DRMs and shift towards more adjudicative and compulsory DRMs.[81] Their findings will be the starting point for the analysis presented below of the evolution of DRM clauses in CEFTA.

Bercero and Robles found that every FTA concluded by the EU has a dispute resolution clause. Most of the FTAs concluded by EU and the third countries during the GATT era followed the political model of dispute resolution which was, indeed, the basic model of GATT itself. However, five years after the establishment of the WTO and its introduction of a DSU that included a quasi-adjudicative model of dispute settlement, the EU DRM clauses in FTAs started to change. In examining this tendency, Bercero grouped the FTAs Bercero into the following three categories:

1. FTAs within the EU space (the EEA, the EAs and the SAAs);

[80] Adopted at the South Eastern Europe Summit, Bucharest, April 6, 2006. The full text of the Joint Declaration is available online at http://www.stabilitypact.org/trade/documents/tradeFINAL-joint%20declaration.pdf (last accessed on April 28, 2007).

[81] See I. G. Bercero, "Dispute Settlement in European Union Free Trade Agreements: Lesson Learned?", *supra* note 15, and E.R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9.

2. FTAs with neighbouring countries (association agreements concluded with EURO-Med countries); and
3. FTAs with non-neighbouring countries (Economic Partnership Agreements (EPAs) with the ACP countries under the Cotonou Agreement initiative and FTAs with third countries geographically distant from the EU borders such as Mexico and Chile).[82]

His analysis shows that the shift towards a quasi-adjudicative model first occurred in FTAs in the third category whereas in the first two categories diplomatic model prevailed until 2000.[83] In the pre-WTO period, dispute resolution was typically addressed in only one article of an FTA and the parties would be directed to resolve disputes related to interpretation and application of the FTA by direct consultations or by diplomatic negotiations and consultations through the FTA's Joint Committee.[84] EAs, though, provided that the Joint Committee could decide disputes and that its decision is binding on the parties.[85] If there were any reference to traditional arbitration, it would be

[82] I.G. Bercero, "Dispute Settlement in European Union Free Trade Agreements: Lesson Learned?" , "Dispute Settlement in European Union Free Trade Agreements: Lesson Learned?" *supra* note 15 at 385.

[83] It should be noted that even the EEA made a shift towards quasi-adjudicative model in 2001 with the Vaduz Convention when it added Annex T to Article 48 of the original 1992 EEA to introduce arbitration based on the rules inspired by the WTO DSU in addition to the already existing Article III(1)(2) of EEA which provided for consultation procedure within the A Joint Committee as the main DRM and only if the parties agree, the dispute not resolved before the Joint Committee could be sent to the ECJ. See A. Ziegler, "The EFTA Experience" in L. Bartels & F. Ortino, *Regional Trade Agreements and the WTO System, supra* note 15 at 408-411.

[84] See, for example, DRMs in FTAs concluded between the EU and the Euro-Med countries, the EAs concluded with the Central and Eastern European countries in the 1990s or the 1963 Association Agreement between the EEC and Turkey.

[85] Article 107 of the *Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part* (O.J. L 347, 31/12/1993 p. 0002 - 0266) states that:
"1. Each of the two Parties may refer to the Association Council any dispute relating to the application or interpretation of this Agreement.
2. The Association Council may settle the dispute by means of a decision.
3. Each Party shall be bound to take the measures involved in carrying out the decision referred to in

arbitration based on the consensual decision of the parties to arbitrate, and would be subject to a vague set of procedural rules, with non-binding decisions of the arbitral tribunal and without any enforcement procedure.[86] It is noteworthy that prior to 2000 this model of DRM was used consistently by the EU regardless of the depth or scope of integration that the agreement was intended to achieve, meaning that it was used in the same manner both in agreements intended to prepare third countries for accession to EU membership and in agreements that did not have that objective.[87]

Scholars differ in their explanation of why the EU favours a political dispute resolution model. Broude, for example, sees it as power-based model dependant on the political context of inter-RTA relations and claims that this services the EC's regional hegemony[88] whereas a rule-based DRM, by relying on impartial third party adjudication and providing an efficient method of enforcement, would detach trade disputes from the

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paragraph 2.
4. In the event of it not being possible to settle the dispute in accordance with paragraph 2, either Party may notify the other of the appointment of an arbitrator; the other Party must then appoint a second arbitrator within two months. For the application of this procedure, the Community and the Member States shall be deemed to be one Party to the dispute.
The Association Council shall appoint a third arbitrator.
The arbitrators' decisions shall be taken by majority vote.
Each party to the dispute must take the steps required to implement the decision of the arbitrators."

[86] I.G. Bercero, "Dispute Settlement in European Union Free Trade Agreements: Lesson Learned?", *supra* note 15 at 385 and E.R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9 at 21. Note that Article 107 of the Europe Agreement concluded between the EU and Hungary of 13 December 1993, *ibid*, states that each party to the dispute must take the steps required to implement the decision of the arbitrators but it does not say what would happen if a party to the dispute does not take such measures. See also other EAs, for example, *Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part* (OJ L 360, 31/12/1993) Articles 107(4) and 117(2) or *Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Poland, of the other part* (OJ L348, 31/12/1993) Articles 105(4) and 115(2).

[87] E. R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9 at 14 and 15. Robles summarizes her analysis of the EAs concluded between the EC and Estonia, Poland, Czech Republic and Slovak Republic in Table 2 at 15 to show that the same model has been used throughout all EAs. In Table 3 at p. 17 she proves that the similar DRM provisions were introduced into EU's association agreements with the Euro-Med countries.

[88] T. Broude, "From Pax Mercatoria to Pax Europea", *supra* note 34.

political process and from the political considerations in which the EU deals.[89] He finds that, despite the non-judicialized character of the EU's DRM and the fact that it makes no reference whatsoever to possibility of overlapping jurisdiction with the DRMs of other RTAs and of GATT, the EU has had very few disputes with its FTA partners and that most of the EU FTA partners do not use the WTO DSU. The EU itself has almost never taken south a WTO settlement in disputes with its partners.[90] Broude does mention Turkey, Mexico and Chile as being exceptions but the latter two have FTAs with the EU that involve quasi-adjudicative rather than political model of dispute settlement.

Bercero and Robles argue that the EU choice of political dispute settlement model is due to its institutional conservativism and tendency to follow previously utilized models.[91] Indeed, prior to NAFTA and the WTO, there was no FTA that had a binding arbitration clause.[92] Instead, FTAs tended to follow the GATT model of dispute settlement, which was based on negotiation and conciliation; that is, on a consensual decision making process.[93] In the view of these authors, the EU has started to negotiate quasi-judicial models of dispute settlement after they were first introduced by NAFTA and the WTO, but only as an alternative or addition to the political model.

The quasi-adjudicative model of dispute settlement is a hybrid based on several elements of arbitration and judicial settlement and some elements of the political model of dispute settlements. The WTO DSU is usually cited as such a model because dispute

[89] *Ibid*. at 9-10.

[90] *Ibid.* at 29.

[91] I. G. Bercero, "Dispute Settlement in European Union Free Trade Agreements: Lesson Learned?" , *supra* note 15 at 390, and E.R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9 at 12 and 35.

[92] I. G. Bercero, "Dispute Settlement in European Union Free Trade Agreements: Lesson Learned?", *ibid.*

[93] For a detailed analysis of political dispute settlement model see E. R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9 at 4-9.

settlement consultation (the political model)as its first stage with a panel review, as the second stage and an Appellate Body (AB) decision, the appellate stage (the last two stages both being adjudicative models). In brief, the WTO DSU has introduces compulsory jurisdiction, a defined and transparent pre-established procedure for each stage of dispute settlement, an appellate stage, and empowerment of the AB to issue binding decisions.[94]

It was in its FTA with Mexico that the EU first included a quasi adjudicative model for dispute settlement with third countries.[95] Since then, the dispute settlement mechanism options in its FTAs concluded with non-neighbouring countries, such as the FTA with Chile[96] and EPAs with the ACP countries based on the Cotonou Agreement of June 23, 2000, have included fully developed arbitration proceedings in addition to bilateral consultation and consultations within the Joint Committee. The introduction of that quasi-adjudicative model in the EU-Mexico FTA also triggered changes to some of the FTAs between the EU and states within the EU space (e.g., modification of EEA by

[94] E. R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9 at 25-26.

[95] *Supra* note 16.

[96] *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* (EU-Chile Association Agreement) OJ L352, 3/10/2002, the trade provisions entered into force on an interim basis in February 2003 but the full agreement entered into force on 1 March 2005.

the 2001 Vaduz Convention[97]) but not to those with potential candidates for EU membership (the EAs and SAAs[98]).

The DRM related provisions of the EU FTAs with Mexico and Chile were obviously inspired by the WTO DSU and they have several features in common: the procedural arbitration rules are well developed and laid out in several article and the decision to take a dispute to arbitration does not require consensus but is the right of any party should consultations fail to resolve the dispute.[99] Both FTAs include provisions intended to avoid concurrent proceedings before the FTA tribunal and a WTO

[97] See Annex T: Arbitration of the *EFTA Convention*, available at http://secretariat.efta.int/Web/EFTAConvention/EFTAConventionTexts/EFTAConventionAnnexes/AnnexTArbitration.pdf (last accessed on April 28, 2007). The consolidated version of the *Convention Establishing European Free Trade Association* (EFTA 2001 Convention) is available at http://secretariat.efta.int/Web/EFTAConvention/EFTAConventionTexts/EFTAConventionText/EFTAConvention2001.pdf (last accessed on April 28, 2007).

[98] Moreover, the SAAs do not have any provisions related to possibility to arbitrate disputes. See, for example, Article 113 of the *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part* (OJ L26, 28/1/2005, p. 0003-0220) which is similar to article on dispute resolution in the EAs: "Each Party shall refer to the Stabilization and Association Council relating to the application of interpretation of this Agreement. The Stabilization and Association Council may settle the dispute by means of a binding decision." Compare with Article 107 of the EA concluded between the EU and Hungary, *supra* note 84. Note that the EUROMed association agreements include dispute settlement provisions similar to those of the EAs. See E. R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9 at 17; Table 3. Thus, both the EAs and the EUROMed association agreements provide for the possibility to arbitrate disputes, thought decisions of the arbitration lack binding power or they are binding only under consensus of the parties.

[99] EU-Chile FTA, Article 184: "Article 184; Initiation of the procedure
1. Parties shall at all times endeavour to reach a mutually satisfactory agreement on the dispute.
2. Where a Party considers that an existing measure of the other Party is in breach of an obligation under the provisions referred to in Article 182 and such matter has not been resolved within 15 days after the Association Committee has convened pursuant to Article 183(3) or 45 days after the delivery of the request for consultations within the Association Committee, whichever is earlier, it may request in writing the establishment of an arbitration panel.
EU-Mexico FTA, Free Trade Area in services: *Decision No 2/2001* of the EU-Mexico Joint Council of 27 February 2001 implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement (OJ L70/7); Article 39; Establishment of an arbitration panel:
1. In case a Party considers that a measure applied by the other Party violates the covered legal instruments and such matter has not been resolved within 15 days after the Joint Committee has convened pursuant to Article 38(3) or 45 days after the delivery of the request for a Joint Committee meeting, either Party may request in writing the establishment of an arbitration panel.
2. The requesting Party shall state in the request the measure and indicate the provisions of the covered legal instruments that it considers relevant, and shall deliver the request to the other Party and to the Joint Committee.

panel/tribunal. However, while the EU-Mexico FTA states that the two procedures are not mutually exclusive but simply cannot be concurrent, the EU-Chile FTA explicitly states that they are mutually exclusive.[100]

In addition to different solution of the concurrent jurisdiction issue, here are several other important differences between the two FTAs: the EU-Chile FTA specifically excludes competition issues from arbitration, provides for the submission of *amicus curiae* briefs and requires the parties to cooperate on increasing transparency, while the EU-Mexico FTA does not have any provisions on these matters. The two FTAs also differ with the respect to appointment of third arbitrator. The EU-Mexico FTA provides that in the case of the parties' failure to agree on the third arbitrator, she/he will be selected by lot from the list of candidates for the Chair nominated by each party to the dispute.[101] The EU-Chile FTA provides that the selection will be made by lot from an agreed roster of 15 panelists (five nationals of each party and five that are non-nationals of the parties).[102] Note that admissibility of *amici curiae* briefs as permitted in the EU-Chile FTA[103] had never before been seen in an EU FTA.

In conclusion, it is possible to say that the EU is slowly moving towards WTO-type DRMs in its FTAs but that the political model of dispute settlements still prevails in its FTAs with third countries.

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[100] Article 47(4) of the EC-Mexico FTA; *Decision No 2/2000* of the EU-Mexico Joint Council of 23March 2000(OJ L157/10) and Article 189(4)(c) of the EC-Chile Association Agreement, *supra* note 96.

[101] Article 40(4) of the Decision No. 2/2001 (re: services).

[102] Article 185(2)(3) of the EU-Chile Association Agreement.

[103] See Articles 35-37 of the ANNEX XV of the EU-Chile Association Agreement available online at http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111642.pdf (last accessed on April 29, 2007).

4.2. CEFTA Practice: Following in the steps of the EU

Article 31 contains CEFTA 1992's only provisions related to dispute settlement. They were based on the political model of DRM—that is, direct bilateral consultations between the parties to a dispute and, where necessary, subsequent consultations between the parties within the Joint Committee. These provisions made no reference to the GATT dispute settlement mechanism and there is no record that they have ever been used. In contrast, since the WTO DSU has been established, several CEFTA members have submitted their disputes to its panels/tribunals for settlement.[104] However, not all of the disputes that could have arisen between the CEFTA members could be resolved through the WTO DSU. For example, disputes arising out of the application or infringement of competition rules concerning undertakings (CEFTA Article 22) have had to be resolved in accordance with the procedure set out in CEFTA Article 31—through consultation of the parties. Since competition policy has not been part of the WTO agreements, its quasi-adjudicative procedure does not extend to resolution of competition related disputes and was therefore not available to the CEFTA disputants.

[104] DISPUTE DS148 (1998; Hungary complainant, Czech Republic respondent, no panel established nor settlement notified; measure affecting import duty on wheat from Hungary); DISPUTE DS240 (2001; Hungary complainant, Romania respondent, Hungary withdrew request for establishment of a panel; import prohibition on wheat and wheat flour from Hungary); DISPUTE DS235 (2001; Poland complainant, Slovakia respondent, no panel established and mutually agreed solutions notified under Article 3.6 of the DSU; safeguard measure on imports of sugar); DISPUTE DS143 (1998; Hungary complainant, Slovakia respondent; no panel established nor settlement notified; measure affecting import duty on wheat from Hungary); DISPUTE DS159 (1999; Czech Republic complainant, Hungary respondent; consultations requested, no panel established nor settlement notified; safeguard measure on imports of steel products from the Czech Republic); DISPUTE DS297 (2003; Hungary complainant, Croatia respondent; consultations requested, no panel established nor settlement notified; measures affecting imports of live animals and meat products from Hungary); DISPUTE DS289 (2003; Poland complainant, Czech Republic respondent; consultations requested, no panel established nor settlement notified; additional duty on Imports of pig meat from Poland).

CEFTA 2006 significantly amended the original 1992 treaty by modifying the rules related to consultation, by establishing a new quasi-adjudicative DRM, and by providing detailed rules of procedure for the new arbitral tribunal. It is possible to say that these changes are the result of two factors. First, as previously mentioned, the EU has been the driving force behind the establishment of CEFTA and its facilitator, and the CEFTA provisions were drafted to comply with the EC Treaty and the bilateral SAAs concluded between the EU and each member of CEFTA as a means of ensuring that the member countries would meet their obligations under the SAP and SAAs and would be ready for EU membership. Accordingly, CEFTA's DRM provisions are similar to those that the EU has used since 2000 in its FTAs with third countries and are more in line with WTO practice. The second factor leading to the implementation of changes in the CEFTA DRM procedures was the need to ensure that trade disputes between countries that were not used to cooperating with each other would be resolved efficiently and that awards made in those disputes would be final, binding and enforceable.

As already mentioned, in case of a dispute, the parties are first expected to cooperate and try to resolve the dispute through direct consultations or consultations in the Joint Committee[105]. The new CEFTA strengthened the earlier political model of dispute settlement by requiring the parties's direct consultations to take place in the presence of a mediator[106], who would submit a final report to the Joint Committee. The rules on the appointment of a mediator are set out in Annex 8 of CEFTA 2006. It is

[105] CEFTA 2006 Article 42(1)(2).

[106] Article 42(3): "These consultation ***may*** take place, ***should the Parties concerned so agree***, in the presence of a mediator. If the Parties concerned do not agree on a mediator, the Chairman of the Joint Committee or, if he is a national or resident of one of the Parties concerned, then the first of his predecessors who is not, shall appoint the mediator within 20 calendar days of receipt of the initial written request for mediation in accordance with the rules set out in Annex 8…"

noteworthy that Annex 8 provides the UNCITRAL rules on conciliation to apply to the mediation proceedings.[107] If the parties fail to reach agreement regarding the dispute through bilateral consultations and mediation, or through the Joint Committee, then they have the right to submit the dispute to an arbitral tribunal[108] for a final and binding resolution. [109]

At present, any dispute between CEFTA members arising out of competition issues and any dispute in which only one of the parties is also a WTO member has to be resolved by the CEFTA DRM.[110] The issue of concurrent jurisdiction between the CEFTA tribunal and the WTO DSU will become more significant when all CEFTA members become the WTO members.[111] The matter has been addressed in CEFTA Article 43(4). The said article which states that a "dispute under consultation and arbitration under this Agreement shall not be submitted to the WTO for dispute settlement [n]or shall an issue already before the WTO DSU be submitted for arbitration under this article." This solution has clearly been inspired by EU-Mexico and the EU-Chile FTAs. An equally interesting issue is that of the substantive law that CEFTA arbitrators have to apply in dispute resolution. Clearly, if no WTO rules and disciplines

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[107] Annex 8, Article 1. Annex 8 is available online at Stability Pact web site http://www.stabilitypact.org/trade/Annexes%208%20%20Appointment%20of%20a%20mediator%20FINAL.pdf (last accessed on April 22, 2007).

[108] Article 43(1): "Disputes between the Parties.... ***may*** be referred to arbitration by any Party to the dispute by means of a written notification addressed to the other Party to the dispute…"

[109] Article 43(3).

[110] This is different from the EU-Chile FTA which also excludes competition issues from its scope of jurisdiction.

[111] Until 22 April 2007, majority of the Western Balkan countries have become WTO members. Indeed, only Bosnia and Herzegovina, Montenegro and Serbia have not acceded to the WTO. Kosovo has not been recognized as an independent country. Bosnia and Herzegovina and Montenegro are currently observes at the WTO. See data on membership and observers at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last accessed on April 22, 2007).

apply to the provisions of the FTA that are in dispute (usually because the areas regulated by the FTA and the WTO do not overlap) or where the FTA explicitly refers to the WTO, or even GATT, the CEFTA tribunal will apply CEFTA rules. However, the situation is more complex when the areas of regulation of the FTA and the WTO do overlap and where the WTO remedies are different from those provided for in the FTA. It is possible to see that the CEFTA tribunal could use the WTO rules to interpret the provisions of CEFTA but not vice versa.

Another way in which the EU-Chile FTA has influenced CEFTA 2006 is the inclusion in the latter of a clause on the admissibility of *amicus curiae* briefs during arbitration proceedings.[112] That allows opinions of third parties to be presented before the tribunal and potentially contribute to a better understanding of the issue in disputes and thereby influence the tribunal's decision.

Annex 9 of CEFTA sets out how its arbitral panels are to be constituted and how they will function.[113] It provides that, if the parties fail to agree on the appointment of the third arbitrator, that arbitrator would be nominated by the President of the Permanent Court of Arbitration at the Hague. This solution is different from those provided for in the FTAs between the EU and Mexico and Chile but the purpose is clearly the same—to prevent the parties from obstructing the procedure by failing to agree on a panel. It is also noteworthy that Annex 9 specifies that the procedural arbitration rules applicable will be

[112] CEFTA 2006 Article 43(2).

[113] Annex 9; Constitution and Functioning of the Arbitral Tribunal referred to in Article 43, paragraph 3, available online at http://www.stabilitypact.org/trade/Annexes%20%209%20Constitution%20and%20Functioning%20of%20the%20Arbitral%20Tribunal%20FINAL.pdf (last accessed on April 29, 2007).

the Optional Rules for Arbitrating Disputes Between Two States of the Permanent Court of Arbitration at the Hague.

In summary, it is possible to say that CEFTA 2006 follows the general trend already observed towards judicialization of the EU's DRMs. The original treaty included a DRM that was somewhat limited by CEFTA's transitional nature and restricted scope of an international treaty, and was generally not expected to be very effective. However, CEFTA's scope has changed with the accession of the Western Balkan countries to the treaty. Because not all of those countries were members of the WTO, it was not possible to rely, as had been done before, on that agreement's much more structured and enforceable mechanism to be utilized for the settlement of CEFTA disputes. CEFTA 2006 therefore includes certain DRM provisions that have been tailored in accordance with its specific nature, providing more detailed substantive and procedural rules, independent from the WTO.

Conclusions

DRMs provide an authentic uniform source of interpretation of the rules and norms of the international treaties that establish FTAs (and RTAs in general). They facilitate consistent compliance with the treaties and thus enhance the legitimacy of the FTAs and their legal rules. DRMs are therefore an important tool to increase the likelihood that an integration will be successfully implemented and will be permanent.

I have stated earlier in this article that it is possible to discern two trends in the evolution of international trade dispute settlement—the increasing juridicialization of the DRM and the establishment of compulsory rather than consultative jurisdiction of

international tribunals. As analyzed in this article, the development of CEFTA and other FTAs concluded between the EU and third countries over the last decade seems to confirm these tendencies.

In the previous sections of this paper it has been suggested that the level of political commitment to regionalism varies from state to state according to whatever "actual or perceived conflict between national and regional objectives"[114] there might be. In the case of the EEA, for example, it seems that the EU and the EFTA countries have the ambition to achieve deep economic integration and thus the DRM provisions in that treaty, at least since the 2001 Vaduz Convention, are detailed, include not only parties' direct consultation and consultation within the EEA Joint Committee but also classical arbitration and the right of the parties to place dispute before the ECJ itself.[115] It has been shown how the broader scope of the new CEFTA and the anticipation by the EU and the rest of the international community that, for historical reasons, the new CEFTA members from the Western Balkans would lack a commitment to co-operate and integrated, have influenced how CEFTA institutional scope and DRM have developed, drawing the DRM away from the political and quasi-adjudicative models preferred by the EU towards the more juridicialized WTO model. As the jurisdiction of the WTO bodies and of regional courts and tribunals broaden, it seems that the possibility of overlapping and conflicting

[114] F. Rueda-Junquera, "European Integration Model: Lessons for the Central American Common Market", The Jean Monnet Chair lecture, February 2006, University of Miami, Florida (on file with the author) at 13.

[115] Agreement on the EEA Article 11(2). See more on the reference to the ECJ in EEA in A. R. Ziegler, "The EFTA Experience" in L. Bartels & F. Ortino, *Regional Trade Agreements and the WTO System, supra* note 15 at 409-411 and E.R. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements", *supra* note 9 at 12-13. Note that the Ankara Agreement, or the association agreement signed between the EEC and Turkey (OJ L361/3, 31/12/1977) provides in Article 25(2) a similar solution with respect to reference to the ECJ or any other court or tribunal (but without provisions on arbitration proceedings; arbitration was included later in 1995 Decision re Customs Union between Turkey and the European Community, Articles 61-61).

jurisdictions increases. Given the fact that CEFTA focuses primarily on trade among member states that are either already WTO members or soon will be, it will be interesting to see how workable the CEFTA provision on the mutual exclusivity of proceedings before the WTO and CEFTA tribunals turns out to be. However, it seems that the more robust dispute settlement clauses of the modified CEFTA are intended to provide better support of the integration by improving the effectiveness of dispute settlement through minimizing reliance on national governments' political will and commitment to integration and communitarian law. For a treaty of a transitional nature and limited by a net of bilateral SAAs, this can be counted as a huge improvement.