From *Pax Mercatoria* to *Pax Europea*: How Trade Dispute Procedures Serve the EC's Regional Hegemony

Tomer Broude*

ABSTRACT

The European Union's policies towards the states on its new, post-2004 enlargement, external borders (the European Neighbourhood Policy, but also the Cotonou project) present two complementary yet competing tendencies: the establishment of *Pax Mercatoria* (the model historically developed in and by the EC itself, wherein international political stability is facilitated by economic interdependence) - on the one hand, and the pursuit of *Pax Europea* (the establishment of a European zone of superior international economic, political and legal influence), on the other. The balance between these will ultimately be struck by the cumulative economic, political and social effects of the new legal arrangements that will be reached. This paper focuses on one detailed aspect of the EU's external relations that may affect this balance, the role of trade dispute resolution provisions in the European Community's Regional Trade Agreements (RTAs), in particular their 'juridical interface' with the dispute settlement system of the World Trade Organization (WTO), in the context of their legal, economic and political implications for the EC's RTA partners.

Beyond providing a focused comparative overview of certain relevant elements of the dispute settlement provisions in EC RTAs and their regulation of choices of forum and applicable law, I argue that the dispute settlement provisions of most EC RTAs (and their practice) contribute to the maintenance and management of the EC's regional economic pre-eminence by encouraging and perpetuating non-judicialized, bilateral diplomatic dispute settlement in which the EC enjoys distinct advantages. This substitutes and subverts the more judicialized, rule-based dispute resolution system that is available on a formal basis in the WTO, and on an unutilized optional basis in most EC RTAs. In this regard, existing EC RTA dispute settlement does not conform to the theoretical requisites for the achievement of a regional *Pax Mercatoria* (which in my analysis include effectiveness, automaticity, and legalized juridical interface with the WTO), but is rather more designed in furtherance of a *Pax Europea*.

This is in contrast to the parallel situation in the North American Free Trade Agreement (NAFTA) (as well as the EC's 'extra-regional' RTAs with Chile and Mexico, and to lesser extent, the SACU), that although historically established for purely economic purposes and devoid of a political ethos, the law and practice of its dispute settlement mechanisms promote a *Pax Mercatoria*, but not a *Pax Americana*. This contradicts the *Pax Mercatoria* ethos of the EU's contemporary regional policies, is contrary to the EU's advocacy of the rule of law, and depicts the EU as a 'poor man's' hegemon in the shadow of the United States. It is therefore in the interest of the EU's own initiatives to reform the dispute settlement procedures in its regional trade agreements, to bring them more in line with its strategic statements, by introducing improved, judicialized dispute settlement in RTAs; but ultimately it is up to each partner to weigh the balance between *Pax Mercatoria* and the degree of *Pax Europea* that it is willing to accept in its relations with the EU.

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I. Introduction

Having completed the first and major wave of its 21st century enlargement,[1] the European Union (EU) is now intent on restructuring its relations with the immediate non-European geopolitical surroundings. As the Commission of the European Communities (EC)[2] stated in its March, 2003 Communication entitled *Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours* (the Wider Europe Initiative; subsequently renamed the "European Neighborhood Policy" or "EPN"),[3] the EU "must act to promote the regional and subregional cooperation and integration that are preconditions for political stability, economic development and the reduction of poverty and social divisions"[4] in the environment it shares with the countries on its new external borders – Russia, the Western Newly Independent States (NIS) and the Southern Mediterranean. Concurrently, the EU is casting its net even farther afield by engaging in the implementation of the Cotonou Agreement[5] with the African, Caribbean and Pacific Group of States (ACP), in the process of negotiating new Economic Partnership Agreements (EPAs) with its ACP regional groups.

These EU initiatives are not merely cloaked in benevolence: they hold significant potential for improving economic, political and social conditions in the partner states.[6] Their dynamic logic is one of peace and prosperity through interdependence - the EU exporting its recipe for success.[7] Yet at the same time, these agendas can be understood as EU bids for

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[1] On 1 May, 2004, the following 10 states acceded to the EU: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. Although the candidacy of Bulgaria, Romania, Turkey and Croatia is still outstanding, and the future accession of Switzerland, Norway, Iceland, Liechtenstein, Macedonia and Serbia and Bosnia-Herzegovina is conceivable, the completion of the mainstay of the post-cold war enlargement project has shifted considerable European attention to the states surrounding the EU that are not natural candidates for accession; see European Commission, Press Release, "Beyond Enlargement: Commission Shifts European Neighborhood Policy into Higher Gear", PP/04/632, Brussels, 12 May, 2004, available online: http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/632&format=HTML&aged=0&language=EN&guiLanguage=en (this and all other web sources cited in this paper were last accessed on 21 October, 2004). The EU Commissioner for Enlargement has since 2003 also been responsible for the European Neighborhood Policy.

[2] Throughout this paper, primary reference is made to the EC, rather than the European Union (EU), because by virtue of their legal personality and competences, it is the EC and its Member States that are party to RTAs and the WTO. Reference to the EU is made mainly in political contexts.

[3] See Com(2003) 104 final, 11 March, 2003.

[4] *Ibid.* p. 1.

[5] See *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*, Signed 23 June, 2000 in Cotonou, Benin, entered into force, 1 April, 2003, full text available online, Commission of the European Communities, http://europa.eu.int/comm/development/body/cotonou/agreement_en.htm.

[6] For an overview of the EPN and a discussion of its limitations, see G. Harpaz, "The Obstacles and Challenges that Lie Ahead for a Successful Implementation of the European Neighbourhood Policy as a Social Engineering and Peace-Promotion Instrument", paper presented at an international conference on "the European Union in Regional Conflict Resolution", on the occasion of the establishment of the Trilateral Center for European Studies, organized by the Israeli Association for the Study of European Integration in cooperation with the Friedrich Naumann Foundation, The EU-Israel Forum, The German Innovation Centre and the Interdisciplinary Centre, Herzliya, 24-25 October, 2004.

[7] *Ibid.*, p. 1.

regional influence and hegemony, employing the resources at its disposal in order to serve its own interests and impose its own order,[8] with less sensitivity to the actual wishes of those whose lot it would like to improve. The balance between these complementary yet competing tendencies – the establishment of *Pax Mercatoria* (the model historically developed in and by the EC itself, wherein international political stability is facilitated by economic interdependence) - on the one hand, and the pursuit of *Pax Europea* (the establishment of a European zone of superior international economic, political and legal influence), on the other - will ultimately be struck by the cumulative economic, political and social effects of the new legal arrangements that will be reached under the ENP and Cotonou projects.

This paper focuses on one detailed aspect of the EU's external relations that may affect this balance. Looking towards the redesign of the legal frameworks of the EU's regional trade relations, the paper discusses the role of the trade dispute resolution provisions in the Regional Trade Agreements (RTAs) of the EC, in particular their 'juridical interface'[9] with the dispute settlement system of the World Trade Organization (WTO), in the context of their legal, economic and political implications for the EC's RTA partners. Beyond providing a focused comparative overview of certain relevant elements of the dispute settlement provisions in EC RTAs and their regulation of choices of forum and applicable law, I argue that the dispute settlement provisions of most EC RTAs (and their practice) contribute to the maintenance and management of the EC's regional[10] economic pre-eminence by encouraging and perpetuating

[8] See Commissioner for Enlargement and European Neighbourhood Policy, G. Verheugen, as quoted in Press Release, *supra* note 1: "A ring of well-governed countries around the EU, offering new perspectives for democracy and economic growth, is in the interests of Europe as a whole".

[9] I adopt this term from F.M. Abbott, "The North American Integration Regime and its Implications for the World Trading System" in J.H.H. Weiler (ed.), *The EU, WTO and NAFTA: Towards a Common Law of International Trade* (Oxford: Oxford University Press, 2000), 169-199 at 177. This term is flexible enough to include a broad range of legal issues arising from the coexistent activity of formally independent international legal systems, courts and tribunals, primarily the problem of competing jurisdictions (identified as including three "different temporal situations", i.e., (1) choice of forum; (2) parallel proceedings; and (3) successive proceedings; see Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003), 17) but also questions related to applicable sources of law and conflicts of norms: the recognition of rules from competing legal systems, and the hierarchy or priority between different sources of law (on this, see J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003); and J. Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 Am. J. Int. L. 535-578.

[10] The term 'regional' is used in at least two different ways in this paper and so requires some clarification. On one hand, following the ordinary meaning of the word, 'regional' denotes a spatial geopolitical context that is common to the EC and its neighbours, based primarily on geographical proximity, e.g., 'Europe'. Or the 'Euro-Mediterranean' region. On the other hand, however, following *General Agreement on Tariffs and Trade* (GATT)/WTO terminology, the term 'regional' is detached from the strictures of geography. 'Regional Trade Agreements' (in capitals) is a catch-phrase-cum-misnomer encompassing virtually all sub-GATT trade agreements that derogate from the Article I GATT most-favoured-nation (MFN) principle; many of the RTAs in existence today are not 'regional' in the proper geographical sense – e.g., the *Free Trade Agreement Between the Republic of Korea and the Republic of Chile*, signed 15 February, 2003, entered into force, 1 April, 2004 (full text available online, http://www.mofat.go.kr/ko/division/fta_new_9.mof) or the *Free Trade Agreement between Israel and Canada*, signed 31 July, 1996, entered into force, 1 September, 1997 (full text available online, http://www.sice.oas.org/Trade/can-isr/can-isr.asp). Indeed, the provisions governing the establishment of RTAs and their GATT/WTO compatibility (regarding trade in goods) - Article XXIV GATT, *Ad* Article XXIV and the WTO *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade* (part of the WTO Agreements incorporated in the *Agreement Establishing the World Trade Organization*, app. 1 in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1226 at 1244 *et seq.*) – do not include the term 'regional' but rather refer more generally to 'customs unions' and 'free trade areas' (the corresponding Article V of the *General Agreement on Trade in Services* uses the phrase "an agreement liberalizing trade in services between or among the parties to such an agreement"). The 'Enabling Clause' which is, *inter alia*, the basis for certain RTAs among developing countries (*Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries*, GATT Document L/4903, 28 November 1979, BISD 26S/203) explicitly allows "regional" but also "global" arrangements (Article 2(c)). In none of these cases is regional proximity a substantive condition for the establishment of a preferential trade arrangement. Nevertheless, the term 'regional' has persisted for decades, and the relevant WTO committee has been dubbed the 'Committee on Regional Trade Agreements' (CRTA) (established by the WTO General Council in WTO Doc. WT/L/127, 7 February, 1996; notably, footnote 1 of this Decision, applies the CRTA's mandate to "all bilateral, regional, and plurilateral trade agreements of a preferential nature"). In this paper I refer to the EC's regional

non-judicialized, bilateral diplomatic dispute settlement in which the EC enjoys distinct advantages, on both tactical and strategic levels (i.e., with respect to a specific trade dispute, but also with regard to the ECs regional economic and political status, more generally). This substitutes and subverts the more judicialized, rule-based dispute resolution system that is available on a formal basis in the WTO,[11] and on an unutilized optional basis in most EC RTAs. In this regard, existing EC RTA dispute settlement does not conform to the requisites for the achievement of a regional *Pax Mercatoria*, but is rather more designed in furtherance of a *Pax Europea*. This is in contrast to the parallel situation in the North American Free Trade Agreement (NAFTA), for example, that although historically established for purely economic purposes and devoid of a political ethos, the law and practice of its dispute settlement mechanisms promote a *Pax Mercatoria*, but not a *Pax Americana*.

In developing this argument the paper is constructed as follows. The following section II explains and consolidates political theories of *Pax Mercatoria* and suggests an incorporation of the role of trade dispute settlement into their framework. Subsequently, section III provides an empirical sketch of the record of EC/RTA-partner disputes since 1995, and contrasts it with the parallel record of trade disputes between the United States (US) and the partners to its main RTA, the NAFTA – Mexico and Canada - during the same period.[12] On this background, in section IV, I survey and categorize the dispute settlement systems of NAFTA and EC RTAs, with special focus on their effectiveness, automaticity and juridical interface provisions, evaluate them in relation to the theoretical outline of section II and associate them with the factual findings of section III, demonstrating the non-*Pax Mercatoria* character of EC RTAs in the EC's own regional environment. In the concluding section V I explain how the law and practice of most EC RTA dispute settlement mechanisms, as depicted in previous sections, not only stray from the *Pax Mercatoria* rationale, but also may serve a *Pax Europea* function. This is then discussed in the broader context of the EC's maneuvering between multilateralism and region-bilateralism in global trade relations, as are the limits of the EU's pursuit of political aims through RTA dispute settlement; finally, some advice is tendered to the EC and to states and groups of states currently engaged in negotiations with the EC towards the establishment of RTAs or the enhancement of existing ones, with respect to the design of future dispute settlement procedures.

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economic and political relations in the first sense; i shall see that there are differences between the EC's truly 'regional' RTAs and its 'extra-regional' RTAs.

[11] In its formal design, the legal basis for the jurisdiction of the WTO is one of 'supra-consent', requiring the consent of the WTO Membership as vested in the WTO Dispute Settlement Body; moreover, in practical terms, the 'negative consensus' rule in Article 6.1of the WTO Dispute Settlement Understanding (DSU) (*Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes*, April 15, 1994, app. 1 in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1226 at 1244 *et seq*.) means that the establishment of a WTO Panel is dependent upon the consent of one party only – the complainant – making WTO jurisdiction effectively compulsory or 'quasi-automatic'. See Pauwelyn *supra* note 2 at 553; and in some detail, T. Broude, *International Governance in the World Trade Organization: Judicial Boundaries and Political Capitulation* (London: Cameron May, 2004), Ch. VIII.A.3.

[12] The year 1995 provides a convenient starting point for analysis. It provides us with a decade of practice to analyze; it was the year of entry into force of the WTO agreements, not long after the entry into force of NAFTA; within a year of the entry into force of the first European Partnership Agreements and the year of the signing of the first Euro-Mediterranean Agreement (for more information on these categories of RTAs, see section IV *infra*).

II. *Pax Mercatoria* and Trade Dispute Settlement: A Theoretical Outline

(a) *Pax Mercatoria*: The Academic Debate

The concept of *Pax Mercatoria* – the proposition that the economic interdependence that comes with increased international trade promotes peaceful international relations – has pervaded liberal thinking for centuries,[13] and is one of the fundamentals of Kantian peace theory.[14] It is a central justificatory tenet of regional economic integration,[15] perhaps most obviously embedded in the theoretical underpinnings of the project of European integration.[16] As mentioned in the introduction to this paper, it is also the declared ideological foundation of the European Union's extra-European regional policy, not only in the field of trade. In this section I explore the relevant theoretical aspects of the concept, focusing on the relationship between models of trade dispute settlement and the stability of international political relations.

The last several decades have seen a veritable explosion of scholarship on the possible linkage between trade, peace and international political stability. Some research focuses on the empirical validity and specification of *Pax Mercatoria* theory,[17] while other contributions attempt to model the relation between trade and interdependence, on one hand, and peace and political stability, on the other,[18] and investigate the causal domestic and international dynamics of the relationship.[19] While the basic liberal insight of "peace through trade" enjoys significant support, and has yet to be effectively refuted,[20] it is nevertheless clear from the literature that we do not yet possess a firm understanding of *Pax Mercatoria* as a practical concept that is theoretically comprehensive and empirically sound.[21]

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[13] The idea can be traced in the 17th century musings of Emeric Crucé on international peace (*The New Cineas* (New York: Garland Publishing, 1972 (original ed. 1623, *Le Nouveau Cynée ou Discours d'Etat*)). Well known proponents from the 18th-19th centuries include Montesquieu (see Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (First ed. 1773), translated and edited by M. Cohler, B.C. Miller and H.S. Stone (Cambridge: Cambridge University Press, 1990), Book XX, Chapter 2), Adam Smith, David Hume, and Richard Cobden (for a partial intellectual history, see A. Robson, "Individual Freedom, International Trade and International Conflict: Cobden was Right", 15 September, 2003, online: The Independent Institute, http://www.independent.org/students/article.asp?ID=1333).

[14] I. Kant, *Perpetual Peace* (New York: Liberal Arts Press, 1957 (original ed. 1795, *Zum Ewigen Frieden*)); for a contemporary exposition in international relations theory, see B. Russet and J.R. Oneal, *Triangulating Peace: Democracy, Interdependence and International Organizations* (New York: W.W. Norton and Co., 2001).

[15] See E.D. Mansfield, "Preferential Peace: Why Preferential Trading Arrangements Inhibit Interstate Conflict" in E.D. Mansfield and B.M. Pollins (ed.), *Economic Interdependence and International Conflict: New Perspectives on an Enduring Debate* (Ann Arbor: University of Michigan Press, 2003) 222.

[16] In the famous words of Robert Schuman, in the *Declaration of May 9, 1950* regarding the establishment of the European Coal and Steel Community: "the solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible".

[17] See e.g. M. Gasiorowski, "Economic Interdependence and International Conflict: Some Cross-National Evidence", (1986) 30(1) Int. S. Q. 23.; J.R. O'Neal *et al*., "The Liberal Peace: Interdependence, Democracy and International Conflict, 1950-1985" (1996) 33(1) J. Peace Research 11.

[18] See, generally, S. W. Polacheck, "Conflict and Trade" (1980) 24(1) J. Conflict Resolution 55. Specific contributions have revealed many nuances, for example, the degree to which free trade – rather than simply trade – may be responsible for peaceful relations (P.J. Mcdonald, "Peace through Trade or Free Trade?" (2004) 48(4) J. Conflict Resolution 547); the effect of size asymmetry on the link between trade and conflict (H. Hegre, "Size Asymmetry, Trade and Military Conflict" (2004) 48(3) J. Conflict Resolution 403); or the effect of additional factors such as foreign aid, tariffs, contiguity and country size (S.W. Polacheck *et al.*, "Liberalism and Interdependence: Extending the Trade-Conflict Model" (1999) 36(4) J. Peace Research 405).

[19] See, e.g., J.D. Morrow, "How Could Trade Affect Conflict?" (1999) 36(4) J. Peace Research 481; and contributions by J.D. Morrow, E. Gartzke, A.A. Stein, J.S. Levy and E.D. Mansfield in Mansfield and Pollins, *supra* note 15.

[20] Despite the stream of thought according to which interdependence may actually *increase* the probability of international conflict, e.g., K. Waltz, "The Myth of National Interdependence: in C.P. Kindelberger (ed.), *The International Corporation* (Cambridge MA: MIT Press, 1970), and to lesser extent, K. Barbieri, "Economic Interdependence: A Path to Peace or a Source of Conflict?" (1996) 33(1) J. Peace Research 29, arguing that the effect of interdependence on peaceful relations varies over time and space.

[21] See, recently, C.F. Goenner, "Uncertainty of the Liberal Peace" (2004) 41(5) J. Peace Research 589 (demonstrating through model averaging intended to account for uncertainty in model selection, that trade interdependence does not have a significant effect on the prediction of militarized conflict). On the challenges to be tackled by future research, see E.D. Mansfield and

It would be considerably beyond the scope of this paper to seriously contribute to this debate. Moreover, in discussing the role of trade dispute settlement in the promotion of international political stability, I do not intend to argue, let alone to prove, that such a role exists in a meaningful empirical sense. This would require broader research. Rather, the discussion is a contingent, theoretical one: *if* one accepts *Pax Mercatoria*, to varying degree, as one of the rationales, functions and/or effects of RTAs – either through the increase in trade that they bring, the economic interdependence that they promote or by virtue of their institutional aspects, or for whatever other plausible reason – what, then, is the anticipated role of trade dispute settlement in enacting it? And which model of dispute settlement is appropriate for its facilitation? The analysis will thus be limited to proposing the ways in which the settlement of trade disputes may contribute to *Pax Mercatoria* under the latter's own terms.

Furthermore, while the academic debate has focused on the narrower, properly Kantian meaning of *Pax Mercatoria* – put bluntly, that trade promotes peace by preventing the emergence of the exceptional condition of war[22] – I have here taken some license with the term, referring to a broader articulation whereby economic interdependence is perceived as reducing political tensions that fall short of military conflict.[23] Indeed, this is closer to the more complex conceptualization of 'peace and prosperity through interdependence' that is reflected in EU policy statements.[24]

The question at hand thus becomes: how can trade dispute settlement procedures be understood and typified as reducing political friction among RTA partners? For the time being this question, as a generalized inquiry, must remain on the theoretical level, as it is fraught with problems of measurability and commensurability.[25] I will delve into the issue, however, but only to the extent necessary to demonstrate that within the *Pax Mercatoria* concept itself, there is room to include reference to an expected positive effect of trade dispute settlement on the reduction of political tension in RTAs, albeit subject to certain conditions. As will be seen, the main argument is that for trade dispute settlement mechanisms to contribute to the reduction of political tension between RTA parties, they must be of an effective judicialized, rather than political diplomatic nature.[26] This theoretical outline will subsequently be applied to the practice and law of trade dispute settlement in EC RTAs.[27]

B.M. Pollins, "The Study of Interdependence and Conflict: Recent Advances, Open Questions and Directions for Future Research" 2001 45(6) J. Conflict Resolution 834.

[22] For some qualifications see Levy *supra* note 19.

[23] In this sense I may be culpable for continuing the "failure to distinguish conflict from contests", as lamented by E. Gartzke, "The Classical Liberals Were Just Lucky: A Few Thoughts about Interdependence and Peace" in Mansfield and Pollins *supra* note 15, 96. Moreover, I prefer to consider this as a broadening of the debate to the more general – and realistically relevant – questions of the relation between economic interdependence and political stability. I(nternational) R(elations) scholarship's preoccupation with military conflict vs. peace is understandable, given the overwhelming destructive effects of war (and also its relative ease of measurability and quantification), yet it gains, at times (and paradoxically so, given its liberalist basis), an almost Schmittean, dichotomic, perspective of politics ("The sovereign is he who decides on the exception", C. Schmitt (G. Schwab, trans. from original German, 1922), *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, MA: MIT Press, 1985) 5. Tomes have been written in either support, apology or derision of the concept of the exception as the defining element of politics; see several contributions in D. Dyzenhaus (ed.), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham and London: Duke University Press, 1998); another good introduction and critique may be found in O. Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy" (2000) 21 Cardozo L. R. 1825). This mode of thinking may threaten to neglect the nuances and textures of real international politics. Furthermore, I quite simply contend that the theoretical explanations of the effect of economic interdependence on military strife can be extended to explain the mitigating effects on political tensions.

[24] See, e.g., ENP, *supra* note 3.

[25] For example: how to quantify political friction that does not express itself through the use or threat of force? How to associate trade disputes with seemingly unrelated non-trade political issues?

[26] On the difficult divide between diplomatic and judicialized dispute settlement, see A. Reich, "From Diplomacy to Law: The Juridicization of International Trade Relations", (1996-7) 17 Nw. J. Int. L. & Bus. 775; and J.H.H. Weiler, "The Rule of

(b) Increased Trade and its Effect on Economic and Political Disputes

First of all, consider that by no means does *Pax Mercatoria* imply a *Pax* in *Mercatoria*, in which trade partners will have no differences of interest or disagreements on the interpretation and implementation of their mutual RTA obligations. In fact, the proliferation of new rules, rights and obligations included in RTAs,[28] the increase in inter-partner trade brought on by the preferential arrangements of the RTA, as well as the adjustment costs imposed upon less-efficient domestic sectors in each partner by trade liberalization (creating groups of political influential stakeholders that will lobby for external trade measures and/or for the initiation of trade disputes, including resorting to political pressure)[29] – all these can only be expected to increase the intensity and frequency of trade disputes. Thus, a first theoretical inference is that we would expect parties to RTAs to have a noticeably higher number of trade disputes between them, then in the absence of RTAs.[30]

In this respect, it might even be said that the conflict-level between RTA partners will actually rise, insofar as disputes over trade are deemed to be part of the overall bank of disagreements, political and otherwise. Furthermore, economic disputes may ultimately provoke political tensions,[31] even unrelated ones, as a form of negative or disruptive issue 'spill-over'. Thus, RTAs, of themselves – that is, if understood only as a nexus of trade obligations – may in fact have a negative effect on political relations – the opposite of *Pax Mercatoria*. Additional elements must be added to RTA relations in order to counteract this potential problem.

(c) The Remedial Role of Effective RTA Institutions and Dispute Settlement

This is the point where trade dispute settlement mechanisms become relevant to the idea of "peace through trade". The formal aspect of RTAs has a measurable effect on reduction of political conflict. In fact, empirical research has shown that trade flows *per* se have little effect on the likelihood of conflict between states that are not mutual RTA partners, but within RTAs

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Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) J. World T. 35(2) 191. It has long been the ideology of central streams of thought in international law scholarship that a rule-based global legal system would best promote worldwide peace(for an intellectual overview see D. Zolo, "Hans Kelsen: International Peace Through International Law", (1998) 9(2) Eur. J. Int. L. 306. The proposition here can be seen is a bit different and more specific: judicialized dispute settlement best serves the promotion of political stability in systems of economic interdependence.

[27] See section IV *infra*.

[28] A typical RTA has between 50 to 200 articles and many annexes and appendices.

[29] This is a simple political economy inference: the sectors are harmed by liberalization will push for protectionist measures and any foreign policy act that serves their interest. This can be taken a step further. An occasional theoretical suggestion that in my opinion requires additional empirical substantiation, contends that societal sectors that benefit from economic protectionism and so suffer from liberalization (as in RTAs), are the same sectors that are most likely to push for aggressive foreign policy that may lead to military conflict, but at the very least contributes to political tensions; See McDonald *supra* note 18, building on R. Cobden, *The Political Writings of Richard Cobden*, Vols. 1-2 (London: William Ridgeway, 1868); R. Cobden, *Speeches on Questions of Public Policy*, edited by J. Bright and J. E. Thorold Rogers, Vols. 1-2 (London Macmillan and Co., 1870); and J.A. Schumpeter, "The Sociology of Imperialisms" (1919), trans. H. Norden, in P.M. Sweezy (ed.), *Imperialism and Social Classes* (New York: Augustus M. Kelley, 1951). A reverse formulation is that trade increases the incentives of internationalist groups that benefit from trade to pressure government into maintaining a foreign policy environment that does not hamper trade (See R. Rogowski, Commerce and Coalitions: How Trade Affects Domestic Political Coalitions (Princeton: Princeton University Press, 1989).

[30] This is yet another issue that would best be subjected to rigorous empirical research. Moreover, this hypothesis can be substantiated by some rational induction from real trade disputes: the majority of them would simply not exist without trade agreements, for simple lack of legal basis (no obligation, no liability, no dispute).

[31] See A.A. Stein, "Governments, Economic Interdependence and International Cooperation" in P.E. Tetlock *et al.* (eds.), *Behavior, Society and Nuclear War*, Vol. III (New York: Oxford University Press, 1993).

there is a strong negative correlation between trade and political conflict.[32] This may suggest, *inter alia*, that beyond the trade effects of the economic mechanisms of RTAs, it is their institutional elements that are primarily responsible for reduction of political friction between RTA parties.[33] These include trade dispute settlement mechanisms.

If trade dispute settlement mechanisms are put in place as part of the RTA, the potential increase in trade disputes and residual political effects may be countered by an improved method for settling them. If trade dispute settlement mechanisms are effective – that is, capable of resolving trade disputes quickly and durably – they will diminish the number of outstanding disputes, their duration and intensity. Effective RTA institutions contribute not only to the proper implementation of the RTA, but also to the removal of trade disputes and, consequently, to the promotion of good political relations.[34] Thus, one role played by dispute settlement mechanisms in reducing political friction in RTAs, quite simply, is to reduce the salience of trade dispute between RTA members, by effectively removing these disputes from the agenda of RTA relations. Moreover, this role can be played meaningfully only if dispute settlement mechanisms are effective.

(d) The De-linkage Effects of Judicialized RTA Dispute Settlement

In order to reduce political tensions, it is not enough for RTA dispute settlement mechanisms to be effective. They must also be detached from the political context of inter-RTA relations. To this end they must be judicialized. The well-known arguments for judicialized dispute settlement in international trade[35] – dispute settlement that is rule-based rather than power-based, that relies on impartial third-party adjudication instead of negotiation, and that has an efficacious method of enforcement - here gain an additional, regional and political dimension, through recourse to theories of *Pax Mercatoria*.

The classical theoretical argument that links economic integration with peace is the 'economic opportunity cost hypothesis'.[36] War undermines the real and expected economic benefits of trade liberalization; this reduces incentives to resort to force,[37] sometimes defined as a state's 'resolve' to wage war.[38] This may arguably be extended to political tension more generally. In this vein, strong political disagreements and international crises – even without the threat of military intervention – risk undermining RTA benefits.[39] For example, political

[32] See E.D. Mansfield and J.C. Pevehouse, "Trading Blocs, Trade Flows and International Conflict", (2000) 54(4) International Organization 775. Note that the study refers to overt conflict, not to political tensions of a lower degree.
[33] It is, however, possible to argue that this finding shows that it is not the level of actual trade but the degree of protectionism that affects political relations (without referring to RTA institutions). For example, Viner posited that heightened barriers to international economic activity increase conflicting interests that cause political discord up to the degree of the threat or use of force (J. Viner, *International Economics* (Glencoe: Free Press, 1951), 259). It seems, however, artificial and indeed inaccurate to separate the level of barriers to trade from the volume of trade between parties. Even if this approach is adopted, however, trade dispute settlement maintains a role in promoting good political relations, if only because they themselves serve to remove barriers to trade and to enforce the substantial rules of liberalization in RTAs.
[34] For a related comment, see Mansfield *supra* note 15.
[35] On the process on the global scale, see J.H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute for Strategic Affairs, 1998).
[36] See Levy *supra* note 19.
[37] See Mansfield *supra* note 15.
[38] See Morrow *supra* note 19. Morrow argues convincingly, on a game-theoretic basis, that contrary to the classical theory, the simple 'resolve' effect of trade flows on the likelihood of conflict is indeterminate. However, increased trade flows can prevent escalation to war because they provide states with opportunities to signal to each other the degree of their otherwise unobservable resolve, for example through the use of trade sanctions.
[39] In fact, some empirical research has shown that there is little difference in trade flows in the shift from a state of poor relations to a state of actual conflict; rather, the significant changes in trade occur in shifts from good relations to poor; see D. Morrow *et al.*, "The Political Determinants of International Trade: The Major Powers, 1907-1990", (1998) 92(3) Am. Pol. Sci. Rev. 649.

discord may reduce willingness, at the state level, to comply with RTA obligations, or encourage protectionist tendencies (not to mention the less legally tangible effect, at the private level, of the unpopular politics of one state upon customer preferences in another, resulting in consumer boycotts).[40] Ultimately, foreign policy disharmony may cause a party to resort to trade measures in support of its political position, even if it is not in conformity with trade obligations.

Dispute settlement, if judicialized, may alleviate these problems, by de-linking the trade dispute from political processes and considerations. Rule-based dispute settlement becomes detached from power ratios. Third-party adjudication detaches the dispute from political pressures. Effective enforcement virtually blocks the path of RTA non-compliant economic pressure in the service of political interests, and alters the costs that affect a state's 'resolve' in a political dispute. Furthermore, as trade disputes emerge, if they are left to resolution exclusively at the political-diplomatic level, the inclination to make concessions on demands for compliance with the RTA may be low. If trade disputes are settled at a more rule-based, even judicial level, they are less liable to contribute to the exacerbation of the political disagreement.

On a derivative level, effective rule-based dispute settlement, particularly of a judicialized nature, can contribute to the establishment of predictability and security that are important to the expansion of trade.[41] As such, dispute settlement contributes directly to the increase in trade and economic interdependence that underpins *Pax Mercatoria*; but in addition, dispute *settlement* in this manner contributes to dispute *prevention*. Future reasons for political tension are thus avoided.

Absent judicialized dispute settlement procedures, trade disputes will be managed on the diplomatic and political levels. This may produce or enhance linkages between the trade issue and political disagreements, politicizing the trade dispute and making it more difficult to resolve, while simultaneously increasing political tension. In contrast, specialized judicial trade dispute settlement mechanisms can cause two de-linkage effects that reduce political tension. First, by preventing or reducing issue linkage to unrelated political disagreements between the parties; and second, by keeping the management of the trade dispute contained in a more technical, rule-oriented, institutional context. In certain circumstances, such procedures may also promote a sense of fairness in the conduct of trade affairs, detaching them from political rhetoric and power ploys, as a cultural matter. In sensitive cases this detachment from political debate may have the normative disadvantage of leaving rule-making up to technical or legal authorities,[42] but in the present context it has the advantage of reducing political tension with respect to specific disputes.

Thus, the second role played by dispute settlement mechanisms in reducing political friction in RTAs, is to de-link and detach trade disputes from the modalities in which the economic dispute can impose a negative effect on political relations. This requires a judicialized system, that will be isolated, as far as is possible, in its process and its input, from the political relationship between RTA parties.

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[40] Reportedly, France's refusal to cooperate with US policy towards Iraq during 2003 brought a sharp decline in the sale of French wine in the US (see, e.g., M. Scram, "Retailers: Some Drinkers Kiss French Wine Goodbye", *The Daily Star*, 15 May, 2003, online: http://www.thedailystar.com/news/stories/2003/05/15/wine.html), although this may be attributed in part to other more commercial reasons.

[41] See Article 3.2 DSU; and WT/DS152/R *US – Sections 301-310 of the Trade Act of 1974* , (panel report), paras. 7.75 *et seq.*.

[42] See Broude *supra* note 11, p. 325 *et seq.* (advocating the invigoration of political decision-making processes in the WTO).

(e) Theoretical Conclusions

Pulling these diverse theoretical threads together, and setting aside more general criticism of the incompleteness of the *Pax Mercatoria* concept on both descriptive and normative levels, there is assuredly a theoretical case to be made for the contribution of trade dispute settlement mechanisms to the reduction of political friction between RTA parties. Moreover, in order to contribute to peaceful relations among RTA parties, dispute settlement must be effective. Furthermore, it must lean towards rule-based procedures, to the point of judicialization. Otherwise, the central advantages of reduction of dispute salience, decoupling from political fora and de-linkage from political disagreements are lost, and the positive effect of trade dispute settlement on the reduction of political friction is diminished. Bearing these theoretical insights in mind, I turn now to an examination of the factual record of intra-RTA dispute settlement in NAFTA and EC RTAs.

III. The Factual Record: Where Have All the Disputes Gone?

A survey of EC/RTA-Partner trade disputes must refer not only to those disputes settled within RTA systems, but also to those that emerge in the framework of the WTO.[43] After all, there are many trade issues or trade-related issues that are concurrently governed by WTO and RTA disciplines. In which forum the dispute is settled depends on a combination of party preferences and the legal framework of juridical interface.[44]

Hence, to begin this factual examination, here is a small, yet intriguing and potentially significant, empirical puzzle: why is it that parties to EC RTAs have never taken the EC to WTO dispute settlement, nor (almost)[45] vice versa?[46] Of 317 WTO trade disputes initiated to date,[47] the EC has been directly complained against in over 40 cases and has itself brought

[43] In fact, the fullest possible discussion of disputes between RTA partners must also look 'down' at the domestic level, not only 'up' at the WTO level. Many disputes that reflect international trade or trade-related differences do, can or should reach domestic judicial systems, enabled by private rights of action and the direct effect of international law in domestic systems. These may either take the form of private challenges to economic policy within the jurisdiction of the challenged state (e.g., Chapter 11 NAFTA or domestic/Community judicial processes against measures taken by the Community/Member; or of private action within a state whose rights may have been impaired, with the intention of urging international action against the actions and policies of another state (e.g., Section 301-310 and the EC's Trade Barriers Regulation (TBR) (Council Regulation (EC) No 3286/94 of 22 December 1994 *laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization*). A full discussion of these options would, however, far transcend the scope of this paper. In this respect the reader is referred to the general literature on Chapter 11 NAFTA; on the direct effect of the WTO and RTAs in EC law; on the TBR; and on a more modest scale, on the effect of international trade law in the courts of the EC's trade partners, such as Israel.

[44] For an extremely illuminating case study of the considerations determining choice of forum, in this case between the Administration Commission of the Chile-MERCOSUR Agreement and the WTO, see D. Tussie and V. Delich, "The Political Economy of Dispute Settlement: Case From Argentina", August, 2004, Mimeo, on file with author.

[45] The sole existing example of a WTO dispute between the EC and an RTA-partner is, at the time of writing, still at the consultations stage (see WT/DS314/1 *Mexico – Provisional Countervailing Measures on Olive Oil from the European Communities – Request for Consultations by the European Communities*, 24 August, 2004 (*Mexico – Olive Oil*). As will emerge in greater detail below, the EC's economic and legal relations with Mexico, as related to the specifics of this case, are substantially different from the norm in the EC's existing regional relations, and are not representative of the EC's 'extra-regional' RTA relations; and so the case may serve as an exception elucidating, if not proving, the rule.

[46] The most obvious answer could have been that EC RTA dispute settlement procedures are formally established to the exclusion of all others; as will be described below, this is not, however, the case. See section IV *infra*.

[47] For a chronological list of all dispute settlement proceedings initiated in the WTO since its establishment in 1995, see online, WTO, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. 'Initiation' in this case means a request for Consultations under Article 4 of the WTO DSU. In other contexts, mainly of RTA provisions, the meaning of an 'initiation' of dispute settlement procedures may be restricted to the more advanced stage of the request for a Panel under Article 6 DSU or an equivalent stage under RTA rules; see *infra* section IV.

some 50 cases – nearly one-third of proceedings initiated.[48] Many of these have directly involved the United States (US) or Japan, while others have been with economically important developing countries such as Brazil, India and Argentina. Yet despite this record of intensive WTO litigation the EC has only once, indeed very recently, taken one of its RTA partners to task in the WTO.[49] The opposite instance has never emerged, so far, even though in several cases, disputes had in the past been taken to the WTO, both by the EC and by certain subsequent RTA partners, *before* the establishment of an RTA.[50] The curiosity of the absence of EC/RTA-partner WTO disputes becomes even more conspicuous when one realizes that the US, by contrast, has been party to numerous formally adjudicated WTO disputes with both its NAFTA partners, Canada and Mexico, as both complainant and respondent.[51] Many, if not all, of these WTO disputes could have been settled through a variety of NAFTA procedures;[52] in other cases, NAFTA dispute settlement procedures have been applied to issues that could have otherwise been settled in the WTO.

A derivative, factual question here arises, whose solution may cast some light on the initial puzzle: where have all the EC/RTA-partner disputes gone? In practice, the answer is simple: where inter-NAFTA disputes sometimes reach the WTO dispute settlement system, EC/RTA-partner disputes remain securely within the domain of each of the EC RTA systems. Seeking to complete the statistical mapping of disputes instigated above, our curiosity is aroused: how many such EC/RTA-partner disputes have arisen? Which party initiated them, how many have reached third-party dispute settlement, how have they been settled and in which party's favour?

Tellingly, these questions cannot easily be answered for lack of readily accessible information. Whatever partial knowledge might be gleaned would require a considerable amount of sleuthing among trade *cognoscenti* in five continents, and remain essentially

[48] EC direct involvement in completed dispute settlement procedures is even more salient – over 40 disputes out of a total of approximately 110 (in this calculation, Article 21.5 DSU compliance panels are not counted but regarded as part of the original procedures; this may have a distortive effect, with the EC's involvement in the system actually being somewhat higher than indicated).

[49] *Mexico – Olive Oil*, supra note 45.

[50] In these cases, the WTO dispute was either resolved or dissolved before or in parallel with the agreement upon or establishment of the RTA (and not necessarily as a result thereof). With Mexico (the "Global Agreement" with the EC (*Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part - Final Act - Declarations* O.J. L 276 , October 28, 2000, pp. 45-79) entered into force on 1 October 2000), pre-RTA disputes include: WT/DS158/1 *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Request for Consultations by Honduras, Mexico, Guatemala, Panama and the United States*, January 25, 1999 (Panel never requested); WT/DS53/1 *Mexico - Customs Valuation of Imports - Request for Consultations by the European Communities* , 9 September, 1996 (Panel never requested); and WT/DS27 *European Communities - Regime for the Importation, Sale and Distribution of Bananas – Complaint by Ecuador, Guatemala, Honduras, Mexico and the United States* (the last determination made by the WTO dispute settlement system in this case was a decision by Article 22.6 WTO arbitrators given on 24 March, 2000 (WT/DS27/ARB/ECU); moreover, the *Bananas'* saga paper-trail reveals that Mexico was not actively involved from a much earlier stage. With Chile (*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*, signed 18 November, 2002, not yet in full effect, online: http://europa.eu.int/comm/trade/issues/bilateral/countries/chile/docs/euchlagr_i.pdf (Chile-EC Association Agreement)), pre-RTA disputes include: DS/WT193/2 *Chile - Measures Affecting the Transit and Importation of Swordfish - Request for the Establishment of a Panel by the European Communities* (Panel constitution suspended indefinitely by EC-Chile arrangement notified in WT/DS193/3, 7 November, 2000); and WT/DS110 *Chile - Taxes on Alcoholic Beverages* (last determination made by the WTO dispute settlement system in this case was an Article 21.3(c) DSU Arbitrator's award made on 23 May, 2000 (WT/DS87/15). There have been no pre-RTA WTO disputes between the EC and other RTA partners.

[51] The US has, to date, initiated 6 WTO disputes with Mexico and 4 with Canada. No less than 18 WTO disputes have been initiated by Canada and Mexico, combined, with the US.

[52] Shany (*supra* note 9 at 56-57) assumes that in all the 15 such cases identified at the time of his writing, the WTO and NAFTA had "overlapping jurisdiction"; such a finding regarding these and subsequent cases may, however, require more detailed case-specific analysis.

tangential to the disputes themselves, at best, or anecdotal, at worst.[53] In contrast to the WTO (or NAFTA), there is no official roster of EC/RTA-partner disputes, neither on an individual RTA basis, nor on a combined, cumulative one. There is no website that lists or tracks them. Requests for bilateral consultations within RTA institutional frameworks (let alone casual diplomatic discussions of problems that might otherwise be regarded as disputes) or recourse to more structured dispute settlement procedures within RTAs are not regularly a matter of public record, save for occasional reports in the formal or informal press. Even the EC Commission's Directorate-General for international trade apparently does not keep a collective list of disputes with the EC's RTA partners, but rather deals with them on a specific, bilateral or regional basis.[54] Much as the transparency of WTO dispute settlement may be criticized,[55] the practice of EC RTA disputes is, infinitely less accessible to the interested observer. While it is not inconceivable that the EC simply has very few disputes with its RTA partners, this observation is perhaps indicative of a more generalized attribute of EC RTA dispute procedures – their inherently non-judicialized character - to which I shall return later.[56]

Another relevant fact arises here, placing the initial puzzle in proper empirical context. Most EC RTA-partners do not resort to use of the WTO dispute settlement procedures *at all*, not just versus the EC. Only two current EC RTA-partners have made regular use of the WTO dispute settlement system, and they are both geographically 'extra-regional' to the EC: Mexico[57] and Chile.[58] The EC's properly regional Euro-Mediterranean RTA partners

[53] For example, consider the dispute between the EC and Israel over the trade status of the produce of Israeli enterprises located in the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip. Although this dispute extended for a few years, arguably, the only formal expression of its existence is an EC *Avis* (O.J. 2001/C 328/04, 23 November 2003) excluding products of these territories from the preferential tariff treatment accorded to Israel under the EC-Israel Association Agreement (*Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, on the one part, and the State of Israel, of the other part*, O..J. L 147, 21 June, 2000, 3). For descriptions and analyses of this dispute, see G. Harpaz, "The Dispute over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip - The Limits of Power and the Limits of the Law", J. World .T. (forthcoming); M. Hirsch, "Rules of Origin as Foreign Policy Instruments?" (2003) 26 Fordham Int. L. J. 572; C. Hauswaldt, "Problems under the EC-Israel Association Agreement: The Export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement", (2003) 14(3) Eur. J. Int. L. 591; and L. Zemer and S. Pardo, "The Qualified Zones in Transition: Navigating the Dynamics of the Euro-Israeli Customs Dispute" (2003) 8(1) Eur. Foreign Aff. Rev. 5.

[54] This is reflected – and may be the result – of DG Trade's organizational structure; there is no Directorate entrusted with bilateral or regional dispute settlement (although there is one in charge of WTO dispute settlement); see online, http://europa.eu.int/comm/trade/whatwedo/whois/index_en.htm.

[55] Lack of transparency in the WTO in general and its dispute settlement system in particular is a regular complaint from segments of international civil society, particularly "antiglobalist" (see e.g., "'WTO - Shrink or Sink!' - The Turnaround Agenda International Civil Society Sign-On Letter", online: Public Citizen <http://www.citizen.org/trade/wto/shrink_sink/articles.cfm?ID=1569> (last accessed: 20 October, 2004): "The WTO system, rules and procedures are *undemocratic, un-transparent and non-accountable* and have operated to marginalize the majority of the world's people"' (emphasis added). The transparency of the system has, however, been identified by many more disinterested commentators as requiring improvement. What is particularly frustrating, from a WTO-watcher's perspective, is the public inaccessibility of party submissions in disputes (that remain confidential unless publicized by the parties themselves) and Interim Panel Reports (issued to parties under Article 15 DSU); in the latter case, one may know for weeks or even months (on a 'leaked' basis) what the result of a Panel Report will be, without having access to the legal analysis of the anticipated Report (this has been the case in many disputes; for example, the outcome of the interim report in WT/DS285 *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* was reported on 25 March, 2004 (see 21(13) BNA International Trade Reporter, "Antigua-Barbuda Wins WTO Interim Ruling Against US Internet Gambling Restrictions"); at the time of writing, towards the end of October, 2004, the interim report is not yet publicly available and the final report has yet to be issued (due to procedural agreements between the parties, postponing the end of the panel process (see WT/DS285/5/Add.2 *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Communication from the Chairman of the Panel – Addendum*, 11 October, 2004, suspending panel proceedings until 16 November, 2004 to allow for the continuation of bilateral discussions. In addition, there is a sentiment growing among WTO practitioners and scholars that WTO Reports are simply becoming too difficult and convoluted for the reader to follow; what is inaccessible to the expert is certainly opaque to the lay person, resulting in a lack of transparency.

[56] See section IV *infra*.

[57] See Global Agreement, *supra* note 50.

[58] See EC-Chile Association Agreement, *supra* note 50.

completely avoid WTO dispute settlement,[59] as has South Africa, at least so far. Turkey has participated in only two cases as a complainant, staying safely in the consultations stage.[60] Looking back at the record of the now superseded 'European Partnership' Association Agreements',[61] Central and Eastern European states that have subsequently acceded to the EU made very limited use of WTO dispute settlement; when they did it was usually in WTO diplomatic consultations among each other.[62] Switzerland, Norway, Liechtenstein and Iceland, the EC's trading partners who are members of European Free Trade Agreement (EFTA) (the first on the basis of numerous bilateral agreements; the latter three as EC partners in the European Economic Area (EEA)) have made some marginal use of the WTO system, mainly at the level of consultations – none of them has ever been a party to a dispute that reached a Panel Report.[63]

In contrast, all three NAFTA Parties are important users of the WTO dispute settlement system, not only among themselves, but with a range of additional parties. This makes the difference between the US/NAFTA and EC/RTA experiences less puzzling – the propensity to either launch or avoid WTO dispute procedures apparently remains unchanged by the respective regional arrangements. The reasons *why* RTA partners avoid WTO disputes are presumably a combination of country-specific attributes along with a number of inter-related contributing factors of a general nature, such as trade volumes and patterns, financial capabilities, economic and political power differentials, and judicial acculturation; this is an interesting question, worthy perhaps of further research, but for present purposes, I will take the facts at face-value: the EC's 'regional' RTA partners can be characterized as 'WTO dispute-averse'.

[59] Egypt, Tunisia, Israel, Jordan and Morocco are all WTO Members and have Association Agreements with the EC. Algeria, Lebanon and the Palestinian Authority are parties to Association Agreements but are not WTO Members; Syria initialed an Association Agreement very recently (see EC Press Release, "EU and Syria Mark End of Negotiations for an Association Agreement", IP/04/1246, Brussels, 19 October, 2004, online: http://europa.eu.int/comm/external_relations/syria/intro/ip04_1246.htm, but is not a WTO Member (note that Lebanon and Syria were original contracting parties to the GATT 1947, but are also the only sates to have withdrawn from the GATT, in 1951, for political reasons (on WTO accession and Membership of Arab states and the Palestinian Authority see T. Broude, "WTO Accession: Current Issues in the Arab World", (1998) 32(6) J. World T. 147). Israel has thrice requested to join consultations (as a third-party): in an EC complaint against Canada regarding pharmaceutical patent protection, in which Israel supported the basic Canadian position not only in consultations but before the Panel (*Canada – Patent Protection of Pharmaceutical Products – Complaint by the European Communities and their Member States*, WT/DS114/R); in the EC complaint in *United States – Sections 301-310 of the Trade Act of 1974 – Report of the Panel*, WT/DS152/R, in which Israel reserved third-party rights but did not exercise them before the panel; and in an EC complaint against the US, which did not crystallize into an adjudicated dispute (see WT/DS212/3 *US – Countervailing Measures Concerning Certain Products from the European Communities – Request to Join Consultations – Communication from Israel*, 20 December, 2003) (for a history of Israel's participation in the GATT/WTO system, with reference to dispute settlement, see (in Hebrew), A. Reich, "The History of the State of Israel's Participation in the GATT and WTO" in A. Reich (ed.), *The World Trade Organization and Israel: Law, Economics and Politics* (forthcoming, Bar Ilan University Press). Morocco has once submitted an *Amicus Curiae* brief, in *EC – Trade Description of Sardines* (2002), WTO Doc. WT/DS231/AB/R (Appellate Body Report) (see discussion at para. 153 *et seq.*); interestingly, in this case – a complaint by Peru against the EC – Morocco chose not to participate even as a third-party taking a stand against the EC, as if to underline its dispute-averseness, but also its unwillingness to confront the EC.

[60] Turkey has twice requested WTO consultations: WT/DS211/1 *Egypt - Definitive Anti-dumping Measures on Steel Rebar from Turkey - Request for Consultations by Turkey*; and WT/DS288/1 *South Africa - Definitive Anti-Dumping Measures on Blanketing from Turkey - Request for Consultations by Turkey*. Only in the former case has a panel been established, but no report has been issued.

[61] See *infra* note 91.

[62] For example, WT/DS240/2 *Romania - Import Prohibition on Wheat and Wheat Flour - Request for the Establishment of a Panel by Hungary* , 28 November 2001 (later withdrawn).

[63] Norway and Switzerland have both been involved in proceedings entailing the establishment of a panel, but one of these has been followed through to the report stage.

This empirical overview thus provides us with two modest conclusions that stem from exploring the implications of the initial puzzle. First, we know that most EC RTA partners – certainly the truly 'regional' ones, that are located within the EC's geographical hinterlands – are WTO dispute-averse in general. This may circumstantially explain the absence of WTO disputes initiated by EC RTA partners against the EC. Moreover, it does not explain why the EC, who has been directly responsible for the initiation of 16% of all WTO disputes,[64] does not itself regularly take its 'regional' RTA partners to the WTO dispute settlement system. Second, we are armed with the (somewhat murky) knowledge that EC/RTA-partner disputes (however numerous and intensive they may be) normally remain in the non-transparent shadows of RTA systems.

What now begs clarification is the legal dimension of this factual constellation. The low visibility of EC/RTA-partner disputes can be interpreted as having two diverging significances. Either the EC RTAs have a dispute settlement system that is incredibly effective, so as to reduce their salience to substantially zero – a positive effect in terms of *Pax Mercatoria* theory; or the low visibility is due to the legal fact that RTA dispute settlement systems are so non-judicial that disputes remain in the non-transparent RTA arena – decidedly contrary to the prescriptions of *Pax Mercatoria*. To determine which of these possible explanations is correct, an analysis of the RTA's dispute settlement provisions is helpful. In this vein, I turn now to a stylized comparative discussion and characterization of relevant aspects of EC RTA (and for comparative purposes, NAFTA) dispute settlement provisions.[65]

IV. The Legal Parameters of *Pax Mercatoria*: Effectiveness and Judicialization

(a) General

As discussed in section II, in order to serve a *Pax Mercatoria* purpose, RTA dispute settlement must be *effective* – capable of resolving disputes in a relatively short timeframe and with durable effect; and *judicialized* – a system of rule-based, third party adjudication with mechanisms of enforcement. In this section we review these parameters in relevant RTAs, to assess the extent to which theory predicts that they will promote a reduction of political tension.

Moreover, all of the dispute settlement systems discussed here – the WTO, NAFTA, and the various EC RTAs - incorporate a degree of what has been called judicialized or "juridicized"[66] dispute settlement. They all include elements of international adjudication regimes.[67] In each of them, there is a formally pre-agreed possibility that a trade dispute will be settled by an impartial third party (but they do not all include comprehensive mechanisms of enforcement, that is rightly a constituent part of judicilization). The critical parameter is therefore not the ultimate level of judicial dispute settlement that each system offers its parties – their 'highest common denominator' - but rather the conditions that apply and the ease of access to these judicial processes. This parameter, a component of judicialization, shall be referred to here as the *automaticity* of the judicialized process. A process in which the

[64] See *supra*, text accompanying note 48
[65] This survey of EC RTAs omits reference to EC agreements with Turkey; the European Economic Area (EEA) partners (Iceland, Norway and Liechtenstein); and Switzerland, each of which maintains a special relationship with the EC, that is expressed in the dispute resolution mechanisms that apply to them.
[66] See Reich, *supra* note 26.
[67] On this term and for a general typology of trade dispute settlement regimes, see A.K. Schneider, "Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Regimes", (1999) 20 Mich. J. Int. L. 697.

judicialization of the dispute requires consent of a party, or is free from binding time restrictions – allowing for the establishment of a judicial procedure to be blocked indefinitely - is non-automatic; in contrast, a process that is compulsory to all parties, and must take place within obligatory time limits, is automatic.

Furthermore, each of the RTAs discussed here allows, to varying extent, recourse to judicialized WTO dispute settlement, in the case of a dispute between the parties that can be subjected to either regional or WTO jurisdiction. Thus, it might be said that all the RTA systems are similarly judicialized, by assimilating the WTO process as their own. This might have been true, but for the different terms in which various RTAs allow access to the WTO – their choice of forum provisions. Choice of forum may also be influenced by the substantive law that will apply in each forum. A party that calculates that it has "more" or better rights in one forum, or that it loses rights by choosing the other, will act accordingly. The applicability of WTO law in each RTA is also significant. Choice of forum and applicable law – *juridical interface* – are therefore the second parameter of judicialization relevant in the present context. The parameters of judicialization to be examined in RTAs in the context of *Pax Mercatoria* are therefore (1) *automaticity* of judicial dispute settlement; and (2) the *juridical interface* between the dispute settlement mechanisms of the RTA and the WTO.

(b) NAFTA Dispute Settlement

(i) NAFTA and Pax Mercatoria*: Background*

As a comparative benchmark, we turn first to the NAFTA. As we have already seen, the NAFTA's intergovernmental dispute settlement procedures[68] have been employed by all NAFTA parties, and there has been no shortage of WTO disputes between them either. The design of dispute settlement procedures may be related to this practice, and in turn may relate to the effect of dispute settlement on political stability. To be sure, *Pax Mercatoria* was not a dominant rationale for the establishment of NAFTA. Although the US has had a history of belligerence with both its contiguous neighbors, which may have a residual effect on certain cultural aspects of its foreign relations, this negative narrative is largely a thing of the distant past. It is commonly accepted that NAFTA has no agenda of political integration, overt or otherwise. This does not, however, preclude the NAFTA from having, in practice, a *Pax Mercatoria* effect, regardless of pre-formulated intentions. There is no question that the closer economic relations caused by NAFTA have had a positive influence on US-Mexico-Canada political relations (or at least, have not had a negative effect). Thus, there is no reason not to examine the possible links between NAFTA dispute settlement effectiveness, the NAFTA/WTO juridical interface and reduced political tensions.

(ii) Effectiveness of intergovernmental NAFTA dispute settlement

The default dispute settlement provisions of Chapter 20 NAFTA, that apply to all issues "regarding the interpretation and application" of NAFTA not otherwise provided for (such as Chapter 19 NAFTA antidumping and countervailing duty matters) are subject to a series of time-limits, resulting in a total time span of up to 240 days between a NAFTA party's request

[68] We focus on the provisions of Chapter 19 (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and Chapter 20 NAFTA (Institutional Arrangements and Dispute Settlement Procedures); Chapter 11, Section B NAFTA (Settlement of Disputes between a Party and an Investor of Another Party) applies in a non-intergovernmental context and should be dealt with separately (see note *43* supra). On NAFTA investment law, see T. Weiler (ed.), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (New York: Transnational publishers, 2004).

for consultations and the presentation of a report by an arbitral panel established under Article 2008.2 NAFTA. Of course parties can allow derogations from the constituent time limits at various stages in the process, but this would require either the consent of all parties, or a party postponing the exercise of a right, as the case may be.[69] With respect to antidumping and countervailing duty issues, binational review Panels[70] are normally expected to complete their work within 315 days of the date on which a request for a Panel is made (Article 1904.14 NAFTA). In the case of an Extraordinary Challenge Procedure, the Extraordinary Challenge Committee must reach a decision within 90 days of its establishment (Article 2, Annex 1904.13 NAFTA). As far as the conclusiveness of results, disputes that have reached panel arbitration have produced conclusive results, and been complied with, even if adverse to a party's interests.[71]

(iii) Automaticity

The timeframes of Chapters 19 and 20 NAFTA are mandatory, subject to contrary agreement by the parties (and in Chapter 20, to the right of a party to postpone exercising an option to escalate the dispute. Once requested, NAFTA parties have no option to block the establishment and selection of Chapter 20 Arbitral Panels or Chapter 19 binational Review Panels. Under Article 2011 NAFTA, if the disputing parties are unable to agree on the chair of an Arbitral Panel within 15 days of the delivery of a request for the establishment of a Panel, "the disputing Party chosen by lot shall select within five days as chair an individual who is not a citizen" of that party (Article 2011.1(a) NAFTA). Subsequently, even if a disputing party fails to select Panelists within 15 days of the selection of the chair (each party must select two Panelists who are citizens of the other disputing party (Article 2011.1(b)), such Panelists will be selected by lot from the members of the roster of Panelists who are citizens of the other disputing party (Article 2011.1(c) NAFTA). Similar provisions govern the establishment and selection of binational Review Panels and Extraordinary Challenge Committees under Chapter 19 NAFTA.[72] The initiation of intergovernmental judicialized dispute settlement in the NAFTA is therefore automatic (subject to the right of a complainant to postpone the escalation of a dispute).

Reports by Chapter 19 binational review panels also gain legal effect (Article 1904.9 NAFTA) automatically. As for the reports of Chapter 20 arbitral panels, under Article 2018.1 NAFTA, the settlement of a dispute is by agreement between the parties, "which normally shall conform with the determinations and recommendations of the panel", ostensibly leaving the door open to the blocking of a panel report by a disputing party. Article 2019.1 NAFTA makes clear, however, that the final report of an arbitral panel can be the basis for the suspension of NAFTA benefits by the aggrieved party, unless the disputing parties have reached a mutually satisfactory under article 2018.1. In other words, Chapter 20 panel reports have legal effect, unless overridden by an agreement between the parties. The legal effect of panel decisions in NAFTA is therefore also automatic.

[69] In practice, Chapter 20 disputes have extended over longer periods, primarily because parties have chosen to continue consultations and "not to formally escalate a dispute to Commission Review"; see D. Lopez, "Dispute Settlement Under NAFTA: Lessons from the Early Experience" (1997) 32 Texas Int. L. J. 163, 205. This is not a "breach" of NAFTA Chapter 20 requirements, since under Articles 2007-2008, the shift from consultations, to Committee review and then to a request for a panel, are matters of party discretion (employing the permissive "may")

[70] Note that Chapter 19 NAFTA procedures are not fully intergovernmental, but rather of a hybrid binational/domestic character, as discussed below. They are noted here for the purpose of comprehensive review only.

[71] See Lopez *supra* note 69, 200-204.

[72] See Article 2-4, Annex 1901.2 and Article 1, Annex 1904.13 NAFTA.

(iv) The NAFTA/WTO Juridical Interface

(a) Choice of forum in Chapter 20 NAFTA

Choice of forum is expressly and specifically regulated in Chapter 20 NAFTA. Article 2005.1 NAFTA provides that "disputes regarding any matter that arises under both" the NAFTA and the General Agreement on Tariffs and Trade (GATT) (and, by succession, the WTO),[73] may be settled in either forum at the discretion of the complaining party. Several exceptions apply to this rule. If the complaining party initiates a WTO dispute, a NAFTA third party may request that the dispute be settled in NAFTA; if parties cannot agree on the forum, the dispute "normally shall be settled under" the NAFTA (Article 2005.1). In cases involving environmental issues, sanitary and phytosanitray measures or technical standards, the responding party may demand that the matter be settled under the NAFTA (Article 2005.3-4 NAFTA). Whichever forum is selected, it becomes the exclusive forum for the dispute (Article 2005.6 NAFTA).

These rules make it clear that recourse to judicial proceedings – either in the NAFTA or the WTO – are a natural part of the legal relations between the NAFTA parties. Not only does the NAFTA provide for a judicialized system of dispute settlement, in addition to the WTO, but the access of parties to both alternate systems has itself been legalized, detached from political processes and pressures, in the form of plain rules on choice of forum.

(b) Choice of forum in Chapter 19 NAFTA

In contrast to Chapter 20, Chapter 19 does not expressly acknowledge the possibility of WTO and NAFTA fora dealing with the same dispute, and does not itself prohibit it. In fact, several cases have been adjudicated in parallel in both GATT/WTO and NAFTA (including its bilateral predecessor, the Canada-US Free Trade Agreement (CUSFTA)[74] dispute settlement systems, most famously in the ongoing softwood lumber saga between Canada and the US.[75] Indeed, commentators have discussed the choice between the respective fora in terms of the policy benefits of each system,[76] rather than as matters of law.

The logic behind not making NAFTA and WTO procedures mutually exclusive in this field appears to be that Chapter 19 NAFTA and WTO proceedings are not competing procedures in conflict with each other, in the technical sense. This is because of the hybrid character of Chapter 19 as a binational/domestic proceeding – Chapter 19 NAFTA is not intended to replace challenges under international law, but is rather designed to replace domestic judicial review of final antidumping and countervailing duty determinations with binational review. As a result, the applicable law is not the same.[77] Chapter 19 reviews the determinations under the law that would have applied in the domestic court of review,

[73] The NAFTA was signed during the Uruguay Round negotiations in GATT, before the term "WTO" had even been debated; NAFTA negotiators took into account the expansion and replacement of the GATT 1947, applying Article 2005.1 NAFTA not only to the GATT but also to "any agreement negotiated thereunder, or any successor agreement"; for discussion, see Abbott *supra* note 9.

[74] *Free Trade Agreement between Canada and the United States entered into between the Government of Canada and the Government of the United States* signed on 2 January, 1988.

[75] For convenient access to WTO and NAFTA litigation documents in this dispute, see online, International Trade Canada, http://www.dfait-maeci.gc.ca/eicb/softwood/legal_action-en.asp.

[76] See R. Howse, Settling *Trade Remedy Disputes: When The WTO Forum is Better than the NAFTA*, C.D. Howe Institute Commentary No. 111, (Toronto: C.D. Howe Institute, 1998).

[77] See, *accord*, Shany *supra* note 9, 55.

including the standard of review, which differs among NAFTA members.[78] Furthermore, the parties in WTO and NAFTA proceedings will not be the same: in the WTO, only the states involved will be party to the dispute, while in Chapter 19 NAFTA, the parties will be the agency that made the disputed determination and any person who would have had the right to appear in the domestic judicial review process (Article 1904.7). Thus, Chapter 20 rules on choice of forum do not apply,[79] and even if they did, Article 2005.6 NAFTA on the mutual exclusivity of NAFTA and GATT/WTO procedures refers specifically to Article 2007 NAFTA procedures, excluding Chapter 19 from its scope.

Beyond these legal distinctions, however, what is important for our present purposes is that Chapter 19 NAFTA's failure to regulate the choice of forum has (perhaps deliberately) resulted in an increase in judicialized options for dispute settlement, allowing practical access to both judicial systems.

(c) Applicable law and conflicts of norms

The priority and extent of the application of WTO law in Chapter 20 NAFTA proceedings is notoriously uncertain, due to a drafting inconsistency in Article 103 NAFTA, that affirms parties' rights under GATT, but not under successor agreements and agreements negotiated thereunder, as in Article 2005 NAFTA on choice of forum (in Chapter 19, the status of WTO law will be as determined by the national law being applied).[80] Practically, in one Chapter 20 NAFTA (and previously, several Chapter 18 CUSFTA) cases, the issue did not present a problem because the RTA provisions in question were identical to or incorporations of GATT/WTO treaty provisions, and GATT/WTO jurisprudence was used in their interpretation.[81] Where an alleged conflict has arisen, the panel interpreted it away.[82] Where non-specifically incorporated GATT/WTO provisions have been relied on by a complaining party, the panel did not address the issue, having found sufficient cause for accepting the complaint on the basis of NAFTA law alone.[83]

Despite the uncertainty involved, it can be said generally that NAFTA parties do not have to be concerned that recourse to Chapter 20 NAFTA rather than WTO procedures will be accompanied by an erosion of substantive WTO rights, unless a specific conflict is identified. Moreover, because Chapter 20 forces the complaining party to choose one forum to the exclusion of the other, NAFTA parties considering a Chapter 20 complaint must carefully analyze the costs and benefits of using NAFTA rather than the WTO, including financial costs and procedural issues such as the appropriateness of either NAFTA or WTO enforcement measures in each case. What is notable in the present context, however, is that the dilemma of choosing the best forum, is one based almost entirely on a the comparison of the legal advantages and disadvantages of two distinct judicialized dispute settlement systems.

[78] See Article 1904.3 NAFTA and Annex 1911 (country specific definitions) NAFTA.
[79] Under article 2004 NAFTA, Chapter 20 procedures apply only to disputes "between the Parties" to the NAFTA.
[80] See Abbott *supra* note 9, 178-181 and 183-184.
[81] E.g., NAFTA, *Arbitral Panel Established Pursuant to Chapter Twenty in the Matter of Cross-Border Trucking Services* (Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel, 6 February, 2001 (relying on the similarity between article 2101 NAFTA and article XX GATT); and CUSFTA, *In the Matter of Canada's Landing Requirement For Pacific Coast Salmon and Herring*, Final Report of the Panel, 16 October, 1989 (dealing with Article XI GATT by virtue of its incorporation into the CUSFTA by Article 47 thereof).
[82] See NAFTA, Arbitral Panel Established Pursuant to Article 2008 *in the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural* Products (Secretariat File CDA-95-2008-01), Final Report of the Panel, 2 December, 1996 (resolving the conflict finding a specific priority of norms based on in Article 710 CUSFTA as incorporated to NAFTA by Article 702 and Annex 702.1 NAFTA).
[83] See NAFTA, Arbitral Panel Established under Chapter Twenty, *In the Matter of the US Safeguard Action Taken on Broom Corn Brooms from* Mexico (Secretariat File No. USA-97-208-01), Final Report of the Panel, 30 January, 1998.

Importantly, there is no systemic prejudice in favor of political settlement, but neither has this prevented extensive use of the system of consultations or Free Trade Committee review in attempts, some successful, to reach mutually agreed resolution of disputes).[84]

(iv) NAFTA and Pax Mercatoria*: Conclusions*

It is clear from this discussion that NAFTA dispute settlement conforms to the pro-*Pax Mercatoria* model, in both law and practice. Procedures are effective, making determinations within predetermined and realistically short timeframes (while allowing the space needed for parties to try and negotiate a settlement). Both the initiation and legal effect of procedures are automatic. The juridical interface with the WTO is itself legalized, accepting recourse to judicial proceedings in either forum as a natural part of relations between the parties, in fact increasing their litigation alternatives; and the law applied in NAFTA does not have any indirect influence on the choice between informal diplomatic deliberation and access to judicialized dispute settlement in either the NAFTA or the WTO.

It is clear now, in reference to both the theoretical outline of section II and the factual record set out in section III, why there is a highly visible number of disputes between NAFTA members in both the NAFTA and the WTO. The NAFTA does not suppress judicial dispute settlement, but encourages it *in lieu* of unfruitful political-diplomatic dispute negotiation that might disrupt political relations. The NAFTA acknowledges that increased trade and economic interdependence may ampliy the level and intensity of disputes between RTA members (as predicted by theory)[85] and opts for effective, judicialized procedures (either in the NAFTA itself, or by specifically regulating juridical interface with the WTO) to counter this trend. This has (unintentionally, perhaps) had the effect of conforming to the *Pax Mercatoria* model of RTA dispute settlement.

(c) The European Partnership and Euro-Mediterranean Agreements

(i) The dispute settlement provisions

With very minor textual differences (in "boilerplate" fashion), the settlement of disputes between the EC and all its partners to Euro-Mediterranean Agreements[86] and European Partnership Agreements (now mostly superseded by accession),[87] is (or, pre-accession, was) governed by the same provision, worth reproducing in full:[88]

> 1. Each of the Parties may refer to the Association Council any dispute relating to the application or interpretation of this Agreement.

[84] See Lopez *supra* note 69, 200-202.
[85] See *supra* section II.
[86] Algeria, Egypt, Tunisia, Israel, Jordan, Lebanon, Morocco and the Palestinian Authority.
[87] In all, ten European Partnership Agreements were signed by the EC, with Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia (for a table listing dates of signature and entry into force, see online, Commission of the European Communities, http://europa.eu.int/comm/enlargement/pas/europe_agr.htm. Of these countries, only Romania and Bulgaria have yet to accede to the EU. Malta and Cyprus did not have pre-accession European Partnership Agreements. Croatia whose candidacy for accession was approved on 18 June, 2004, has signed a Stability and Association Agreement with the EC (see COM(2001) 371 final, Brussels, 9 July, 2001) and currently has in force an Interim Agreement with it (O.J. L330 1, 14.12.2001). In both Croatia's agreements, disputes are to be settled through consultation only.
[88] Here taken from Article 75 of the Israel-EC Association Agreement (*supra* note 53). For a convenient comparative table of the provisions of all Euro-Mediterranean Agreements, see I. de Prada Leal and J. Deka, *Euro-Med Association Agreements: Implementation Guide*, 30 July, 2004, available online: Commission of the European Communities, http://europa.eu.int/comm/external_relations/euromed/asso_agree_guide_en.pdf.

> 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 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.

How does this procedure measure up to the parameters of pro-*Pax Mercatoria* RTA dispute settlement?

(ii) Effectiveness

The differences between this procedure and the NAFTA procedures just discussed are glaring. As far as effectiveness is concerned, there is no delimitation of the allowed duration of a dispute, neither in the Association Council negotiation stage, nor in the arbitration stage. In fact, the absence of concrete timeframes is just one aspect of the weak and ineffective character of this procedure. The entire concept of settling a dispute at the Association Council level is a case of *faux* institutionalization – the Association Council is a ministerial-level body, designed to meet but once a year,[89] hardly a forum for effective dispute settlement. According to typical Association Council Rules of Procedure, special sessions may be held only if both parties agree.[90] This is in contrast to the only facially similar stage of Free Trade Commission review under article 2007.1 NAFTA, in which the Commission must convene within 10 days of the request, unless it decides otherwise (article 2007.4). Clearly, in these EC RTAs, disputes that arise will normally be delegated to the official-level Association Committee,[91] and essentially managed and negotiated in regular day-to-day diplomatic relations, even if they will ultimately require an Association Council Decision to be formally settled amicably. In these circumstances, without time limits, there is no knowing how long a dispute will take until resolution, even if formally referred to the Association Council.

Furthermore, the Association Agreement procedures have no effective method of enforcement, relying on the parties' respect for the results of an Association Council Decision or arbitration award. Dispute settlement is thus not only potentially lengthy and of uncertain duration, but also potentially indeterminate, because a party may choose not to comply, or to

[89] See, e.g., article 67 of the EC-Israel Association Agreement.
[90] See Article 2 of the Rules of Procedure of the EC-Israel Association Council, in COM(2000) 337 final, 5 May, 2000. Under the same Article, the Association Council is essentially required to meet on EU territory ("at the usual venue for meetings of the Council of the European Union") unless otherwise agreed by the parties.
[91] As permitted under Article 70(2) of the Israel-EC Association Agreement, for example.

comply and then renege, with the only remedy being one of political pressure – or recourse to the same ineffective procedure.

(iii) Automaticity

The issue of time limits naturally flows into the question of automaticity, which is entirely absent in this EC-RTA dispute settlement template, and one of the central contributors to its non-judicial character. In NAFTA, the test for moving from diplomatic negotiation to arbitration was an objective one: the passage of time from the initiation of consultations and Free Trade Committee talks (subject to the decision of the complaining party to request arbitration). In the EC RTA provision, the test is a subjective one: if it is not possible to settle the dispute through negotiation. The complaining party's decision that this test has been satisfied becomes in itself a politically charged statement, signaling a disruption of relations. The lack of automaticity thus has a political effect. The shift to more judicialized arbitration is not itself judicialized, but becomes a matter of negotiation and political ploys. As a result, as we have seen, arbitration under Association Agreements is essentially a dead letter.

In addition, the responding party has several opportunities to block the arbitral process. It can drag negotiations on indefinitely. Once the complaining party has taken the plunge and appointed an arbitrator, the responding party may combine political disdain with the claim that it is still premature to declare that the dispute cannot be resolved diplomatically, and so refuse to appoint its own arbitrator, in spite of the two month time frame.[92] It need not do that however in order to scuttle the process, because the third party is to be appointed by the Association Council – recall its lax Rules of Procedure – and so the third arbitrator must be agreed upon by both parties, granting the respondent an effective veto for appointment. There is no recourse to appointment of the third arbitrator by a third party;[93] and so the appointment of an arbitration panel can also take an unforeseeable period of time, to the point of being blocked entirely. Of course, this kind of conduct should be considered to be in bad faith, but the possibility of it occurring, and the political acrimony that would come with it, make the resort to arbitration distinctly unattractive.

(iv) Juridical interface

The choice of forum - between dispute settlement under the Euro-Mediterranean and European Partnership Association Agreements and the WTO is not regulated by the Association Agreements themselves. There are two interpretative alternatives for this default.

First, the silence of the agreements could be said to be permissive. Absent an 'exclusive jurisdiction' clause, parties are free to disregard Association Agreement provisions and to take disputes that may be governed by both legal systems to the WTO. This alternative is problematic from a few respects. The complaining party, by opting for the WTO, will be waiving the ability to make a claim there on the basis of RTA provisions. RTA provisions in

[92] See paragraph 4 of the model dispute settlement provision, *supra*.

[93] In the WTO, if parties to a dispute cannot agree on the composition of a panel (as proposed by the Secretariat) within 20 days, the panel will be appointed (at the request of a party) by the WTO Director-General, in consultation with the Chairman of the Dispute Settlement Body and the Chairman of the relevant Council or Committee, subject to the considerations enumerated in article 8.7 DSU. In NAFTA Chapter 20, if a party fails to appoint two panelists of the other party's citizenship, and/or the parties cannot agree on the identity of the panel chair, within 15 days, selection of these will be by lot (article 2011.1 NAFTA; this arrangement applies, *mutatis mutandis*, in the case of a dispute involving more than two NAFTA parties (article 2011.2)).

the WTO may, in certain circumstances, be the basis for a respondent's defense,[94] but clearly cannot be the basis for a legal claim.[95]

Indeed, the same could have been said of the NAFTA/WTO interface, but there, as we have already seen, the choice is between two judicialized systems, to be based on a nuanced cost-benefit analysis. In the EC RTAs discussed here, the option is between judicialized WTO dispute settlement based on WTO-only obligations, on one hand, and non-judicialized (by virtue, at least, of non-automaticity) negotiation involving RTA preferences. Add to this that as the factual record shows, all Association Agreement partners have proven to be WTO dispute-averse,[96] the choice is essentially non-existent.

Furthermore, if the bilateral environment discourages shifting to arbitral proceedings in the RTA context, by excluding it from the natural course of RTA relations and turning it into a disruptive exception, resorting to WTO proceedings is *a fortiori* problematic in bilateral relations based on this kind of dispute settlement provision: not only do they disturb the diplomatic culture of the RTA itself, but they set aside its framework entirely, in favour of an external legal arrangement.

Second, in the alternative, it might be argued that according to general rules of interpretation of international law – *lex posterior derogat priori*[97] and *lex specialis derogate generali*,[98] at least in the cases where the EC RTA was concluded at a date later to either the entry into force of the WTO Agreements, or to the date of WTO accession of the EC RTA partner, the RTA dispute provisions prevail over the WTO system, including Article 23.1 DSU, inasmuch as this provision might be interpreted as, at the time of the WTO Agreements, directing WTO parties to use the WTO system to the exclusion of others. Now, it is entirely unnecessary in the present context to debate the validity of this argument. Where the previous interpretative alternative would merely make recourse to WTO dispute settlement seriously 'uncomfortable' for the complainant, this interpretation would make it legally impossible, or at least, a violation of the RTA.

Regarding the second aspect of juridical interface – application and choice of laws - EC Association Agreements with WTO Members typically make extensive reference to the application of WTO rules.[99] In the context of the choice of forum just described, this may have the effect of strengthening the legal and political arguments whereby RTA disputes ought to be

[94] Such a defense may be successful between RTA partners, but is problematic when third parties are involved, in light of the requirements of article XXIV GATT, and as Turkey found in WT/DS234/AB/R *Turkey - Restrictions on Imports of Textile and Clothing Products* (Appellate Body Report), 22 October, 1999..

[95] This appears to be the proper interpretation of the WTO DSU, which applies to disputes under the WTO covered agreements (article 1.1); it serves to "preserve the rights and obligations of Members under the covered agreements" (article 3.1); standard panel terms of reference require the panel to examine the matter referred to it in light of the covered agreements. Arguably, none of this should preclude a panel from considering the rights and obligations of the parties under other agreements to which they are both parties, but there is a considerable gap between this argument, and allowing the WTO dispute settlement to accept claims not based ont eh WTO agreements themselves.

[96] See section II *supra*.

[97] The rule later in time derogates from the earlier one. See Article 30, Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, entered into force 27 January, 1980, 1155 U.N.T.S. 331 (VCLT). On the question of whether this rule at all applies to the WTO Agreements, and an argument whereby the WTO should be viewed as un-dateable ongoing obligations to which the *lex posterior* does not apply, see J. Pauwelyn, "The Nature of WTO Obligations", Jean Monnet Working Paper No. 1/02, available online, Jean Monnet Program, http://www.jeanmonnetprogram.org/papers/02/020101.html.

[98] The specific rule derogates from the general one. In this case, the sense referred to is that regulated by Article 41 VCLT, wherein parties to a multilateral convention may modify the terms of the treaty as apply between them by separate agreement, subject to the conditions of Article 41 VCLT.

[99] E.g., fifth preambular paragraph, Articles 6, 22, 26 and 29 of the EC-Israel Association Agreement.

settled within the RTA (because there is ostensibly no loss of rights in the RTA) – again agitating for political rather than judicial procedures.[100]

(v) Euro-Med and European Partnership Agreements and Pax Mercatoria*: Conclusions*

The degree to which the dispute settlement provisions of the Euro-Mediterranean and European Partnership Association Agreements stray from the requisites of the *Pax Mercatoria* is striking. They lack the effectiveness required to shorten the duration and reduce the intensity and salience of trade disputes, and to increase the durability of dispute settlement findings. By de-automaticizing the shift from consultations to arbitration, they actually suppress judicialized dispute settlement between parties to the RTA, either in the RTA itself or in the WTO, encouraging the retaining of the dispute in diplomatic negotiations. The option of resorting to WTO procedures is not regulated expressly, resulting in legal uncertainty that deters from taking such action, for political reasons. All the de-linkage effects of judicialized dispute settlement are thus passed over.

This is consistent with the factual record presented in section III *supra* – EC RTA partner disputes remain in the non-transparent, non-judicial sphere of RTA political relations. In a sense, it might contrarily be argued that the non-transparency of RTA disputes act as a counterweight to the negative effects of non-judicialization, making disputes less visible and hence less damaging to political relations, but this ignores the fact that the economic actors most severely affected by the dispute, and hence most likely to exert influence and contribute to the politicization of the dispute, are privy to the dispute's details, even if the general public is not.

In sum, the dispute settlement provisions of EC Association Agreements – notably, those RTAs with partners in the ECs immediate geographical region – run counter to the logic of *Pax Mercatoria*.[101] This does not exhaust the discussion of the law and practice of the EC's RTAs, however; it is quite dissimilar when geopolitically distinct and qualitatively different partners are involved.

(d) SACU, Mexico and Chile

Three relatively recent EC RTAs have, to varying degrees, broken the mold of dispute settlement set in the Euro-Mediterranean and European Partnership Association Agreements: the EC-Mexico Global Agreement;[102] the EC-Chile Association Agreement;[103] and the Trade, Development and Cooperation Agreement (TDCA) between the EC and the South African

[100] To be sure, the express reference to certain WTO disciplines creates a degree of uncertainty regarding the extent of application of WTO rules not so expressly referred to in or incorporated by the RTA – either *expressio unius est exclusion alterius* (the expression of one is to the exclusion of others) or *ex abundante cautela* (reference out of excessive caution) may apply.

[101] A footnote to this conclusion, and in essence to the entire paper. The non-conformity of the dispute settlement provisions of these agreements with the *Pax Mercatoria* model does not bear upon the *Pax Mercatoria* design and effect of the substance of the Association Agreements in general. In other words, the economic interdependence enhanced by the agreements may serve the purpose of promoting peaceful and stable relations, but the dispute settlement provisions do not contribute to this, becoming a counterproductive element of the whole, and, as will be explained in the concluding section *infra*, possibly charged with a *Pax Europea* purpose, if not effect.

[102] See *supra* note 50.

[103] See *supra* note 50.

Customs Union (SACU).[104] All three demonstrate higher levels of effectiveness and judicialization, more in line with the *Pax Mercatoria* model.

In the TDCA, a distinction has been drawn between non-trade subjects covered by the agreement, provided for in Titles IV-VIII TDCA (such as development, financial issues and other areas of cooperation), and trade disputes. In the case of a dispute related to the former, the Euro-Mediterranean/European Partnership template of dispute settlement is generally followed, except for the addition of time limits: the third arbitrator must be appointed by the Cooperation Council (substantially equivalent to the Association Council in Euro-Mediterranean Agreements) within 6 months of the appointment of the second, respondent-appointed arbitrator (Article 104.5 TDCA). The Arbitral decision must be taken "within 12 months", presumably of the appointment of the third arbitrator (Article 104.6). This is a step towards effectiveness and automaticity – but a small one, as there is no procedure that applies if the respondent party does not appoint the second arbitrator on time, or delays the agreement on the identity of the third arbitrator by the Cooperation Council. Timeframes are extended, enabling the judicial process to commence while allowing considerable space for negotiations – an important element given the non-trade subject matter.

In the case of trade or trade-related disputes, on issues governed by Title II-III TDCA, timeframes are considerably shorter (Article 104.9). The second arbitrator must be appointed within 30 days, the third within an additional 60 days. The arbitral decision must be rendered within six months of appointment, or within three months, in cases of urgency. A procedure for preventing blockage or simple procrastination by the respondent is, however, absent, as in the Euro-Mediterranean/European Partnership Association Agreements. There are also timeframes for compliance, similar to those of the WTO DSU:[105] 60 days for the respondent to inform of its intentions with respect to implementation (Article 104.9(d) TDCA) and a "reasonable period" for implementation that shall not exceed 15 months (Article 104.9(e) TDCA); but again, there is no provision for dealing with non-compliance with these time limits.

Article 104.10 TDCA addresses the juridical interface with the WTO in an unusual way, attempting to disconnect the regional from the multilateral. Rights to have recourse to the WTO DSU are preserved, but the parties "endeavour" to settle trade and trade-related disputes relating to Titles II-III TDCA using the TDCA's dispute settlement procedure. Furthermore, on any issue, arbitral panels established under the TDCA will not address WTO rights and obligations. The upshot of this provision is to try to construct the TDCA dispute settlement as separate from and operatively parallel to the WTO DSU, implying that disputes, even if settled judicially, should be kept within RTA bounds. Nevertheless, it appears that disputes relating to the same issue can therefore be brought by an interested party in both the WTO and TDCA; the WTO panel will apply only WTO rules; the TDCA panel will apply only TDCA rules. Whether this bifurcation or compartmentalization can be applied in practice, and if so, whether it is efficient, remains to be seen. What is interesting in our context is that the regulation of choice of forum is itself legalized through specific rules, whose effect is to broaden rather than to restrict the range of judicial procedures accessible to the parties.

The EC-SACU TDCA is thus formally close to the Euro-Mediterranean/European Partnership formula, and leaves much to be desired as far as the effectiveness of time limits is concerned, but in substance, it promotes effectiveness and automaticity, treating judicialized

[104] *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*, O.J. L 311 , 4 December, 1999, pp. 3-297.
[105] Article 21 DSU.

dispute settlement as an inevitable, normal part of bilateral relations; it also adopts a special pro-judicialized juridical interface with the WTO. It is *prima facie* in conformity with the *Pax Mercatoria* model.

Where the TDCA somewhat timidly progresses towards effective and judicialized RTA dispute resolution, the EC-Mexico Global Agreement and the EC-Chile Association Agreement contain some of the most judicialized RTA dispute settlement provisions in existence today, representing a mixture of NAFTA, WTO and entirely original provisions. Their intricacy cannot be done justice in this brief survey, and we will mention only those provisions that are relevant to the resent discussion. The Global Agreement procedures, set out in a Joint Council Decision,[106] are themselves detailed enough, but include additionally elaborated *Model Rules of Procedure* (MRP)[107] for panels, as well as a *Code of Conduct*[108] regulating panelist qualifications and obligations. At the consultations stage, the responsible forum is the Joint Committee,[109] a body composed of senior officials rather than ministers; at a party's request it must meet within 30 days. Timeframes are strict at all stages of the process,[110] and include alternatives to prevent blocking – for example, after the complaining party proposes the first arbitrator, and three candidates for the panel chair, the respondent must propose a second arbitrator and its own three candidates for panel chair, within 15 days (Article 44(1) Joint Council Decision). If there is no agreement on the panel chair within an additional 15 days, the chair is selected by lot from among the six candidates (Art 44(4) Joint Council Decision). In these provisions the Global Agreement has adopted some of the NAFTA's insights.

This is not all: the Global Agreement also includes strict procedures and timelines for the completion of the panel process and the implementation of its findings, including the possibility of arbitral proceedings on the reasonable time for compliance, on the subsequent measures taken to comply, or on the proportionality of suspended concessions to the loss caused by the other party (Article 46 Joint Council Decision). In these provisions the Global Agreement mimics the WTO DSU.

The process under the Global Agreement is therefore far more effective and automatic than in the EC RTAs discussed so far. As for juridical interface, the Global Agreement adopts what may be called a 'bright line approach', separating between WTO and RTA procedures in a more advanced way than in the EC-SACU TDCA. First, under Article 41(2) Joint Council Decision, certain trade issues are entirely excluded from the coverage of the Global Agreement arbitration procedures. This means that they can be subjected to consultation (including the requirement to convene the Joint Committee within 30 days), but if these are unsuccessful, litigation in these excluded subjects will need to be held in the WTO. The excluded subjects are mainly issues in which the Joint Committee Decision taken under the Global Agreement simply incorporates and reaffirms WTO commitments: antidumping and countervailing duties

[106] Title VI of Decision No. 2/2000 of the EC-Mexico Joint Council of 23 March, 2000, O.J. L 157/10-28, 30 June, 2000 (the Joint Council Decision).
[107] Annex XVI to Decision No. 2/2000 of the EC-Mexico Joint Council, 23 March, 2000, available online, Commission of the European Communities, http://www.europa.eu.int/comm/trade/issues/bilateral/countries/mexico/docs/en2_annex_16.pdf.
[108] Appendix I, *ibid.*.
[109] See Article 42(2) of the Joint Council Decision. The EC-Mexico Joint Committee established under Article 48 of the Global Agreement is substantially equivalent to Association Committees in the Euro-Mediterranean/European Partnership Association Agreements.
[110] Under the Joint Council Decision, an arbitration panel can be requested within 15 days of commencement of consultations or 45 days of the request for consultations (preventing delay in case the Joint Committee does not convene in a timely manner) (Article 43(1); arbitrator and chair selection is to be completed within a further 30 days (Article 44); and a final arbitration panel report should be presented within four to six months of the panel's appointment (Article 45).

(Article 14), technical barriers to trade (Article 19(2)); sanitary and phytosanitary measures (Article 20(1)); and balance of payment difficulties (Article 21); but also areas in which arbitration may not be fruitful, such as RTAs with other parties (Article 23); and the activity of the special council on intellectual property (Article 40).

Second, as in the TDCA, the Global Agreement Joint Decision arbitration procedures are not permitted to consider issues relating to the party's rights and obligations under the WTO Agreements (Article 47(3)). This may raise questions of efficiency – forcing litigation in two fora instead of one, but this is a premature concern, because of the next, third and final element of importance. Article 47(4) of the Joint Decision sets out rules of choice and priority of forum. While arbitration under the Global Agreement is without prejudice to WTO dispute settlement (and as we have seen, the exclusion of certain trade subjects and separation of WTO rights and obligations mandates this), Global Agreement arbitration and WTO panel procedures (but not consultations) on the "same matter" cannot be held simultaneously, but rather serially, with the complaining party determining the order of preference. The combined effect of these juridical interface provisions is that when a trade dispute involves a mixture of RTA and WTO rights and obligations, and/or a mixture of issues covered by RTA arbitration and issues excluded therefrom, the RTA claims on covered issues will be litigated separately - and consecutively - from the WTO claims on excluded issues. If the complainant is successful in one forum on one legal basis, it may not feel compelled to continue to the other forum to pursue its additional claims, thus preserving efficiency without deterring necessary litigation.[111]

This juridical interface accepts judicial dispute settlement as an inseparable part of bilateral RTA relations. This is not surprising – as already noted, Mexico is very active in dispute settlement in both the NAFTA and the WTO. It is therefore also not surprising that the only case to date of the EC initiating a WTO dispute against an RTA partner – *Mexico – Olives* – is against Mexico. The taboo of judicial dispute settlement that is encouraged by the design of most EC Association Agreements does not exist in the Global Agreement (and indeed, could, most likely, not be accepted by Mexico). The reason that *Mexico – Olives* was initiated in the WTO and not in the RTA is also clear now; it relates to countervailing duties, which are one of trade issues excluded from the coverage of Global Agreement arbitration under Article 41 of the Joint Decision.

In sum, the Global Agreement procedures, in their effectiveness, automaticity and express legalized regulation of juridical interface, are distinctly pro-*Pax Mercatoria*.

Much the same could be said of the EC-Chile Association Agreement dispute settlement procedures.[112] Without surveying all the details of these procedures, suffice it to mention that they also include strict time limits, some of which are even shorter than those applicable in trade and trade-related disputes under the Global Agreement;[113] that there are additional mechanisms to prevent delay and blocking, including a pre-selected roster of panelists[114] and a detailed implementation procedure;[115] and several innovative elements of

[111] One possible problem in the application of the Article 47(4) system of separate, serial litigation, is that the prohibition on initiating two parallel procedures on the same matter applies only to the same party. There appears to be no impediment upon the other party, i.e., a respondent in a case brought to Global Agreement arbitration is not precluded from bringing a counterclaim on the same matter to WTO dispute settlement.
[112] Title VIII, Annex XV (*Model Rules of Procedure*) and Annex XVI (*Code of Conduct*).
[113] The three arbitrators serving on an arbitral panel are to be selected by lot from a pre-agreed roster, within only three days of the request for a panel (Article 185(3)).
[114] Article 185(2).

judicialization such as the possibility of holding public hearings,[116] and the regulation of *amicus curiae* brief submission.[117] All of these serve to make the EC-Chile procedures highly effective, automatic and judicialized overall.

The juridical interface of the EC-Chile Association Agreement with the WTO is regulated in Article 189, presenting a different approach to separation of proceedings, bearing some similarity to Chapter 20 NAFTA. Claims under the WTO will be brought to the WTO; claims under the Association Agreement will be brought under the Association Agreement. This may be taken to define the application of law as well, with each system of law applying only in its system of dispute settlement, but this is not stated expressly. In the case of claims relating to obligations under both agreements that are substantially similar to each other, the default forum is the WTO, unless otherwise agreed by the parties. Once a procedure has been selected, it becomes the exclusive forum on that matter.

As in NAFTA and the Global Agreement, arbitration in the EC-Chile Agreement is not regarded as an irregular occurrence, but rather as a normal part of bilateral relations, whose mechanisms must be regulated in advance. Effectiveness, automaticity, judicialization, and well-defined juridical interface are all included, conforming to the *Pax Mercatoria* model.

Our findings in this section make it clear that not all RTA dispute settlement procedures were created equal in their propensity to support the *Pax Mercatoria* rationale of RTAs. More specifically, we have found a distinct contrast between the *Pax Mercatoria* parameters - effectiveness, automaticity and legalized juridical interface – of the NAFTA and the minority of the EC's RTAs (its 'extra-regional' agreements, with Mexico, Chile, and to some extent, SACU), on the one hand, and those of the EC's properly 'regional' RTAs (the Euro-Mediterranean agreements and (insofar as these are still exist and are relevant at the time of writing) the European Partnership Association Agreements. There is therefore a correlation between the geopolitical context of EC RTAs and the character of their dispute settlement procedures. In addition, there is an evident correlation between the WTO dispute-averseness of EC RTA-partners (as demonstrated in section III supra) and the judicial-ness (and hence, the *Pax Mercatoria* character) of EC RTA dispute settlement procedures. Of course, correlation does not necessarily prove causation, and the causal relationships between these findings are prone to either puzzlement or premature conclusions (although perhaps worthy of further thinking and research). Moreover, their cumulative impression is indisputable. The EC's 'regional' RTA partners are well within the EC's sphere of political and economic influence; do not use the WTO's judicial system for the settlement of trade disputes; and do not have the real option of recourse to judicial dispute settlement procedures in their bilateral relations with the EC.

V. Summary and Conclusions: Three Paradoxes and the Need for Reform

It is now time to summarize and integrate this paper's findings, on its three levels: Theoretical, empirical and legal. On the theoretical level, our discussion of *Pax Mercatoria* theory, while not ignoring its deficiencies, found that the design of trade dispute settlement procedures can contribute to the reduction of political friction between RTA parties, if they satisfy certain conditions; namely, these procedures must be effective and tend towards judicialization. This

[115] Article 188.
[116] Article 23, *Model Rules of Procedure*.
[117] Article 35, *Model Rules of Procedure*.

judicialization should be expressed in the automaticity of proceedings and, in the RTA/WTO context, in the legalization of the RTA/WTO juridical interface. If not, the central advantages of reduction of dispute salience, decoupling from political fora and de-linkage from political disagreements will be lost, and the positive effect of trade dispute settlement on the reduction of political friction will be diminished.

On the factual level, we found that the EC's RTA partner's within its proper geopolitical vicinity are WTO dispute-averse, in general, but also that the EC has never taken any of these partners to WTO dispute settlement. EC-RTA disputes thus remain in the low-visibility domain of RTA dispute settlement. This tendency towards RTA dispute settlement is either due to an extraordinarily high degree of effectiveness or to a non-judicial pulling effect that keeps disputes 'under wraps'.

The legal analysis confirms the second hypothesis. The dispute settlement procedures of the EC's 'regional' RTAs are deficient in all *Pax Mercatoria* parameters, in contrast to those of the NAFTA and the EC's 'extra-regional' RTAs (with Mexico and Chile, certainly, but also with the SACU). The WTO dispute-averse regional partners have no real recourse to RTA judicialized dispute settlement. The entire concept of effective and impartial third-party dispute settlement is discouraged by the perpetuation of political pressures in the non-automatic, non-legalized process of most EC RTAs. Indeed, as we have seen, in the 'regional' EC RTA's, recourse to judicialized dispute settlement is regarded as irregular and disruptive, as if not a natural part of ongoing trade relations, as if increased liberalization does not, in fact, bring an augmentation of trade disputes.

There is therefore good reason to argue that most EC RTA dispute settlement provisions – particularly in those RTAs with the EC's properly 'regional' partners – are not consistent with the theoretical requirements of a *Pax Mercatoria* model, and do not themselves serve the idea of 'peace through trade'.

This is only one side of the coin, however. The non-judicial character of EC RTA dispute settlement necessarily emphasizes the political asymmetry between the EC and its partners. This could easily be shown in terns of trade volumes and so on, but that would be belabouring an obvious point. If not judicialized, in trade dispute settlement there is a high degree of linkage between trade issues, other economic interests and political dialogue. In all of these arenas the EC has an absolute advantage in relation to its trading partners. Of what importance is a sectoral trade dispute, when one's participation in the EU's Sixth Framework Programme for research and development might be on the line? Or support, of even a passive nature, in the United Nations? If not legalized, in form and culture, turning to bilateral arbitration or to the WTO dispute settlement system by a partner may run the risk of offending the EC, with the permanent fear of political or economic countermeasures, of an unquantifiable, perhaps even intangible nature. Where in NAFTA the complaining party may choose between competing judicial systems, in the EC RTA context the decision to litigate is equivalent to crossing the Rubicon between "amicable", intra-RTA political negotiation and "hostile" RTA or extra-RTA third-party litigation. The unknown costs maintain European interests, to the point of a kind of regional hegemony.

There is nothing necessarily 'wrong' in this situation. *Pax Europea* may be better than no *Pax* at all. A problem is that this order has little chance of surviving. This may be because of the EU's limited span of influence, beyond the form of economic pressure. Not least,

however, this is because of three paradoxes that present themselves in the *Pax Europea* model of RTA dispute settlement:

First, there is an inherent conflict between a hegemonic/asymmetric element such as the form of non-judicial dispute settlement discussed here, and a system otherwise aimed at *Pax Mercatoria*.

Second, there is an internal inconsistency between the objectives of the ENP and Cotonou projects, that include the promotion of the regional and global rule of law, and a system of dispute settlement that stresses political power over rule-based compliance.

Third, insofar as the ENP and EU foreign policy in general presumes to present a 'softer' substitute to post-modern, power-based US 'empire', especially in the middle east, in this form of dispute settlement the EU presents itself as a 'poor man's' hegemon, rather than as a real paradigmatic alternative.

In short, it is in the best interest of the EC's own initiatives to reform the dispute settlement procedures in its regional trade agreements, to bring them more in line with its strategic statements. As for the EC's partner's, present and future, this analysis may serve as a clarion call for improved, judicialized dispute settlement in RTAs; but ultimately it is up to each partner to weigh the balance between *Pax Mercatoria* and the degree of *Pax Europea* that it is willing to accept in its relations with the EU.