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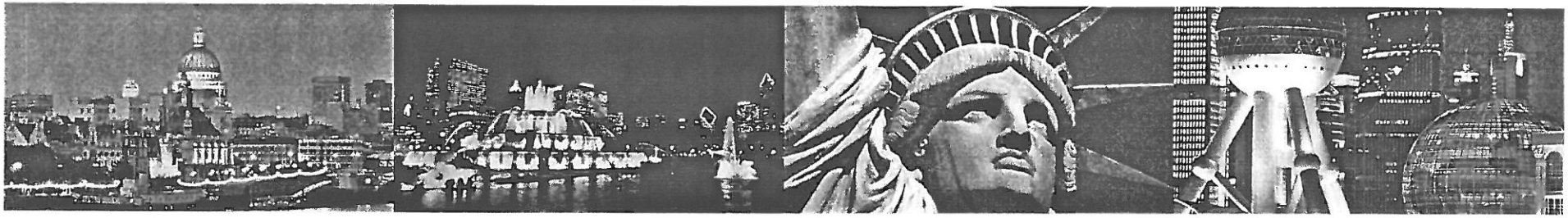

Dispute Settlement in Regional and Multilateral Fora:

A Discussion in the Light of the Dispute Settlement Mechanism of the EU – Egypt Association Agreement

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The Broader Context

- The EU's policy towards the Mediterranean region as a whole is governed by the Euro-Mediterranean Partnership (Barcelona Process), launched at the 1995 Barcelona summit between the European Union and its Mediterranean partners.

- Under this umbrella, the EU has concluded a web of bilateral "Association Agreements" (RTAs). The EUROMED partner countries have also concluded a number of agreements between themselves

- These Agreements are RTAs within the meaning of Article XXIV of the GATT 1994 (but also go beyond Article XXIV)

- The dispute settlement mechanism in the EU – Egypt Association Agreement (identical in a number of other EUROMED Agreements) is weak, but is to be renegotiated pursuant to the recently adopted Action Plan under the European Neighbourhood Policy

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The Dispute Settlement Mechanism (DSM) of the Association Agreement (1)

- Article 82 of the Association Agreement provides:

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

2. The Association Council may settle the dispute by means of a decision.

3. Each Party shall be bound to take the measures involved in carrying out the decision referred to in paragraph 2.

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The Dispute Settlement Mechanism (DSM) of the Association Agreement (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.

(Identical to Articles 86 of Tunisia AA, 100 of Algeria AA, 97 of Jordan AA, 75 of Israel AA, 82 of Lebanon AA, 86 of Morocco AA)

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The DSM is not an effective dispute settlement instrument

- The DSM is only a very rudimentary dispute settlement tool
- Much less "juridical" and detailed than the Dispute Settlement Understanding (DSU) of the WTO
- Also (significantly) less "juridical" and less detailed than dispute settlement provisions in manyt other bilateral and regional RTAs
  - This includes some RTAs concluded by the EC, in particular with Mexico (2000) and Chile (2001).
- Diplomatic-political rather than an adjudicative DS mechanisms – historically, this has been the EU's approach to dispute settlement in its RTAs until 2000.
- More recently, trend towards (quasi)adjudicative dispute settlement in EU RTAs

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Why is the current DSM a diplomatic rather than an adjudicative DS tool?

- A dispute settlement mechanism is (quasi)adjudicative and effective if it guarantees the Parties a compulsory procedure that respects due process, leads to an independent binding third-party judgment, and provides mechanisms to ensure effective compliance by the defendant.
- The DSM does not satisfy all of these criteria:
  - Dispute "channelled" through the Association Council (political body)
  - Absence of time frames
  - No automaticity of proceedings
    - possibility of blocking by defendant (by not appointing arbitrators)
  - No compliance/enforcement procedure

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The DSM does not define its relationship with the WTO DSU (1)

- The Association Agreement does not address the juridical interface between the DSM and the WTO DSU.
  - Where similar rights are granted to parties under RTAs and under WTO law, choice of forum becomes an issue
  - Many RTAs address this issue in different ways, including RTAs concluded by the EU (e.g. the Mexico and Chile Agreements)
  - E.g. exclusivity; fork in the road; prohibition of concurrent proceedings

The DSM does not define its relationship with the WTO DSU (2)

- Where a dispute relates to rights and obligations that are found both in the Association Agreement and in the WTO Agreements → parties appear to have a choice to bring most disputes in the forum of their choice (or in both)
  - e.g. a quantitative restriction can violate Articles 8 or 17 of the AA as well as Article XI of the GATT 1994 (or the SPS and TBT Agreement)
  - The Association Agreement does not speak to this issue

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What criteria may influence the choice between two dispute settlement fora?

- Automaticity
- Applicable law and predictability of results (case law)
- Duration of proceedings
  - timelines, appeal?
- Detailed vs. flexible procedural rules
- Institutional Concerns
- Likelihood of Compliance by the Defending Party
  - Which concessions can be withdrawn?
- Multilateral environment & possibility of third party participation
- Costs of Litigation
- Political Considerations

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General Experience with Dispute Settlement in RTAs (1)

- Globally speaking, state-to-state DS provisions in RTAs have so far not been used much in practice (at least not formally)
  - Exceptions: NAFTA, MERCOSUR, and CUSFTA
  - Little publicly available information on disputes and dispute settlement under RTAs

General Experience with Dispute Settlement in RTAs (2)

- Why so little recourse to RTA DS?
  - Limited scope of DSMs and/or of RTA
  - Weak juridical character of some DSMs
  - RTA DSM are untested, whereas WTO DS handles a large case-load and functions well
  - Bilateral relationship may increase political reluctance to initiate disputes (especially asymmetrical power relationships)
  - Certain countries are dispute settlement-averse to begin with

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DSM reform mandated by the Action Plan (1)

- Overall objective as set out in the Action Plan, section 2.2.1(a):

  "Establish rules of procedure to ensure the effective implementation of dispute settlement provisions under the Association Agreement on economic/trade matters based on the principles of the Dispute Settlement Understanding of the WTO."

- Thus: greater legalization of the DSM (applied to trade/economic matters)
  - Whose interests does it serve?
  - Is this a positive development?

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DSM reform mandated by the Action Plan (2)

- Suggestions for specific aspects of the new DSM
  - Automaticity and greater legalization of the dispute settlement process
  - Fewer procedural steps than in WTO dispute settlement
  - Right to use outside advisors and to determine delegation for hearings
  - Evidence (BCI protection; adverse inferences)
  - Compliance proceedings
  - Remedies
    - Concessions to be withdrawn
    - Other remedies?
  - Costs? Institutional matters?
- Forum selection
  - Ensure that the WTO remains available as a forum for disputes against the EU

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