Sovereignty and Regionalism

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It has become a truism to say that globalization of the world economy poses daunting challenges for nations, prompting them to change their economic and legal structures and rethink their strategies vis-à-vis the rest of the world. Adaptation to these new demands is more difficult for less developed countries because of their weaker economies, their social, legal, and economic structures, and entrenched ideas or local interests that are not always sufficiently in tune with free trade, competition, and open market policies. Local economic and social conditions require a more gradualist, protectionist, or "dirigiste" approach and a more paused rhythm of implementation of liberalization policies.1

Finding adequate responses to the need for change has become tantamount to surviving. As a result, recent years have witnessed efforts by developing countries to adapt their legal and economic structures, as well as their internal and external policies, to the new realities. While these changes have indisputably been protagonized and implemented by national sovereigns, they have been induced by the new realities of globalization, largely fashioned by transnational corporations.

Thus it is no wonder that such sovereign-piloted changes have, to a large extent, sought to create a more permissive legal framework for the development of private business through "deregulating regulations" that reduce state intervention and permit free, competitive access to national markets. At the national level, these changes have been implemented through legislation limiting both the economic areas subject to state public ordering and the participation of the state as an operator in economic activities. Unilateral efforts undertaken by a number of developing states have included passing privatization laws and legislation favoring the creation and development of capital markets, facilitating access to foreign investment, reducing restrictions on foreign trade, creating incentives for free competition, and deterring

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1 See Colin L. McCarthy, Regional Integration of Developing Countries at Different Levels of Economic Development: Problems and Prospects, 4 TRANSNAT'L L. & CONTEMP. PROBS. 1, 2 (1994).
and sanctioning unfair business practices. The practical outcome of these sovereign measures has been to create an adequate framework for the transfer of decision-making powers regarding a substantial number of micro-and macro-economic issues to private business, i.e., to private ordering. In this sense, sovereign measures have contributed to a significant reduction in sovereign power over economic decisions and have led to a privileging of private over public ordering.

At the international level, similar options present themselves to national sovereigns. If national sovereigns decide to implement different economic cooperation policies related to insertion of their nations in the world economy, inspired by the influence of private ordering over the adoption of economic decisions, the nature of this insertion and the degree of delegation or abdication of national sovereign powers it requires may vary substantially.

Developing countries thus have two approaches available for inserting themselves into the world economy (though these options seldom present themselves in their pure form): (1) unilateral insertion through participation in multilateral efforts aimed at the liberalization of trade, such as those administered or undertaken by the World Trade Organization (WTO),² accompanied by adoption of measures aimed at liberalizing individual national economies in accordance with global trends; or (2) insertion through participation in bilateral or minilateral economic cooperation efforts with other nations. This second strategy, often referred to as "open regionalism,"³ accommodates the relatively weak local business sectors in developing countries, sectors which are not yet able to compete on a level basis in world markets.

Without increasing barriers to external trade or introducing new barriers that would in fact reduce the overall (or weighted average of⁴)

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4. This would be one of the factors making an open regionalism scheme compatible with GATT. See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex IA, in RESULTS OF THE URUGUAY ROUND, supra note 2, at 31. Article XXIV authorizes groups of member countries to reduce tariffs and trade barriers among themselves for substantially all their reciprocal trade, as long as no higher barriers are imposed on third countries. General Agreement on Tariffs and Trade, opened
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barriers on external trade, countries participating in these types of bilateral or minilateral efforts jointly adopt measures favoring the development of private business within subregional or regional areas based on the comparative advantages available for private business development within such areas. Open regionalism strategies seek to "bridge the gap between member states' economies and the world economy by seeking international competitiveness of domestic products through technological advancement rather than by merely increasing [intra-regional] trade."5 Such strategies organize "member states' previously dispersed capacities to accomplish their collective reinsertion into the world market."6 Because open regionalism schemes permit more efficient integration of their participants into the multilateral trade and economic system, they pursue "liberalization and greater integration inside the region while at the same time attempting to lower barriers to trade and investment with the rest of the world."7 Certain open regionalism schemes are so decentralized (in that they give member states a great deal of leeway to fashion their economic policies) that the participating states are left with substantial autonomy for making vital decisions regarding their international economic policies. This apparent openness, however, may disguise subtler means of shielding regional markets from undesirable external competition, such as the introduction of stringent rules of origin for impeding the access of third-party country goods to regional preferences.8 Open regionalism programs are not always associations of countries with

6. Id. "Open regionalism" is such an open-textured expression that it is difficult to ascribe a clearly delimited meaning to it. This explains why the doctrine of open regionalism has been characterized as "an undefined term implying that the benefits of regional cooperation will be made available to outsiders on a nondiscriminatory basis." Carl J. Green, APEC and Trans-Pacific Dispute Management, 26 LAW & POL'Y INT'L BUS. 719, 724 (1995). For a discussion of the limitations of open regionalism economic integration approaches and the possibility that international integration efforts originally labeled as open or outward-oriented schemes will revert to explicit or implicit protectionist strategies, see Carlos Primo Braga et al., Regional Integration in the Americas: Deja Vu All Over Again?, WORLD ECON., July 1994, at 577.
similar development levels,"9 countries from one geographical region, or even countries within the same continent.10

Although endorsement of any one of these strategies is often not absolute, and responses to the new realities posed by globalization are different across the world and depend on the level of development of individual countries and regions, one could say that the members of the Association of Southeast Asian Nations (ASEAN)11 align themselves along the first strategy of unilateral insertion (though ASEAN has recently adopted some measures to coordinate trade policies at a regional level, such as a uniform scheme for intra-ASEAN tariffs and restrictions on trade).12 Many Latin American countries have aligned themselves along something closer to the second strategy of open regionalism via associations such as MERCOSUR13 and the Andean Pact.14 Yet economic cooperation and integration strategies in Latin

9. See Gary Hufbauer, International Trade Organizations and Economies in Transition: A Glimpse of the Twenty-First Century, 26 LAW & POL’Y INT’L BUS. 1013, 1018 (1995). MERCOSUR (the Southern Cone Common Market), for example, includes Argentina and Brazil on the one hand and Uruguay and Paraguay on the other. Unequal partners have often undertaken regional economic integration programs in Africa and Latin America, although such schemes have usually contemplated devices, like investment promotion programs or compensatory measures, designed to correct inequalities in the development of participating countries and avoid or rectify economic polarization, and have been considered instrumental to the harmonious development of the participating countries. See F. Salazar Santos, El Problema de las Desigualdades en la Integracion, 22-23 (IX) DERECHO DE LA INTEGRACION 13 (1976). Such corrective policies are no longer favored by regional integration programs primarily relying upon market forces.

10. The Asia-Pacific Economic Cooperation, for example, includes Pacific Rim countries from different continents and hemispheres.

11. See Association of Southeast Asian Nations Declaration, Aug. 8, 1967, 6 I.L.M. 1233 (creating ASEAN) [hereinafter ASEAN Declaration].


14. The Andean Pact was created in 1968 by the Cartagena Agreement and was modified in 1987 by the Quito Protocol. See Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol, July 26, 1988, 28 I.L.M. 1165 [hereinafter Andean Pact]. More recently, the Cartagena Agreement was modified in 1996 by the Trujillo Act resulting from the VIIIth meeting of the Andean Presidential Council and by the provisions of the Protocol Modifying the Subregional Andean Integration Agreement. Trujillo Act, Mar. 10, 1996, Bol.-Ecuador-Peru-
America are anything but chemically pure. Latin American countries involved in bilateral or minilateral open regionalism strategies are at the same time pursuing broader hemispheric trade integration efforts and participating or seeking participation in (1) bilateral or minilateral economic cooperation efforts with other Latin American nations; (2) bilateral trade or foreign investment treaties with other Latin American nations; (3) minilateral international economic cooperation with non-Latin American countries; and (4) bilateral investment treaties with the United States or European or Asian countries.

The above considerations need, however, to be qualified in at least two ways. First, not all current minilateral or plurilateral international economic integration efforts pursue unqualified open regionalism objectives. For example, some of the economic integration programs presently being undertaken in Africa, while increasingly open to free-market ideas and private sector initiatives, still gravitate toward policies privileging import-substitution and regional productive growth over international trade. Furthermore, economic disparities among partici-

Venez. (on file with author); Protocol Modifying the Subregional Andean Integration Agreement, Mar. 10, 1996, Bol.-Ecuador-Peru-Venez. (on file with author) [hereinafter Trujillo Protocol].

15. For example, Latin American countries have participated in the Miami and Denver Summits of the Americas, which are aimed at creating a Free Trade Area of the Americas by the year 2005.

16. See, e.g., Treaty on Free Trade, June 13, 1994, Mex.-Colom.-Venez., available at (agreement among the Group of Three nations) [hereinafter G-3 Treaty]. The Group of Three was first formed in 1990.


20. See infra Part IV.
participating countries may lead to the concentration of growth and investment in the more developed participating countries, with the result that the more developed countries would be the only ones to actually benefit from the integration program, to the detriment of the less developed participants. Such inequalities may be corrected through "dirigiste" mechanisms such as preferred treatment for less developed participants; redistribution of regional investments through incentive policies; redistribution of investment earnings through special taxation devices or compensatory loans administered by regional banks; protectionist tariffs; rules of origin; or trade restriction policies benefiting certain countries or economic sectors. Most of these devices require member countries to delegate some of their sovereign powers in favor of supranational entities or structures.

Second, in part because of their flexibility and openness, open regionalism strategies are subject to setbacks as a result of the changes in the international economic environment that may result from the appearance of strongly protected trading blocs competing for control of world markets. Even within the loose structure of the Asia-Pacific Economic Cooperation (APEC), fears of some Asian states—notably Malaysia—about the potential hegemony of countries like Canada or the United States and their aggregated presence in NAFTA led to the formation of the East Asian Economic Caucus (EAEC) within APEC. Although it has not materialized into a rigid protectionist structure with its own supranational legal framework or bureaucracy, EAEC might evolve in such a direction as a defensive measure if confronted with protectionist or trading bloc policies of other APEC countries.21 The same may be said of ASEAN's incipient free trade area despite clear statements indicating that ASEAN does not aim to become a closed trading block.22 Any derogations to open regionalism would lead to the creation of more cohesive and closed regional integration or economic cooperation structures, probably requiring greater delegation of the sovereign powers of participating countries.

The extent to which a nation must limit or abdicate its sovereign executive and legislative powers in favor of collective decision-making will depend on the peculiarities of the specific international economic integration or cooperation program. Such limitations, delegations, or

22. See Rudner, supra note 21, at 180–83.
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Abdications do not originate in general public international law; rather, they arise out of the promissory or contractual obligations found in international agreements or treaties\(^2\) (i.e., "special" or "particular" public international law\(^3\)). This does not, of course, make general public international law unimportant for the interpretation, construction, and application of international agreements and treaties.\(^4\) Sovereignty thus means a nation-state's autonomy over its internal and external affairs and the measure of its independence from both "legal and factual control by any authorities or persons outside [its] borders,"\(^5\) though the idea of characterizing external factual limitations on a nation-state's sovereign powers as only those originating outside of its territorial borders is no longer realistic. It should be noted that the mere fact that a nation has become a party to an international economic cooperation or integration scheme incorporating collective decision-making or supranational organs need not significantly detract from its full control over its internal or external affairs if the adoption of decisions by such organs requires a supermajority or unanimous affirmative vote. This seems to be the case particularly in Latin American and African economic cooperation and integration schemes. Members would also retain near-full control if the effectiveness of the norms created at the supranational level depends substantially on further state action.\(^6\)

On the other hand, participating countries must decide whether disputes arising from infringement of the international instruments and rules governing the economic cooperation program will be adjudicated by supranational bodies or tribunals rather than by domestic courts. They must also determine how binding and enforceable the decisions of a supranational organ will be. Of course, the mere creation of such bodies does not necessarily constitute a delegation of sovereign power if in practice member states do not resort to them to resolve disputes or if the enforceability of their decisions is doubtful, whether for legal reasons or because participating states are unwilling to en-


\(^{26}\) Hart, *supra* note 23, at 216.

\(^{27}\) See generally P. Kenneth Kiplagat, *An Institutional and Structural Model for Successful Economic Integration in Developing Countries*, 29 Tex. Int'l L.J. 39 (1994) (discussing the difficult balance between supranationalism and sovereignty in developing countries as a result of political and sociological aspects of those countries).
force them.  

The degree to which sovereign powers are delegated to supranational bodies or organs does not differentiate multilateral economic integration schemes from bilateral or minilateral schemes. For instance, though decision-making at the WTO level is largely controlled by the rule of consensus, the WTO’s Understanding on Rules and Procedures Governing the Settlement of Disputes constitutes an ambitious step toward creating wide-ranging international dispute settlement bodies independent of local judiciaries or bureaucracies. Certain minilateral schemes, like NAFTA or the Group of Three (G-3), provide elaborate supranational dispute resolution methods, but they have not substituted multilateral organs, endowed with supranational legislative or executive decision-making powers, for the national organs normally charged with delineating, conducting, and effectuating members’ domestic or external economic policies. ASEAN essentially has no supranational decision-making or law-making organs or supranational bodies for the resolution of disputes. The Andean Pact includes among its vital organs the Andean Court of Justice, charged with the final interpretation of Andean regional law, with the power to decide on the validity of its provisions, annul other supranational Andean organs’ decisions incompatible with the regional law, and ensure the supremacy of regional law over incompatible member countries’ legislation. In practice, however, the Court’s ability to restrain member countries from exercising sovereign powers in contradiction to the Andean regional system has been very limited as a result of some legal technical problems in the text of the treaty that created the Andean Court, the unwillingness of Andean Pact countries to resort to the Andean Court, and the lack of enthusiasm shown by the majority of Andean Pact countries for enforcing its decisions.

Nevertheless, it may be argued that the mere existence of supranational institutions or bodies that have executive, legislative, or judicial functions and that are legally and organically independent from na-


30. See supra note 16.

31. See infra Part III.


33. See infra Part III.B.
tional bureaucracies—even if potentially subject to undermining action or inaction by members—serves the purpose of creating a neutral space for exchanging ideas and negotiating under the more or less pressing imperative of achieving the objectives of the economic integration or cooperation program at stake. For example, the decisions of a supranational dispute settlement body legitimize the legal norms, institutions, or structures on which international economic cooperation or integration programs are based, and they render state conduct that is incompatible with those decisions illegitimate. The consequence, in many cases, is to make the breaching state responsible for international tortious conduct and to justify retaliatory action.

However limited the possibility of obtaining compulsory enforcement might be, decisions from supranational dispute settlement bodies significantly contribute to the creation of a framework of legality for economic integration or cooperation processes that transcend the day-to-day political maneuvering of member states, local bureaucracies, and interest groups. Such decisions also contribute to the legality of international economic integration or cooperation programs by helping to clarify the meaning of the provisions or rules constituting their legal framework. The result is a more refined and consistent set of legal principles for resolving concrete disputes and an established pattern for coherent, equitable administration and accommodation of the rights and obligations arising out of such programs and for the creation of a string of decisions carrying the weight of precedent.

Finally, the detachment of international organs charged with conducting and implementing international economic cooperation or integration programs from national sovereign influence may permit participating states to effectuate economic liberalization policies in a politically discreet manner. If liberalization were undertaken solely by local governmental bodies, national constituencies and local interest groups might successfully resist. It may be easier for national authorities to present changes affecting national economic policies as the irresistible or irreversible result of supranational action beyond their control. To the extent that the legal rules created or enforced by supranational

34. For a discussion of the legalistic or rule-oriented approach versus the diplomacy or negotiation-oriented approach in considering the role played by supranational organs or bodies in international economic cooperation and integration schemes, see Thomas J. Dillon, The World Trade Organization: A New Legal Order for World Trade?, 16 MICH. J. INT’L L. 349, 392–96 (1995).
36. See id. at 880–81, 883, 889.
37. See id. at 836 n.20.
organs are rendered more precise, evenhanded, predictable, and reliable, the rules will gain in international acceptance and legitimacy, and as a result, the public disapprobrium following non-enforcement will increase and sovereign action or inaction aimed at barring their effectiveness will become less legitimate.38

This Article will attempt to determine to what extent different economic cooperation and integration schemes that currently or potentially include developing countries require delegation of sovereign powers to supranational organs or bodies and the implications of any such delegation. However, the interaction between such schemes and state sovereignty shall only be considered from the standpoint of the economic and commercial aspects of regional integration. Other aspects of regionalism affecting the sovereignty of participating countries, such as those pertaining to labor rights, cultural or educational cooperation, or the protection of human rights, shall not be covered.

To this end, this Article will describe certain aspects of different economic integration or cooperation programs. ASEAN and APEC will be presented as examples of economic integration and cooperation schemes with practically no delegation of sovereign decision-making or law-making powers to international or supranational autonomous organs or bodies. MERCOSUR, the Andean Pact, and recent African economic cooperation programs, by contrast, are presented as international economic integration and cooperation schemes that seek implementation of their objectives by erecting permanent legal structures. These legal structures empower international organs that are at least formally independent of member governments to establish norms that are binding on members and that, in certain cases, are directly applicable to private persons (legal and natural) in the member states. Most of these schemes include international dispute settlement bodies whose determinations are in principle binding on member countries and subregional or regional organs.

In accordance with Professor John Jackson’s felicitous expression,39 this Article will give attention to the “constitutional law” of these regional economic integration schemes, in order to assess the degree of jurisdiction to prescribe, adjudicate, and enforce vested in their organs40 and the interaction between, and the respective spheres of

38. See id. at 882, 899–902.

39. “The more one turns to institutions of international cooperation, the more one must pay attention to the ‘constitutions’ of these institutions . . . ” John Jackson, Perspectives on Regionalism in Trade Relations, 27 LAW & POL’Y INT’L Bus. 873, 873 (1996).

40. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–416
influence of, such "constitutional" powers and the national juristic systems of the member countries participating in such schemes. Indeed, depending on the "constitutional" characteristics of each regional economic cooperation program, the interaction of the program and its bodies or organs with the participating nations may be viewed from the standpoint of either classic public international law or supranational law. From the standpoint of public international law, national reception or incorporation of the rules, norms, or decisions emanating from the integration program's organs or bodies depends entirely on the national public and constitutional law system of the incumbent state. The determination of how much incorporation is possible and the choice of mechanisms to achieve it are not decided by international law norms, but rather fall exclusively within the province of the municipal law system of the state. Though their powers originate in a public international treaty ratified by member states, regional organs or bodies do not gain jurisdiction to prescribe, enforce, or adjudicate, and thus cannot create or enforce rules and decisions that are directly binding on member countries and their inhabitants, without the mediation of state action.41

From the standpoint of supranational law, the ratification of a regional economic cooperation treaty brings about a direct delegation of sovereign constitutional powers to prescribe, enforce, or adjudicate to the organs or bodies created by the treaty. It would be inconsistent with such delegation if the rules, acts, or decisions adopted within the scope of such powers required further approval or incorporation by member states. Countries adhering to regional integration schemes providing for bodies or organs with supranational rule-making or decision-making powers have not always conformed their internal legal systems to the international obligations arising out of such schemes. To be consistent with the level of delegation inherent in supranational regional cooperation schemes, any further state action at the national level (such as issuing local regulations on the basis of a supranational organ's rules, acts, or decisions) would consist exclusively of seeking promulgation, publication, or facilitation of application; state action may not constitute a new act of approval, since the adoption, effectiveness, and binding effects of such norms are determined by the constitu-

(1987). Though these expressions are used in the Restatement exclusively in connection with nation-state sovereign powers, they may also serve the more general purpose of referring to international legislative, adjudicatory, and enforcement jurisdiction vested in international entities or bodies other than nation-states.

tional system of the regional integration scheme that becomes the 
source of a supranational law immediately and directly applicable in 
the member states. The supranational regional law engendered by such 
organs, as well as the provisions of the regional integration treaty itself, 
also prevail over any incompatible laws of the member countries. This 
supremacy is normally assured by the creation of a regional court 
charged with interpretation and application of such law or instruments 
with binding effects on the authorities, courts, and persons of the 
member countries and the supranational organs or bodies created by 
such treaties. As constitutions, these treaties sometimes explicitly deter-
mine the hierarchy and effects of the different types of norms constitut-
ing the supranational legal structure. 42

Supranationality thus is premised upon the direct binding nature, 
effects, and application of regional norms in the member countries 
and the supremacy of regional law over member country laws. In 
theory at least, these programs provide for the most extensive delega-
tion of sovereign powers and competencies to international or suprana-
tional organs. In practice, however, these powers may remain hostage 
to sovereign decision-making to the extent that their organs’ decisions 
or rules may only be adopted by a unanimous or quasi-unanimous 
affirmative vote of member country representatives. The independent 
international dispute resolution bodies contemplated in these pro-
grams may have little real significance in limiting unilateral sovereign 
action if member states do not in practice resort to them to resolve 
disputes or if their decisions are not observed. Their effect may also be 
limited unless direct *ius standi* and participation in the adjudication 
process is granted to private individuals, thus helping depoliticize 
dispute settlement proceedings and protect individual rights. Finally, it 
should not be forgotten that supranational bodies and organs are 
rooted in traditional public international law treaties and agreements, 
whose adoption and “reception” in each member state are exclusively 
defined by the national sovereign according to its constitutional and 
public municipal law system. 43

In some regional economic cooperation programs, such as NAFTA 
and the WTO, 44 substantial and effective delegation of sovereign

42. As happens with the Andean Court Treaty. See infra Part III.B.1.

43. See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310 (1992), for a discussion of the domestic law issues related to both “self-executing” or “directly applicable” treaties and treaties requiring “an act of transformation” or “formal reception” at the national level.

44. Though the WTO is, of course, a multilateral and world-wide, not regional, economic cooperation organization, WTO methods of dispute resolution are worth analyzing together with
powers to international or supranational bodies independent of national bureaucracies occurs primarily in the form of dispute settlement mechanisms. However, there is significant variation among the different dispute resolution mechanisms and thus in the level of actual delegation of sovereign powers to the bodies charged with performing dispute resolution functions. The sovereign powers delegated will be substantial—more akin to those vested in national judiciaries—to the extent that (1) the functions of a particular dispute resolution body are adjudicatory in nature; (2) its decisions are grounded in international or community legal sources; (3) it replaces or preempts the intervention of domestic tribunals; (4) it permits intervention by private parties; and (5) it can provide remedies aimed at redressing any grievances suffered by the parties. On the other hand, delegation of, or interference with, sovereign powers is likely to be less pronounced to the extent that (1) the dispute resolution body essentially aims at facilitating the settlement of disputes between state parties as subjects of international law; (2) the body aims to create an environment enabling them to reach an amicable solution without the participation of private parties potentially affected by the relevant controversies; and (3) the parties submitting disputes find the remedies available to them limited to those found in public international law.

Delegation to international or supranational bodies of adjudicatory powers or competencies that would otherwise be vested in the national judiciary may be subject to challenge on the basis of the constitutional law of the relevant forum. This may endanger the potential effectiveness or enforceability of the delegation in the forum's national courts, the recognition and enforcement of rules or decisions made under the delegation, and the honoring of the forum's public international law obligations under the international agreements initially delegating these powers.

II. OPEN REGIONALISM UNDER ASEAN AND APEC

A. ASEAN

Perhaps the most accomplished example of an economic cooperation program involving developing countries along lines already an-
nouncing open regionalism trends is the Association of Southeast Asian Nations, created in 1967. Indonesia, Brunei Darussalam, Malaysia, the Philippines, Singapore, Thailand, and Vietnam are currently members of ASEAN, and Myanmar, Laos, and Cambodia are expected to join soon. ASEAN does not purport to create limitations on its member countries regarding their unilateral and immediate insertion in international markets or their freedom to fashion and conduct international investment, trade, and commercial policies with each other and with third countries. It does not create organs with supranational powers, and it does not provide for the introduction of supranational rules that would be immediately enforceable against or within member countries and become a sort of “community” or “regional” law, the application of which would have priority for domestic courts or authorities even if conflicting with national laws or regulations. ASEAN has no supranational dispute settlement body empowered to adjudicate international economic cooperation issues with binding effects on member countries. ASEAN relies heavily on the private ordering of business circles for making macroeconomic decisions affecting international trade and other economic exchanges within and outside of ASEAN. Only recently has ASEAN become more involved in programs aimed at achieving closer trade cooperation among member countries, yet still without sacrificing the individual exercise of sovereign powers by its member countries in any significant way.

It was not until 1976 and the first ASEAN summit that preferential trade arrangements (PTAs) among member countries became a long-term ASEAN objective. Nevertheless, Singapore’s proposals to create a free trade area were defeated at that time because of objections from other member countries. The 1979 Agreement on ASEAN Preferential Trading Arrangements, which aimed at reducing trade barriers on specific products, did not acquire substantive relevance until 1987, when the scope of ASEAN PTAs expanded to cover a more substantial portion of the trade among ASEAN countries. Yet, by late 1982, tariff

45. See ASEAN Declaration, supra note 11.
reductions covered approximately 9,000 traded products and were being expanded at a pace of about 2,000 additional products each year, beyond the traditional range of textile and foodstuff products. At the same time, ASEAN countries agreed on rules of origin to identify products entitled to ASEAN preferential treatment.

On the other hand, ASEAN countries have been approving common rules applicable to ASEAN Industrial Joint Ventures (AIJVs) since 1982. AIJVs benefit from limited monopoly rights, substantial tariff preferences, exclusivity privileges, and protection against unfair business practices. Such rules and benefits have led to a substantial increase in the number of AIJVs: eight were approved in 1991 alone. In many cases, initiatives from ASEAN business clubs or federations are decisive in the creation and approval of AIJVs. No more than two ASEAN states may participate in an AIJV, and foreign equity participation may not exceed 60% of the total equity for each venture.

New open regionalism trends, centered on the creation of larger economic units to facilitate the competitive insertion of national economies into global markets, led ASEAN countries to revisit the ASEAN legal framework and re-evaluate collective action toward a free trade area among the member countries and their relationships with third countries and groups of countries. As a result, in 1992, the members of ASEAN (except Vietnam) signed the Singapore Declaration. Section 5 of the Singapore Declaration contains the provisions that most reflect the trend toward open regionalism. It provides that within fifteen years ASEAN will establish an ASEAN Free Trade Area (AFTA), with tariffs on intra-regional trade between zero and five percent and accelerated tariff reductions on fifteen specified groups of products. The economic cooperation goals set out in Section 5 include the following: fostering increased investments, industrial linkages, and complementarity by adopting new measures and adapting existing cooperation devices; promoting cooperation in the field of

50. See id. at 736.
51. Id. at 737.
52. Id.
53. Id.
54. Id.
55. Id.
57. Id. § 5, 31 I.L.M. at 501.
capital markets and facilitation of free movement of capital; strengthening trade promotion and negotiations for ASEAN agricultural products to “enhance ASEAN’s competitive posture and to sustain the expansion of ASEAN agricultural exports in the international markets”; enhancing regional cooperation to provide better transportation; improving the communications infrastructure; cooperating with other countries and regional and multilateral organizations, including APEC and the East Asia Economic Caucus, with the aim of “sustaining the growth and dynamism” of the Asia-Pacific Region, expanding cooperation among the region’s economies, and promoting an open and free global trading system.58

The Singapore Declaration acknowledges that sub-regional agreements among ASEAN countries, or between ASEAN states and third countries, could “complement overall ASEAN cooperation” and boost trade and investment opportunities.59 It premises ASEAN economic cooperation on the encouragement of increased cooperation and exchanges among the ASEAN private sectors and the advancement of appropriate policies for greater intra-ASEAN investments.60 The Declaration affirms that ASEAN should continue to uphold the principles of free and open trade embodied in GATT and work toward “maintaining and strengthening an open multilateral trading system.”61

On the same day that the Singapore Declaration was signed, the same six ASEAN countries entered into the Framework Agreement on Enhancing ASEAN Economic Cooperation62 and the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (CEPT-AFTA Agreement).63 The objectives of the Framework Agreement include enhancing intra-ASEAN economic cooperation to sustain the economic growth and development of member countries and improving efforts to remove tariff and non-tariff barriers impeding intra-ASEAN trade and investment flows.64 The Framework Agreement is premised on the realization that changes in the world’s political and economic landscape and the ensuing chal-

58. Id. § 5, 31 I.L.M. at 501-02.
59. Id. § 5, 31 I.L.M. at 502.
60. Id. § 5, 31 I.L.M. at 503.
61. Id.
62. ASEAN Framework Agreement, supra note 12.
63. Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Jan. 28, 1992, 31 I.L.M. 513 [hereinafter CEPT-AFTA Agreement]. The Singapore Declaration created a new council at the ministerial level to supervise, coordinate, and review this agreement. See Singapore Declaration, supra note 56, § 8, 31 I.L.M. at 505.
64. ASEAN Framework Agreement, supra note 12, Preamble, 31 I.L.M. at 507.
larges and opportunities require “more cohesive and effective” intra-
ASEAN cooperation.\textsuperscript{65}

The Framework Agreement also reiterates the ASEAN member
countries’ commitment to GATT principles. Under Article 1, member
countries must “endeavor to strengthen their economic cooperation
through an outward-looking attitude so that their cooperation contrib-
utes to the promotion of global trade liberalization.”\textsuperscript{66} Members agree
to establish and participate in AFTA within fifteen years.\textsuperscript{67} CEPT is the
main tool for creating and implementing AFTA; for products not
covered by CEPT, the aims of AFTA will be attained through ASEAN
 Preferential Trade Arrangements or other mechanisms.\textsuperscript{68} Liberaliza-
tion efforts also extend to non-tariff barriers to the import and export
of products.\textsuperscript{69} Additional areas in which cooperation among ASEAN
countries is to be increased and strengthened include industry, miner-
als, energy, finance, banking, food, agriculture, forestry, transporta-
tion, communications, research and development, technology transfer,
and tourism promotion.\textsuperscript{70}

In addition to subregional agreements among members, ASEAN also
anticipates that agreements between ASEAN and non-ASEAN coun-
tries and between regional and international organizations will en-

\textsuperscript{65} Id., Preamble, 31 I.L.M. at 508.
\textsuperscript{66} Id. art. 1(1), 31 I.L.M. at 508.
\textsuperscript{67} Id. art. 2(A) (1), 31 I.L.M. at 508.
\textsuperscript{68} Id. art. 2(A) (2), 31 I.L.M. at 508-09.
\textsuperscript{69} See id. art. 2(A) (3), 31 I.L.M. at 509.
\textsuperscript{70} Id. arts. 2–3, 31 I.L.M. at 509–10.
\textsuperscript{71} Id. arts. 4–5, 31 I.L.M. at 510.
\textsuperscript{72} Id. art. 6, 31 I.L.M. at 511.
\textsuperscript{73} Id. art. 7, 31 I.L.M. at 511.
\textsuperscript{74} Id. art. 8, 31 I.L.M. at 511.
It should be noted that economic cooperation and integration based on initiatives from the business circles of ASEAN countries is well established and enjoys a certain degree of institutional presence within the ASEAN framework. The main expression of this phenomenon are business sectors “clubs” (or “federations”) created by businessmen for specific areas of industrial or commercial activity. These clubs concentrate on assisting in the elaboration of so-called “Complementation Schemes” that are to be forwarded to and approved by the Economic or Foreign Ministers of ASEAN countries. These schemes primarily involve reducing trade barriers between ASEAN countries so that manufacturing processes falling within their scope maximize the utilization of ASEAN products and raw materials. An example of this is the ASEAN auto parts complementation scheme approved in 1983 by the ASEAN Foreign Ministers. 75

The CEPT-AFTA Agreement provides a schedule for reducing tariffs on goods traded among ASEAN countries to levels of zero to five percent over a period of fifteen years. 76 The Agreement does not preclude members from agreeing to an accelerated schedule of tariff reductions or lowering their tariffs to such levels. 77 A product is deemed to originate in an ASEAN member country (and thus be eligible for the lower tariffs) if at least forty percent of its content originates in a member state; 78 only manufactured goods (not agricultural products) are covered under the CEPT scheme. 79

In exchange for the concessions provided under the CEPT scheme, member countries must eliminate all quantitative restrictions on covered products. 80 Non-tariff barriers on CEPT products are to be reduced gradually over a period of five years. 81 Member countries must make an exception to their foreign exchange restrictions for payments for products under the CEPT scheme and for repatriation of such payments. 82 ASEAN officials optimistically expect a regional free trade zone to be created by the year 2000. 83

75. See FOLSOM & GORDON, supra note 49, at 737.
76. CEPT-AFTA Agreement, supra note 63, art. 4, 31 I.L.M. at 517.
77. Id.
78. Id. art. 2, 31 I.L.M. at 516.
79. Id. art. 3, 31 I.L.M. at 517.
80. Id. art. 5(A), 31 I.L.M. at 518.
81. Id.
82. Id. art. 5(B), 31 I.L.M. at 518.
The CEPT-AFTA Agreement constitutes a clear step toward a more structured economic integration, but it is also limited: it excludes trade in agricultural products, unprocessed raw materials, and services; it does not cover non-tariff barriers; it permits members to make exceptions for sensitive products; and it lacks a controlling supranational mechanism such as an international dispute settlement procedure. This limited nature of the Agreement indicates that, despite its affinity for open regionalism, ASEAN remains a program with minimum delegation of sovereign powers by member countries. ASEAN's best chance to exploit the competitiveness of its products in the world market is to keep relying on the GATT/WTO system, a system that will ensure that ASEAN countries do not abandon their open regionalism policies.

B. APEC

APEC was established in 1989 on the basis of an Australian initiative to find ways to manage the growing interdependence of Pacific Rim countries and foster their economic growth. It is a consultative economic forum designed to achieve economic policy harmonization through collective studies and the exchange of views, opinions, and information. A more concrete expression of its objectives was included in the recent Bogor Declaration signed by APEC members in November 1994.

The members of APEC are Australia, Brunei Darussalam, Canada, the People's Republic of China, Hong Kong, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, the Philippines, Singapore, Chinese Taipei (Taiwan), Thailand, and the United States. APEC is an informal arrangement among participating countries: it has no written treaty, institutional structures, or supranational organs or bodies. It coexists with, rather than supersedes, other organizations in which APEC countries are members, such as ASEAN.

APEC has a permanent secretariat but no centralized decision-

84. CEPT-AFTA Agreement, supra note 63, arts. 6, 9, 31 I.L.M. at 518, 520.
85. See generally Rudner, supra note 21, at 168-70; Abbott & Bowman, supra note 21, at 208-25; Green, supra note 6.
86. See Declaration of Common Resolve, Nov. 15, 1994, 34 I.L.M. 758 [hereinafter Bogor Declaration].
87. Asia Pacific Economic Cooperation (APEC) and U.S. Policy Toward Asia: Hearing Before the House Comm. on Foreign Affairs, 103d Cong. 39 (1993).
88. See Canberra Declaration, Nov. 6-7, 1989, 1994 BDIEL AD LEXIS 15.
making organization. Agreement is reached among members by consensus. It has a ministerial annual meeting, and its chair rotates annually among APEC members. APEC channels more formal dialogue on economic issues through inter-governmental committees and working groups that include representatives from business and academic circles.

APEC is not, in its present form, a threat to state sovereignty, nor does it bring about sovereign power delegation to supranational or international organs. It has acted primarily as a consultative forum, though its actions and strategies aimed at fostering the liberalization of international markets within the GATT/WTO framework, and coordinating the positions of its members on matters of collective interest, have become more structured. Malaysia's attempt to create an Asian enclave within APEC that would be a closed trading and investment bloc did not succeed. The ensuing institution, EAEC, excludes the United States, Canada, Australia, and New Zealand, but it remains merely a consultative forum for its members.

The primary principles governing economic cooperation and integration in the Asia Pacific region, as set forth in the Bogor Declaration, include the following: supporting and expanding the world economy and an open multilateral trading system; reducing barriers to trade and investment to enable goods, services, and capital to flow freely among APEC economies; and expanding and increasing economic growth within the context of an open multilateral trading system and the new environment created by the outcome of GATT's Uruguay Round negotiations. APEC's goals include accelerating the implementation of Uruguay Round commitments, supporting the successful launching of and active participation in the WTO, and continuing the process of unilateral trade and investment facilitation and liberalization without resorting to measures that would increase existing levels of protection in APEC countries. APEC countries undertake to achieve free open trade and investment in the area by the year 2020, making allowances for the differing levels of economic development of APEC econo-

90. Canberra Declaration, supra note 88, art. 26, at *15.
92. See Bogor Declaration, supra note 86, arts. 10-11, 34 I.L.M. at 763.
93. See Abbott & Bowman, supra note 7, at 518.
94. See supra text accompanying note 21.
95. Bogor Declaration, supra note 86, arts. 5-6, 34 I.L.M. 760-61.
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Industrialized APEC economies are expected to achieve such goals no later than 2010. APEC countries reaffirm their "strong opposition to the creation of an inward-looking trading bloc that would divert from the pursuit of global free trade." Therefore, trade and investment liberalization in APEC countries shall not be limited to the reduction of barriers among APEC economies but also between APEC economies and non-APEC economies in conformity with GATT/WTO provisions.  

These efforts and plans to harmonize common objectives and put in place implementation mechanisms do not detract from APEC's non-institutionalized and decentralized organizational pattern and flexibility. APEC remains a form of international economic cooperation scheme that leaves intact the sovereign powers of its members to conduct their internal and external trade and economic policies.

III. THE CASE OF MERCOSUR AND THE ANDEAN PACT

A. MERCOSUR

1. General Description

The Asuncion Treaty, signed in 1991 to create a common market among Argentina, Brazil, Paraguay, and Uruguay, provides an example of an open regionalism program based on traditional customs union structures, with ample room for the private ordering of business circles, delegation of sovereign powers to supranational organs, and creation of a supranational legal framework. As indicated in its introductory

97. Id. art. 6, 34 I.L.M. at 761.
98. Id.
99. Id.
100. Id.
101. The United States’ efforts to turn APEC into a rule-making body provided with a rule-enforcement settlement mechanism to implement trade liberalization programs in tune with NAFTA or WTO have so far been successfully resisted by other APEC countries. See Green, supra note 6, at 725–29, 731–34.
103. The direct precedent to the Asuncion Treaty is the Agreement on Argentine-Brazilian

1996]
paragraph, the Asuncion Treaty responds to the appearance in the world of large economic spaces and the need of its member countries to achieve adequate insertion into the international economy through a joint effort to improve the quality and quantity of goods and services to be offered in the world markets.104

Article 1 of the Asuncion Treaty set the goal of creating a common market for the southern cone (MERCOSUR) among member countries by December 31, 1994.105 At present, MERCOSUR is a free trade area that permits, with certain exceptions, the free circulation of goods, services, and productive resources among the member countries through the elimination of tariffs and other restrictions on trade. With some exceptions, MERCOSUR is also a customs union with a common external tariff on products and services imported into the area from third countries. To ensure fair competitive positions for its members,
MERCOSUR seeks the coordination of macroeconomic and sectoral policies, such as international trade, agriculture, industry, tax, monetary, foreign exchange, customs, transportation, and telecommunications policies.\(^{106}\)

The common market is based on the “reciprocity of rights and obligations” among member countries.\(^{107}\) Products originating in any member country enjoy national treatment with respect to the internal taxes of other member countries.\(^{108}\) Member countries undertake to coordinate their national policies in order to create common rules on competition.\(^{109}\) Despite the formal launching of MERCOSUR on January 1, 1995, exceptions to the total liberalization of trade remain. Full integration of Paraguay and Uruguay into the free trade area was delayed until 1996.\(^{110}\) There are also exceptions for the automotive and sugar industries and an adaptation program covering the steel, paper, petrochemicals, leather, and textile industries, motivated by asymmetries in the development or competitiveness of these industries in the member countries. The adaptation program calls for tariffs on these sectors of regional trade to be gradually eliminated. For the automotive industry—a particularly delicate area in view of the competition between the Argentine and Brazilian car industries\(^{111}\)—an agreement on a common policy is to be reached by MERCOSUR countries by 1999. In the meantime, the status quo may not be altered by unilateral action of member countries.

Open regionalism tendencies are apparent in the common external tariff: it encourages the external competitiveness of member countries rather than shield subregional markets from foreign competition. The customs union among MERCOSUR member countries was launched on January 1, 1995. It provides temporary exceptions to the common external tariff for capital goods and information technology and telecommunications; for example, Brazil and Argentina must maintain differential external tariffs on capital goods until January 1, 2002.\(^{112}\)

106. Id. art. 1, 30 I.L.M. at 1045.
107. Id. art. 2, 30 I.L.M. at 1045.
108. Id. art. 7, 30 I.L.M. at 1046.
109. Id. art. 4, 30 I.L.M. at 1045.
110. Id. art. 6, Annex 1, 34 I.L.M. at 1046, 1050-53.
111. Recent information indicates that such differences have been overcome now that Brazilian authorities have agreed to grant Argentine cars free access to Brazilian markets. The automobile sector had been left out of the MERCOSUR free trade zone. See Thomas Andrew O’Keefe, Recent Developments in the MERCOSUR, LATIN AM. L. & BUS. REP., May 31, 1995, at 26, 27.
These exceptions will gradually disappear and finally merge into the common external tariff of fourteen percent for capital goods and sixteen percent for information technology and telecommunications between 2001 and 2006.113 Until January 1, 2001, the members may maintain additional exemptions on 300 items (399 for Paraguay).114

On January 1, 1995, a harmonized tariff schedule or nomenclature for MERCOSUR countries came into force, replacing the national tariff schedule of each member state. At present, the common external tariff applies to eighty-five percent of the product categories under the MERCOSUR nomenclature. MERCOSUR has adopted rules of origin according to which a product qualifies for preferential treatment if sixty percent of its value originates within MERCOSUR.115 About ninety percent of MERCOSUR intra-regional trade takes place at zero percent tariffs.

It should be noted that the Asuncion Treaty does not contemplate preferential treatment for relatively less-developed countries. Only during the five-year transition period before the creation of the free trade area were Paraguay and Uruguay allowed to keep a slower pace in tariff reductions, as set forth in the Trade Liberalization Program.116 But as evidenced by the slower pace Uruguay and Paraguay have been permitted to pursue, it is clear that in practice MERCOSUR is permeable enough to permit additional instances of preferential treatment for less-developed member countries in order to facilitate the transition into a free trade area and customs union.117

The Council has already made decisions setting forth guidelines for eliminating non-tariff restrictions and has identified non-tariff barriers requiring harmonization. Other projects on anti-dumping and countervailing measures and harmonization of intellectual protection in MERCOSUR countries are presently being considered. On November 11, 1994, the presidents of members' state banks signed a Protocol on Banking Cooperation to facilitate economic cooperation and integration through banking cooperation.118 Harmonization in these areas,

113. Id. art. 3.
114. Id. art. 4.
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coupled with the free circulation of productive factors (such as labor and capital), national treatment, and freedom of establishment, should facilitate the creation of a common market among the member countries by 2001.

Two organs are charged with the administration of the Asuncion Treaty: the Common Market Council and the Common Market Group. The Council, composed of the foreign relations ministers of the member countries, is the highest authority under the Asuncion Treaty and is charged with conducting its policies and making decisions ensuring achievement of its objectives and meeting the deadlines for creating the common market. The Group is the executive organ of the common market. It is charged with monitoring compliance with the Asuncion Treaty and the measures adopted by the Council, proposing concrete measures for applying the Trade Liberalization Program, coordinating macroeconomic policies, negotiating agreements with third countries, and creating a program for achieving the common market.

The Group has sixteen members (four appointed by each country, representing the Ministry of Foreign Affairs, Ministry of Economy, and Central Bank). The MERCOSUR Secretariat, in charge of administrative functions, is under the control of the Group.

One interesting aspect of the MERCOSUR arrangement, demonstrating the importance placed on participation of private economic operators under the Asuncion Treaty, is the fact that the 1991 protocol to the Asuncion Treaty (the Brasilia Protocol), which replaced the dispute resolution mechanism contained in Annex III of the Asuncion Treaty, permits private parties to file claims against any member country engaging in discriminatory acts, restraints of trade, or violations of loyal competition practices, thus infringing the Asuncion Treaty, agreements made within its framework, decisions of the Council, or resolutions of the Group. Claims must be filed with the National Section of the Group in the country of residence or business seat of the claimant. The National Section, in consultation with the private claimant and the relevant state party, first seeks an amicable solution to the prob-

119. Asuncion Treaty, supra note 13, art. 9, 30 I.L.M. at 1047.
120. Id. art. 10, 30 I.L.M. at 1047.
121. Id. art. 13, 30 I.L.M. at 1047.
122. Id.
123. Id. art. 14, 30 I.L.M. at 1048.
124. Id. art. 15, 30 I.L.M. at 1048.
126. Id. art. 26.
If such a solution is not reached, then at the request of the private claimant the National Section will elevate the claim to the Group. If the Group does not immediately reject the claim, the Group will request the opinion of a group of experts. This group consists of three experts chosen by the Group from a roster of twenty-four (six designated by each member country). Unless otherwise decided by the Group, none of the experts may be a national of the defendant country or of the forum country. If the group of experts determines that the claim should proceed, any member state may require that the state against which the claim was made modify or annul the measures leading to the claim. If the defendant state does not do so, the other state party to the dispute may have it decided by binding international arbitration under the Protocol. Thus, the private complainant does not have direct international ius standi to ask the defendant state to modify or annul the measures originating the claim or to initiate or participate in an eventual international arbitration under the Brasilia Protocol against such state.

By becoming parties to the Brasilia Protocol, member countries acknowledge and accept the binding nature of the arbitral jurisdiction introduced by the protocol. The panel of three arbitrators is chosen from a pre-existing list of thirty individuals filed with the MERCOSUR Secretariat, ten selected by each member country. Each state party selects one arbitrator for the panel, and they must agree on the third, who may not be a national of either party. If they cannot agree, the third arbitrator will be selected by the MERCOSUR Secretariat by lot from a special list of sixteen arbitrators (eight nationals of member countries and eight nationals of third countries). Arbitral awards are final and unappealable, have res judicata effects, and are binding on member countries. The applicable law includes rulings under the Asuncion Treaty and associated bodies, decisions of the Council,
resolutions of the Group, and other applicable principles of interna-
tional law.\textsuperscript{139} If the arbitral award is not honored by the losing party, the
claimant state may impose sanctions, such as surcharge taxes or prohib-
bitions on imports from the defendant state, in an attempt to obtain
compliance.\textsuperscript{140} The arbitral tribunal, however, may impose other forms
of sanction. Thus surcharge taxes or import prohibitions should not
necessarily be considered the final means of remedying the breach or a
limitation on other remedies available for non-enforcement under
general public international law. The arbitral tribunal is also entitled,
at the request of the interested member country, to decree interim
measures of protection when there is good reason to believe that
continuation of the situation giving rise to the claim would occasion
irreparable harm or damage.\textsuperscript{141} Member states are obligated to comply
immediately with these measures.\textsuperscript{142} This remarkable power vested
with the intervening arbitral tribunal, on the basis of the relevant
Brasilia Protocol provisions, permits the tribunal to order the suspen-
sion or temporary removal of the state measures being challenged.

The Brasilia Protocol also applies to the resolution of disputes
between member countries regarding the interpretation, application,
or violation of Asuncion Treaty provisions, agreements within the
Asuncion Treaty context, decisions of the Council, or resolutions of the
Group.\textsuperscript{143} When a dispute arises, the state parties are obligated first to
attempt to resolve it amicably within a period not to exceed fifteen days
after the date the existence of the controversy was raised by one of
them.\textsuperscript{144} This preliminary period for reaching a settled solution among
the member countries party to the dispute does not apply when the
dispute settlement mechanisms are triggered at the initiative of a
private party.\textsuperscript{145} If the dispute is not amicably resolved, it is submitted to
the Group for its evaluation, giving the parties an opportunity to
present their case and requiring, if necessary, expert opinions.\textsuperscript{146} The
Group then makes recommendations for the resolution of the dis-
pute.\textsuperscript{147} If the dispute is not thereby resolved, any interested member

\begin{itemize}
\item \textsuperscript{139} Id. art. 19.
\item \textsuperscript{140} Id. art. 23.
\item \textsuperscript{141} Id. art. 18.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id. art. 1.
\item \textsuperscript{144} Id. art. 5.
\item \textsuperscript{145} See Marcelo Halperin, Los Particulares y el MERCOSUR: El Protocolo de Brasilia para la
\item \textsuperscript{146} Brasilia Protocol, supra note 125, art. 4.
\item \textsuperscript{147} Id. art. 5.
\end{itemize}
country may notify the MERCOSUR Secretariat of its intention to resort to arbitration as provided in the Brasilia Protocol. The MERCOSUR Secretariat will notify the other interested member countries and the Group of this request and take the necessary steps to commence and pursue arbitral proceedings. Arbitration will proceed as indicated above.

The arrival of the December 1994 deadline for creation of a free trade zone and customs area among the MERCOSUR countries made it necessary to streamline the functions and powers of the MERCOSUR organs in order to facilitate the planning of common policies, the harmonization of actions among the participating countries, and the definition of the supranational law-making powers of these organs and their interaction with national laws, regulations, and authorities. In light of MERCOSUR's growing international presence as the incarnation of a new economic and political unit, it was necessary to provide MERCOSUR with a legal status permitting it to negotiate and consummate, as an independent public international law entity, international agreements with countries and other subjects of public international law.

Though the start-up of MERCOSUR required direct state action and involvement, the smooth operation of the free trade area and customs union, once set in motion, required providing MERCOSUR with its own subregional legal structure, decision-making organs, and dispute resolution bodies. Rather than actually creating new organs or bodies, the strategy followed was to streamline or redefine the functions and powers of existing organs and bodies in accordance with the new realities posed by the launching of the free trade area and customs union for MERCOSUR. The Ouro Preto Protocol entered into in 1994 by the four Asuncion Treaty parties was meant to take care of such needs.

Article 34 of the Protocol gives MERCOSUR legal personality under international law. Article 2 establishes that the Council of the Common Market, the Common Market Group, and the MERCOSUR Trade Commission, which came into existence before the Ouro Preto

148. Id. art. 7.
149. Id.
151. Ouro Preto Protocol, supra note 13, art. 34, 34 I.L.M. at 1255.
Protocol, 152 are the MERCOSUR organs empowered to adopt binding measures. 153 The Council may issue Decisions, 154 the Group may adopt Resolutions, 155 and the Commission may issue Directives. 156 The decisions of the Council, Group, or Commission are binding on member states and, if necessary, “must be incorporated into [members’] domestic legal systems.” 157 Member states do still have significant control over the enactment of these rules or norms, since decisions are adopted by consensus “in the presence of all” the members. 158 In addition, norms approved by MERCOSUR organs need to be adopted internally by each member state by following the procedures contemplated in their respective domestic legal systems for the introduction of international norms. Consequently, MERCOSUR organs do not originate a supranational law immediately and directly applicable to or within the member countries. Once all member countries have informed the MERCOSUR Secretariat that they have passed all necessary legislation to incorporate MERCOSUR norms into their domestic legal systems, the MERCOSUR Secretariat will communicate this to each member country, and the decisions will become simultaneously effective in all member countries thirty days after the date of this communication. 159

In order to facilitate the prompt incorporation of these norms or rules by member countries, the Ouro Preto Protocol created a Joint Parliamentary Commission as a new MERCOSUR organ. 160 The main function of the Parliamentary Commission, composed of representatives of each member country designated by the respective congress or national assembly, is to expedite the domestic procedures for enacting and enforcing MERCOSUR rules and norms. 161

Finally, in order to facilitate the intervention of business circles in the delineation of MERCOSUR policies, the Ouro Preto Protocol also introduced an Economic-Social Consultative Forum, composed of representatives of the business and labor sectors of member coun-

154. Id. art. 9, 34 I.L.M. at 1250.
155. Id. art. 15, 34 I.L.M. at 1251.
156. Id. art. 20, 34 I.L.M. at 1252.
157. Id. art. 42, 34 I.L.M. at 1256.
158. Id. art. 37, 34 I.L.M. at 1255.
159. Id. art. 20, 34 I.L.M. at 1256.
160. Id. arts. 22–27, 34 I.L.M. at 1253.
161. Id. art. 25, 34 I.L.M. at 1253.
tries. The Forum provides advice by making recommendations on business, social, and economic matters to the Group. Its existence emphasizes the importance of private business initiatives and private ordering to the achievement of MERCOSUR's objectives and the need for coordinating the action of private operators and governmental action to that end.

In addition to the functions attributed to the Council by the Asuncion Treaty, the Ouro Preto Protocol entitles the Council to exercise all powers vested in MERCOSUR as a legal person, to negotiate and execute agreements with third countries, groups of countries, and international organs, and to issue Decisions binding on the member countries. In addition to its powers under the Asuncion Treaty, the Group is now charged with taking all necessary measures to enforce the Council's Decisions and to adopt binding Resolutions.

The MERCOSUR Commission is composed of members and alternates designated by member countries. The Commission is generally charged with assisting the Group in the performance of its functions and with monitoring the application of the agreements MERCOSUR enters with third countries and international organs, as well as MERCOSUR internal legal instruments applicable to the member countries. It also considers and rules upon member countries' requests regarding the application and enforcement of the general external tariff and other instruments related to the common commercial policies, including those relating to the customs union. The MERCOSUR Commission is required to propose to the Group new norms (or modifications of existing norms) regarding customs and trade within MERCOSUR, as well as modifications to the common external tariff, and fulfill any tasks regarding common trade policies that the Group may request. The Commission pronounces itself in Directives or Proposals; the Directives are binding on member countries.

162. Id. arts. 28-30, 34 I.L.M. at 1253-54.
163. Id. art. 29, 34 I.L.M. at 1254.
164. Id. art. 8, 34 I.L.M. at 1249-50.
165. Id. art. 9, 34 I.L.M. at 1250.
166. Id. art. 14, 34 I.L.M. at 1250.
167. Id. art. 15, 34 I.L.M. at 1251.
168. Id. art. 17, 34 I.L.M. at 1251.
169. Id. art. 16, 34 I.L.M. at 1251.
170. Id. art. 19, 34 I.L.M. at 1252.
171. Id.
172. Id.
173. Id. art. 20, 34 I.L.M at 1252.
In addition, the MERCOSUR Commission is to consider claims filed under the Brasilia Protocol by a member state or private parties of member states against another member state accused of violating MERCOSUR or its legal instruments, provided that these claims are within the Commission’s jurisdiction. All other claims (including claims that a member has not complied with a Commission Directive) fall under the general rules contemplated in the Brasilia Protocol. These rules coexist with the dispute settlement rules contained in the Annex to the Ouro Preto Protocol, which set up a General Procedure applicable to claims submitted to the MERCOSUR Commission. Thus, Directives of the MERCOSUR Commission become, together with the provisions of the Asuncion Treaty, the Ouro Preto Protocol, the other agreements made within their context, the Decisions of the Council, and the Resolutions of the Group, a component of the “regional” MERCOSUR law that is enforced under the MERCOSUR dispute settlement mechanisms.

Claims by member states or private parties that fall within the Commission’s jurisdiction are first submitted to the Commission’s National Section in the country of the claimant. If no consensus on resolving the claim is reached by the MERCOSUR Commission, the claim is referred to a technical committee, which will provide an expert opinion to the Commission. The Commission can then resolve the claim based on review of the committee’s opinion. If the Commission again does not reach consensus, it refers the claim to the Group, which also attempts to resolve the claim by consensus. If the defendant country does not honor an adverse resolution within the time limit, or if no consensus on the claim is reached, the claimant may seek arbitration under the Brasilia Protocol.

MERCOSUR also helps create the bodies and channels needed to coordinate the legislative, economic, and trade policies of each mem-

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174. Id. art. 21, 34 I.L.M. at 1252-53.
175. Id. The monitoring of the application of instruments regarding the common trade policies of the member countries and the adoption of decisions related to the administration and application of the common external tariff would fall under the MERCOSUR Commission’s jurisdiction. Id. art. 19, 34 I.L.M. at 1252.
176. Id. art. 43, 34 I.L.M. at 1256.
ber country to promote fair competitive conditions within MERCOSUR. For example, at MERCOSUR’s meeting of December 12–14, 1994, several technical bodies were created to (1) eliminate non-tariff trade restrictions, including restrictions derived from the legal regime for bidding on public works, which can deny bidders from one country access to public bidding in another; (2) introduce basic antitrust rules; (3) harmonize public policies affecting free trade; and (4) monitor and coordinate monetary, foreign exchange, tax, or commercial policies of member countries.

In 1994, MERCOSUR countries also signed the Colonia Protocol for the Reciprocal Promotion and Protection of Investment Within MERCOSUR. This Protocol promotes the flow of investments into MERCOSUR countries from other MERCOSUR countries and enunciates the principle that (with certain exceptions set forth in an Annex to the Colonia Protocol) MERCOSUR countries will provide national treatment to investments from other MERCOSUR countries. The Colonia Protocol assures foreign investors that their investments will not be subject to nationalization or expropriation, and it guarantees the right to remit profits and repatriate invested capital. The Protocol recognizes the right of a MERCOSUR country or its agencies to subrogate the claims of its nationals against another MERCOSUR country arising from investments that had been guaranteed for non-commercial risks by the investor’s home country or one of such country’s agencies but were taken or expropriated in the host country. In addition, the Colonia Protocol guarantees investors from MERCOSUR countries access to international arbitration under IC-SID, its Additional Facility, or Ad-Hoc UNCTRAL Arbitration Rules to seek redress for any grievances suffered by the investor inflicted by the MERCOSUR host country in violation of the guarantees provided in the Colonia Protocol. The investor is not required to exhaust local remedies first, provided that six months have elapsed without resolu-

185. Id. art. 4.
186. Id. art. 5.
187. Id. art. 6.
188. Id. art. 9.
Arbitration is mandatory on host MERCOSUR countries, and awards are binding on the parties. Arbitration awards must be enforced by all member countries in accordance with their domestic legislation. The legal sources for resolving disputes include general principles of international law.

In 1994, the MERCOSUR countries signed the Protocol on the Promotion and Protection of Investments Originated in Non-MERCOSUR Countries (Foreign Investment Protocol). The Protocol requires MERCOSUR countries to promote investments from non-MERCOSUR countries in their respective territories, and it provides that foreign investment coming from third countries will enjoy national treatment in MERCOSUR countries. The Protocol also contains a most-favored-nation clause that requires each MERCOSUR country to give investments originated in non-MERCOSUR countries treatment no less favorable than the treatment granted to investments of any other national origin. Nevertheless, MERCOSUR countries may not grant third-party investors treatment more favorable than that provided under the Foreign Investment Protocol.

Expropriation or nationalization of third-country foreign investment is permitted only for a public purpose and requires compensation. If a foreign investment enjoyed a non-commercial risk insurance guarantee, the foreign third-party state or its state agency providing insurance is permitted to subrogate itself in the rights of the expropriated or nationalized foreign investor against the MERCOSUR country taking the property.

Any disputes arising between a third-country foreign investor and a MERCOSUR host country that are not amicably settled may be submitted, at the election of the investor, to the courts of the host country or to international arbitration. Either ad hoc or institutional arbitra-

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189. Id. art. 9(2).
190. Id. art. 9(3).
191. Id. art. 9(6).
192. Id. art. 9(5).
194. Foreign Investment Protocol, supra note 193, art. B.
195. Id. art. C.
196. Id.
197. Id. art. D.
198. Id. art. F.
199. Id. art. H.
tion may be used, but the Protocol does not provide any further rules. Exhaustion of local remedies is not required before resorting to arbitration, and any arbitral award is final and binding.\textsuperscript{200}

2. General Assessment of MERCOSUR

Particularly since the signing of the Ouro Preto Protocol, MERCOSUR relies substantially on the action of supranational executive and legislative organs for enforcement and creation of a common MERCOSUR law, and member countries have delegated to these organs a certain level of decision-making sovereign rights. In practice, however, such delegation is relatively minimal for a number of reasons: (1) the adoption of legal norms by such organs is based on consensus and subject to the unilateral veto of a member country;\textsuperscript{201} (2) MERCOSUR organs are generally made up of the same people who fashion members' economic and foreign policies and thus are not detached from national bureaucracies and local interests; and (3) MERCOSUR norms and decisions, though binding on member countries, still depend on members following their domestic mechanisms for incorporating the norms into law. While it is clear from the Brasilia and Ouro Preto Protocols that the current MERCOSUR dispute settlement mechanism is intended to be amended,\textsuperscript{202} so far MERCOSUR (unlike the Andean Pact) has no regional court of justice with the power to annul rules or norms created by community organizations as incompatible with community law or to ensure the supremacy of community law over the laws of member states by issuing opinions that are binding on domestic courts. Thus, the present institutional structure of MERCOSUR under the Ouro Preto Protocol is still subject to the original criticism of the Asuncion Treaty: the absence of a sufficient supranational autonomous legal framework for implementing the common market and engendering a true MERCOSUR supranational regional or community law.\textsuperscript{203}

\textsuperscript{200} Id.
\textsuperscript{201} In fact, because of the quorum requirements, a member can effectively prevent adoption of measures or decisions it does not support by simply not participating in the relevant deliberations.
\textsuperscript{202} Before full convergence of all external tariffs of member countries, a permanent dispute settlement mechanism is to be adopted. See Asuncion Treaty, supra note 13, Annex 3(3), 30 I.L.M. at 1059.
The dispute settlement mechanisms of MERCOSUR are innovative on several levels. The mechanisms described in the Brasilia and Ouro Preto Protocols may be triggered indirectly at the initiative of private parties; in the case of foreign investment claims under the Colonia Protocol or the Foreign Investment Protocol, private claimants are granted direct *ius standi* before international arbitral tribunals for claims against state parties. Under the Brasilia Protocol, the dispute settlement mechanisms extend to conflicts arising out of non-compliance or interpretation, application, or breach of both MERCOSUR agreements and binding actions of MERCOSUR organs. The dispute mechanisms are also innovative in that they submit the decision to specialized bodies (e.g., the MERCOSUR Commission, the Group) or to special arbitral tribunals. This permits the creation of an adequate technical atmosphere for resolving the dispute on objective bases with intervention of state and private parties. Finally, if no agreement can be reached through the intervention of specialized MERCOSUR bodies (or, in the case of investment claims under the Colonia or the Foreign Investment Protocols, if no amicable solution has been reached between the host state and foreign investor), parties may submit the dispute to international arbitration by independent arbitral panels that are detached from the national legal systems. If the parties do resort to such a panel, its decision is binding on the member countries involved in the dispute and prior exhaustion of local remedies is not required. Thus, as in NAFTA and the G-3 Treaty, the greatest actual delegation of sovereign powers is found in the MERCOSUR treaty provisions on dispute settlement.

Arbitral awards made by ICSID arbitral tribunals under the Colonia or Foreign Investment Protocols are automatically enforceable in ICSID member countries and thus in MERCOSUR countries that have ratified the ICSID Treaty. Any other awards under the Colonia or Foreign Investment Protocols fall under national jurisdiction and are thus subject to *exequatur* proceedings in the country of enforcement when the enforcement is not to take place in the country in which the award was rendered. These awards enjoy advantageous treatment when it comes to recognition or enforcement in any MERCOSUR country, since all MERCOSUR countries have ratified either the 1958 New York Convention on the recognition and enforcement of foreign arbitral

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204. Colonia Protocol, *supra* note 183, art. 9(4); Foreign Investment Protocol, *supra* note 193, art. H.

awards or the 1975 Inter-American Convention on International Commercial Arbitration.\textsuperscript{206} Enforcement of MERCOSUR Group or Commission determinations or Brasilia Protocol arbitral decisions, on the other hand, may be induced only through sanctions or retaliatory action, though non-enforcement implicates the international responsibility of the recalcitrant state.

Nevertheless, the level of delegation of national sovereign powers and competencies to arbitral panels under the Brasilia and Ouro Preto Protocols is very profound. Not only are ensuing arbitral awards binding on the member countries that are parties to the dispute, but member states, by ratifying such Protocols, accept \textit{ab initio} to submit to binding international arbitration should any member country file a complaint under the exclusive jurisdiction of arbitral panels. The composition of the arbitral panels is only partially under the control of the member states party to the dispute, and control is lost entirely if a member state fails to appoint its arbitrator or if arbitration otherwise proceeds \textit{ex parte} against a member state. In this respect, MERCOSUR attains an almost unparalleled level of supranationality, even though private parties do not have direct access to and cannot participate in this type of dispute resolution and the Brasilia and Ouro Preto Protocols' dispute resolution mechanisms do not extend to conflicts among or against MERCOSUR organs or bodies. Several aspects of the Protocols combine to account for MERCOSUR's open regionalism trends in favor of private ordering and its concomitant limitations on the unilateral exercise of state sovereign powers. First, under certain circumstances, private parties may initiate proceedings under the Brasilia and Ouro Preto Protocols for violations of the MERCOSUR legal framework. Under the Colonia and Foreign Investment Protocols, private parties may also directly submit, without prior exhaustion of local remedies, foreign investment international claims against MERCOSUR host countries to international arbitral bodies that will make their decisions primarily on the basis of widely accepted international standards for the protection of foreign investments and investors. In addition, MERCOSUR's legal structure now includes a body, the MERCOSUR Forum, institutionalizing business and labor participation in MERCOSUR policy-making.

SOVEREIGNTY AND REGIONALISM

B. Andean Pact

1. General Description

The Andean Pact, created by the Cartagena Agreement in 1969, was probably the most protectionist economic integration program in Latin America, given its import-substitution policies and hostile attitude toward non-subregional foreign investment. However, the Andean Pact has clearly evolved within the last decade toward greater economic liberalization and open regionalism policies. The most recent expression of this trend materialized through the Trujillo Act and the Trujillo Protocol of March 10, 1996, whereby the Andean Pact institutional structure was streamlined in order to meet the challenges of the new world economic order.

Earlier signs of this evolution may be seen already in the modifications made to the Cartagena Agreement by the 1987 Quito Protocol (the Andean Pact Treaty). The objectives of the Andean Pact Treaty are to promote the “balanced and harmonious development” of member countries under conditions of equality, through integration and economic and social cooperation; facilitate the regional integration process, with a view to creating a Latin American common market; reduce external vulnerability; improve the international economic position of member countries; strengthen subregional solidarity; and reduce existing differences in development among member countries.

Several mechanisms are available for attaining these ends: gradual harmonization of policies regarding foreign investment, trademarks, patents, and licenses; the creation of Andean multinational enterprises; efforts to increase commercial competition; international efforts to improve participation in the international economy, including negotiations with other countries and participation in forums.

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207. Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910. For the current text of the governing treaty, see Andean Pact, supra note 14.
208. See supra note 14.
211. Id. arts. 26-27, 28 I.L.M. at 1178.
212. Id. art. 28, 28 I.L.M. at 1178.
related to the international economy;\textsuperscript{213} intensification of subregional industrialization;\textsuperscript{214} liberalization of intra-subregional trade;\textsuperscript{215} introduction of common rules of origin for identifying goods qualifying for trade preferences within the Andean Pact;\textsuperscript{216} creation of a common external tariff;\textsuperscript{217} and granting of preferential treatment to Bolivia and Ecuador.\textsuperscript{218} The Andean Pact Treaty is more flexible than its predecessor, the Cartagena Agreement: obligations to take specific steps or abide by fixed deadlines have been suppressed, industrial programming is less imperative, and no deadline has been introduced for the attainment of a common external tariff.

The Andean Pact Treaty established the Court of Justice and the Andean Parliament, joining the already existing Commission and Board as the major organs for the group.\textsuperscript{219} The Commission is the highest body of the Andean Pact and is composed of one plenipotentiary representative from each member country.\textsuperscript{220} Its acts, essentially legislative in nature, are carried out through Decisions.\textsuperscript{221} The Commission acts on a wide variety of matters affecting the Andean Pact, including establishing the general policies of the Pact and the measures needed to achieve the Pact’s objectives.\textsuperscript{222} The Commission also approves norms for coordinating development plans and harmonizing the economic policies of the member countries.\textsuperscript{223} Other functions of the Commission include designating and removing members of the Board; approving, rejecting, or amending proposals from member countries or the Board; and monitoring the fulfillment of the obligations deriving from the Andean Pact Treaty and the treaty establishing the Latin American Integration Association (LAIA).\textsuperscript{224} The Commission also promotes the joint efforts of member countries to respond to international economic problems and assists member countries that wish to participate in meetings of international economic agencies.\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{213} \textit{Id.} arts. 108A–108B, 28 I.L.M. at 1204.
\item \textsuperscript{214} \textit{Id.} arts. 32–40E, 28 I.L.M. at 1179–83.
\item \textsuperscript{215} \textit{Id.} arts. 41–59, 28 I.L.M. at 1183–89.
\item \textsuperscript{216} \textit{Id.} arts. 82–85, 28 I.L.M. at 1196–97.
\item \textsuperscript{217} \textit{Id.} arts. 61–68, 28 I.L.M. at 1189–91.
\item \textsuperscript{218} \textit{Id.} arts. 91–107A, 28 I.L.M. at 1199–1204.
\item \textsuperscript{219} \textit{Id.} art. 5, 28 I.L.M. at 1172.
\item \textsuperscript{220} \textit{Id.} art. 6, 28 I.L.M. at 1172.
\item \textsuperscript{221} \textit{Id.}
\item \textsuperscript{222} \textit{Id.} art. 7, 28 I.L.M. at 1172.
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{Id.} art. 8, 28 I.L.M. at 1173.
\end{itemize}
SOVEREIGNTY AND REGIONALISM

The Commission adopts its Decisions by an affirmative vote of two-thirds of the member countries, except for certain matters that require unanimity or other more stringent voting procedures.\(^{226}\)

The Board is the technical body of the Andean Pact.\(^{227}\) It is composed of three members and acts exclusively on behalf of the Andean subregion as a whole.\(^{228}\) The autonomy of the Board is assured by the fact that there are fewer Board members than Andean Pact countries and that members are appointed by the Commission, not by the member countries.\(^{229}\) The Board is charged with monitoring the application of the Andean Pact Treaty and fulfilling the Commission’s Decisions and its own Resolutions.\(^{230}\) The Board also conducts technical studies, prepares proposals for the Commission to expedite achievement of the objectives of the Andean Pact Treaty, and performs any other functions delegated to it by the Commission.\(^{231}\) Decisions of the Board must be unanimous.\(^{232}\) The functions of the Board are not merely executive; it plays a central role in triggering the legislative process by submitting proposals to the Commission and participating in the ensuing discussions.\(^{233}\) The Board also plays a role in initiating non-compliance actions before the Andean Court.\(^{234}\)

In order to adapt the Andean subregional economic cooperation program to the world globalization trends and deepen the process of opening up the markets of the constituent territories, the presidents of Bolivia, Colombia, Ecuador, Venezuela, and Peru signed the Trujillo Act and the Trujillo Protocol,\(^{235}\) whereby significant changes were introduced to the Andean Pact Treaty. As a result of these changes, a new economic integration and cooperation compact emerged that will be hereinafter referred to as the Andean Community Treaty.

Under the Andean Community Treaty, the Andean Community (AC) and the Andean Integration System (AIS) were created. Such institutions should, \textit{inter alia}, support the development of a hemispheric Free Trade Area of the Americas, to be implemented primarily

\(^{226}\) Id. art. 11, 28 I.L.M. at 1174.
\(^{227}\) Id. art. 13, 28 I.L.M. at 1175.
\(^{228}\) Id.
\(^{230}\) Andean Pact, supra note 14, art. 15, 28 I.L.M. at 1175.
\(^{231}\) Id.
\(^{232}\) Id. art. 17, 28 I.L.M. at 1176.
\(^{233}\) Id. art. 15, 28 I.L.M. at 1175–76. See Czar de Zalduendo, supra note 229.
\(^{234}\) Andean Court Treaty, supra note 32, arts. 25–24, 18 I.L.M. at 1207.
\(^{235}\) See supra note 14.
on the basis of the deepening and convergence of existing subregional economic cooperation programs. Another aim to be pursued through the AC and AIS is the strengthening of links between the AC and other economic cooperation programs within and without the Americas, such as MERCOSUR and APEC, as well as securing the participation of AC member countries in WTO ministerial meetings as a coordinated bloc. The AC is characterized as a subregional organization that is also an independent person under international law.\footnote{236}{As enunciated in different recitals of the Trujillo Act, supra note 14. See also Trujillo Protocol, supra note 14.}

The AC comprises its member countries and the bodies, organs, and institutions of AIS.\footnote{237}{Trujillo Protocol, supra note 14, art. 5.} Under the new structure, two new bodies are incorporated into the Andean Pact Treaty institutional structure: the Andean Presidential Council (APC) and the Andean Council of Foreign Affairs Ministers (ACFAM).\footnote{238}{Id. art. 6.} As a result, the APC becomes the highest body of AIS (the Commission, renamed the AC’s Commission, is no longer the top ranking body of the Andean economic cooperation scheme), and the Board is eliminated. The Board’s functions and assets are inherited by a new executive and technical body, the AC’s General Secretariat.

In order to promote coordination and coherence in the actions and activities of the different AIS bodies and to facilitate the exchange of information among them, the president of ACFAM shall call for meetings of the representatives of the different bodies composing AIS. Such meetings shall take place once a year in ordinary sessions, and extraordinary sessions may be held at any time at the request of any AIS body.\footnote{239}{Id. arts. 9-10.}

The APC is the maximum authority of AIS and is composed of all presidents of the member countries. It issues directives containing political orientations regarding the different spheres of Andean integration. Such directives are to be implemented by other constituent bodies of AIS as identified for this purpose by the APC.\footnote{240}{Id. art. 11.} Among other things, the APC defines policies regarding subregional Andean integration; orients and fosters actions in the common interest of the subregion or related to the coordination of bodies and institutions of IAS; evaluates the development and results of the Andean economic integration scheme; and considers and pronounces itself on reports, initia-

\footnotesize{\textsuperscript{236} As enunciated in different recitals of the Trujillo Act, supra note 14. See also Trujillo Protocol, supra note 14.  
\textsuperscript{237} Trujillo Protocol, supra note 14, art. 5.  
\textsuperscript{238} Id. art. 6.  
\textsuperscript{239} Id. arts. 9–10.  
\textsuperscript{240} Id. art. 11.}
tives, and recommendations of other institutions and bodies of AIS.\textsuperscript{241} As its name indicates, ACFAM comprises the foreign relations ministers of member countries.\textsuperscript{242} It is charged with formulating the foreign policies of member countries in matters of subregional interest; coordinating the external activities of the different organs and institutions of AIS and the joint position of member countries in international negotiations and fora; representing the AC in matters of common interest; recommending or adopting measures for achieving the ends and objectives of the Andean Community Treaty; monitoring the harmonious performance of the provisions of this agreement and LAIA; enforcing directives addressed to it by the APC; and seeing that directives addressed to other organs and institutions of AIS are enforced.\textsuperscript{243} It should be noted that ACFAM adopts its declarations and decisions by consensus and that the latter are part of the AC's legal system.\textsuperscript{244}

The Commission (now called the AC's Commission) is specifically entrusted with the formulation, enforcement, and evaluation of subregional Andean integration in the area of commerce and investment, in coordination with ACFAM when appropriate. It is also entrusted with the adoption of all necessary measures for achieving the objectives of the Andean Community Treaty and the enforcement of the APC's directives.\textsuperscript{245} The Commission may also meet with the appropriate ministers and ministerial secretaries to deal with sectoral matters, consider norms to facilitate the coordination of development plans and the harmonization of the economic policies of member countries, or learn and resolve other matters of common interest. Decisions of the AC's Commission, which remain part of the AC legal system, are now taken by the affirmative vote of the absolute majority of its members, except for certain matters that are to be approved by the absolute majority of members with no negative vote.\textsuperscript{246}

The AC's General Secretariat (GS), to be based in Lima, Peru, has now become the AC's technical and executive organ charged with the application of the Andean Community Treaty, the evaluation of the achievement of its objectives, and the enforcement of the norms constituting the AC's legal system. It operates only to advance the

\textsuperscript{241} Id. art. 12.
\textsuperscript{242} Id. art. 15.
\textsuperscript{243} Id. art. 16.
\textsuperscript{244} Id. art. 17.
\textsuperscript{245} Id. art. 22.
\textsuperscript{246} Id. arts. 25–26.
LAW & POLICY IN INTERNATIONAL BUSINESS

interests of the Andean subregion as a whole. The GS expresses itself through resolutions.\textsuperscript{247} It replaces in full and inherits the functions of the Board from the moment the GS's Secretary General takes up his position.\textsuperscript{248} The GS must carry out the tasks entrusted to it by ACFAM and the AC's Commission, formulate proposals for the taking of decisions by ACFAM or the AC's Commission, and, in general, perform any other functions entrusted to it under the AC legal system.\textsuperscript{249}

The Andean Court was created in 1979 by a treaty among Bolivia, Colombia, Ecuador, Peru, and Venezuela.\textsuperscript{250} The Andean Court Treaty is to remain effective as long as the Andean Pact Treaty,\textsuperscript{251} and states adhering to the Andean Pact Treaty must also accede to the Court Treaty without reservations.\textsuperscript{252} The members of the Andean Court are appointed by the unanimous vote of plenipotentiaries of the member countries.\textsuperscript{253}

In view of the important institutional modifications brought about by the Andean Community Treaty, the Court Treaty needs to be adapted to the new structure and to the fact that the Board has been suppressed and its functions inherited by the GS. The Court, previously called the Court of Justice of the Cartagena Agreement, was renamed under the Trujillo Protocol as the Court of Justice of the Andean Community. Actually, the Trujillo Act provides that the president of ACFAM shall take the necessary measures to adapt the Court Treaty to the new institutional environment introduced by the Trujillo Act. This new environment would require, among other things, definitions of the functions of the GS within the context of the Court Treaty and the functions of the Court with respect to decisions of ACFAM and the AC's Commission and GS resolutions. Since APC directives are political orientations not included within the regional legal system, they seem to be excluded from the jurisdiction of the Andean Court. That should not be the case with decisions of ACFAM or the AC's Commission. Nevertheless, one will have to wait and see the final text of the Court Treaty once it has been adapted to the Andean Community Treaty to be able to pass a final judgment in this respect. The analysis of the

\begin{itemize}
\item \textsuperscript{247} \textit{Id.} art. 29.
\item \textsuperscript{248} \textit{Id.} arts. 8–9 (transitional provisions).
\item \textsuperscript{249} \textit{Id.} art. 30.
\item \textsuperscript{250} Andean Court Treaty, \textit{supra} note 32. \textit{See generally} A. ZELADA CASTEDO, DERECHO DE LA INTEGRACION ECONOMICA REGIONAL 201–04 (1989) (discusses the organization and functions of the Andean Court); Czar de Zalduendo, \textit{supra} note 229.
\item \textsuperscript{251} Andean Court Treaty, \textit{supra} note 32, art. 38, 18 I.L.M. at 1209.
\item \textsuperscript{252} \textit{Id.} art. 36, 18 I.L.M. at 1209.
\item \textsuperscript{253} \textit{Id.} art. 8, 18 I.L.M. at 1205.
\end{itemize}
provisions of the Court Treaty that follows is, of course, based on its present text, which does not take into account the institutional changes incorporated into the Andean Community Treaty.

The juridical structure of the Andean Pact consists of the Cartagena Agreement and its protocols and instruments, the Andean Court Treaty, Commission Decisions, and Board Resolutions.254 The Commission’s decisions are binding on member countries from the date they are approved by the Commission255 and are directly applicable in member countries from the date of their publication in the official gazette of the Andean Pact.256 Resolutions of the Board enter into force as provided in the Board regulations, generally on the date of adoption.257 Member countries are required to take all measures necessary to assure fulfillment of the juridical norms of the Andean Pact and to refrain from adopting any measure that would contradict such norms or prejudice their application.258 If a member country violates this provision and the violation affects a legal person’s rights, the person has the right to bring a cause of action in the competent national court in accordance with the provisions of domestic law.259

The Andean Court, located in Quito, Ecuador260 is charged with nullifying any decisions of the Commission or resolutions of the Board adopted in violation of the juridical structure of the Andean Pact when such decisions or resolutions are challenged by a member country, the Commission, the Board, or by a natural or juridical person.261 Persons may only challenge decisions or resolutions that are applicable and harmful to them.262 Such actions must be brought within one year after the enactment or issuance of the decision or resolution.263 If the Andean Court holds that a decision or resolution is not in compliance with the Andean Pact, it must state the effects of its ruling and the time period in which the relevant body must comply with the ruling.264 Andean Pact bodies whose acts are nullified by the Andean Court must

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254. Id. art. 1, 18 I.L.M. at 1204.
255. Id. art. 2, 18 I.L.M. at 1204.
256. Id. art. 3, 18 I.L.M. at 1204.
258. Andean Court Treaty, supra note 32, art. 5, 18 I.L.M. at 1204.
259. Id. art. 27, 18 I.L.M. at 1208.
260. Id. art. 6, 18 I.L.M. at 1204.
261. Id. art. 17, 18 I.L.M. at 1206.
262. Id. art. 19, 18 I.L.M. at 1206.
263. Id. art. 20, 18 I.L.M. at 1206.
264. Id. art. 22, 18 I.L.M. at 1206.
take the measures necessary to comply with the Court’s decision, even if this requires specific performance. 265

The Andean Court also makes determinations in cases brought by the Board or member countries alleging that another member has not complied with the juridical norms of the Andean Pact. The Board may bring an action based on one of its reports only after the allegedly non-complying member country is given two months to respond to the allegations. 266 If brought by a member country, the claim must first be taken to the Board and go through the procedure applying to Board claims. 267 If the Board determines that the member country has breached the juridical norms of the Andean Pact and that country persists in such conduct, the Board then must refer the matter to the Andean Court. 268 If the Board fails to do so within two months, the complaining country may resort directly to the Andean Court. 269 A member country may also file a non-compliance claim directly with the Andean Court if the Board’s report concludes that the defendant member country is in compliance with the Pact or if the Board does not issue its report within three months of receiving the claim. 270

If the Andean Court rules that a member country is not in compliance with the juridical structure of the Andean Pact, the non-complying country must adopt all necessary measures to ensure compliance within three months. 271 If the non-complying member fails to do so, the Andean Court, after hearing the Board, will determine to what extent other members may restrict or suspend the advantages the Andean Pact Treaty affords the non-complying country. 272

Finally, the Andean Court is charged with providing final interpretations of questions about the juridical structure of the Pact raised before the national courts of the member countries in the course of private party litigation. 273 National courts are obliged to defer such issues to the Andean Court and abide by the Court’s decision. 274 The Andean Court’s role in the issuance of these interpretative preliminary rulings is of utmost importance both in ensuring the uniform interpretation

265. Id.
266. Id. art. 23, 18 I.L.M. at 1207.
267. Id. art. 24, 18 I.L.M. at 1207.
268. Id. art. 23, 18 I.L.M. at 1207.
269. Id. art. 24, 18 I.L.M. at 1207.
270. Id.
271. Id. art. 25, 18 I.L.M. at 1207.
272. Id.
273. Id. art. 28, 18 I.L.M. at 1208.
274. Id. art. 29, 18 I.L.M. at 1208.
and application of regional Andean Pact law and in maintaining the supremacy of Andean Pact law over the laws of the member countries. Furthermore, these preliminary rulings permit the participation of local tribunals in the pursuance of these objectives. This process furthers the integration of private and public interests in the effort to safeguard the legality of the regional integration scheme, as the procedure may be initiated by private parties who believe they have been denied full benefit of their rights arising under the Andean Pact.

Most of the activity of the Andean Court stems from preliminary ruling requests originated in domestic courts of the member countries.

Andean Court decisions do not require ratification or _exequatur_ proceedings in any member country in order to become enforceable. Because the Andean Court Treaty establishes that such disputes may not be submitted to any other court or arbitration system, the Andean Court is the only international forum available to the member countries for resolution of disputes arising under Andean Pact regional law. As a result, the Treaty effectively limits the sovereign powers of member countries with regard to procedures and remedies in cases involving alleged breaches of the Andean Pact, the Court Treaties, or Andean regional law.

A new boost to economic cooperation and integration among the Andean Pact countries resulted from the actions and decisions taken at the 1991 meetings of the member country presidents. The immediate precedent of the Barahona Act, the 1989 Galapagos Declaration, signed by Bolivia, Colombia, Ecuador, Peru, and Venezuela, had already made it clear that the objectives of subregional economic integration—including strengthening private businesses and opening subregional economies to the world markets in order to achieve more symmetrical insertion—need not clash with the growing trend in the Andean countries of commercial liberalization and openness toward


276. Czar de Zalduendo, _supra_ note 229, at 37.


278. Id. art. 33, 18 I.L.M. at 1208.


world markets. The Barahona Act furthers economic cooperation and integration by providing for a number of steps:

(1) establishment of the subregional free trade area by January 1, 1992, and extension to Ecuador and Peru by July 1, 1992;
(2) establishment of the bases for the common external tariff;
(3) elimination of subsidies;
(4) harmonization of macroeconomic policies;
(5) initiation of negotiations with the Caribbean countries, Chile, MERCOSUR, and other Latin American countries and extension of the economic agreements already reached by Venezuela, Colombia, and Mexico to the rest of the Andean Pact, including negotiations with less developed Latin American countries based on non-reciprocal concessions and with the European Community; and
(6) reliance on President Bush's Initiative for the Americas and support for the finalization of the GATT Uruguay Round "taking into account that the maintenance of a multilateral trade system is the best guarantee for developing countries."

The Andean Pact thus follows the general open regionalism trend presently predominating the Americas.

In implementing the objectives set forth in the Barahona Act, Andean Pact countries have largely eliminated barriers to their reciprocal trade. As the first step in creation of the Andean Common Market, a common external tariff was established through Commission Decisions 324 and

281. Barahona Act, supra note 279, art. 1(a).
282. Id. art. 1(b).
283. Id. art. 1(d).
284. Id. art. 2.
285. See G-3 Treaty, supra note 16.
286. Barahona Act, supra note 279, art. 3.
288. Barahona Act, supra note 279, art. 3(d).
The common external tariff consists of four tariff levels: 5%, 10%, 15%, and 20%. Bolivia is authorized to maintain its lower levels of 5% and 10%. For certain items in the petrochemical and steel sectors, Ecuador may have tariffs up to five percentage points below those that would otherwise apply under the common tariff. For automotive vehicles, Colombia, Ecuador, and Venezuela may apply tariff levels up to 40%. Member countries are to negotiate a list of items produced only minimally or not at all, for which the common external tariff will be reduced to zero.

The Commission has also taken decisive steps to harmonize different aspects of the economic policies of member countries, in an attempt to create homogeneous competitive bases in the subregion. These steps have included passage of Decision 313, introducing a common regime on intellectual property, including patents and trademarks; Decision 334 (which replaced Decision 313), establishing a common regime on industrial property; Decision 330, eliminating subsidies and harmonizing incentives to intra-Andean Pact trade; and Decision 293, introducing special common norms for determining the origins of goods qualifying for preferential treatment within the subregion.

Decisions 283, 284, and 285 introduced norms to prevent or correct distortions in competition caused by, respectively, dumping or subsidies, export restrictions, and practices that restrict free competi-

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292. Decision 324, supra note 290, art. 1, 32 I.L.M. at 213.
293. Id. art. 3, 32 I.L.M. at 213.
294. Decision 335, supra note 291, art. 3.
295. Decision 324, supra note 290, art. 5, 32 I.L.M. at 213.
296. Id. art. 6, 32 I.L.M. at 213.
301. Andean Group Commission Decision 283 on Norms to Prevent or Correct Competitive Distortions Caused by Dumping or Subsidies, Mar. 21, 1991, 32 I.L.M. 143 [hereinafter Decision 283].
tion, as defined in a uniform way in the Decisions. These Decisions also provide procedures for obtaining relief before the Board if any of the common norms are infringed. Under Decision 283, for example, member countries and private companies claiming a legitimate interest may, to the extent permitted by local legislation, file complaints with the Board seeking authorization or a mandate to apply "measures to prevent or correct competitive distortions in subregional trade deriving from dumping or subsidies" in certain cases. The Board has power to investigate the facts alleged in the complaint and hear the positions of the parties to the dispute. After hearing of the case and the production of evidence, the Board shall issue a "reasoned resolution" and may establish definitive antidumping or compensatory duties. The Board may also authorize the immediate application of provisional corrective measures before resolution of the case if the threat of prejudice or actual prejudice is evident.

Similar proceedings before the Board are available for member countries and interested companies in the case of distortions in competition caused by export restrictions (under Decision 284) or by restrictive practices (under Decision 285). These decisions thus provide both member countries and private companies the opportunity to obtain immediate, binding relief from the Board, where practices negatively affecting free competition violate the supranational norms incorporated through such Decisions. The Board resolutions under these Decisions are final unless they are later repealed or modified when the causes giving rise to them have ceased, suffered changes, or been successfully attacked before the Andean Court in a nullification proceeding.

In the field of foreign investment, Decision 291 introduces further liberalization regarding the treatment of foreign investment in member countries of the subregion. This Decision, which replaces Decision 220, enacts a Common Code for the treatment of foreign capital and for trademark, patents, licenses, and royalties. All limitations on the entry of foreign investment are eliminated and foreign investors

304. Decision 283, supra note 301, art. 2, 32 I.L.M. at 147.
305. Id. arts. 11–14, 32 I.L.M. at 151–53.
306. Id. art. 18, 32 I.L.M. at 154.
307. Id. art. 23, 32 I.L.M. at 155.
309. Decision 285, supra note 303, art. 1, 32 I.L.M. at 163.
310. See supra notes 260–65.
(subregional or otherwise) are ensured national treatment in member countries.\textsuperscript{312} Direct foreign and subregional investments are to be registered in freely convertible currency,\textsuperscript{313} and their owners shall have the right to transfer abroad, in freely convertible foreign currency, the net earnings derived from the relevant investment\textsuperscript{314} and to repatriate their investment.\textsuperscript{315}

Decision 292 updated the legal regime applicable to Andean Multinational Enterprises (AMEs).\textsuperscript{316} To be an AME, a company must have its seat in a member country and at least sixty percent of it must be owned by national investors of two or more member countries.\textsuperscript{317} If investors come from only two member countries, the investors from each country must own at least fifteen percent of the total value of the AME.\textsuperscript{318} If the investors come from more than two member countries, the contributions of the investors from at least two of the countries must be at least fifteen percent.\textsuperscript{319}

AMEs enjoy preferential treatment in a number of areas: (1) national treatment in each member country;\textsuperscript{320} (2) free circulation of contributions to their share capital in the subregion;\textsuperscript{321} (3) eligibility for export incentives under the same conditions granted to companies of the member countries;\textsuperscript{322} (4) participation in economic sectors normally reserved for national companies in the respective member countries;\textsuperscript{323} (5) the right to open branches in member countries;\textsuperscript{324} (6) the right to transfer net earnings to the country of the AME's seat in freely transferable currency;\textsuperscript{325} (7) the right of foreign and subregional investors in AMEs to transfer their net earnings abroad in freely convertible currency;\textsuperscript{326} (8) the right to receive the same treatment granted to local companies of each member country with respect to

\textsuperscript{312} Id. art. 2, 30 I.L.M. at 1290.
\textsuperscript{313} Id. art. 3, 30 I.L.M. at 1290.
\textsuperscript{314} Id. art. 4, 30 I.L.M. at 1290.
\textsuperscript{315} Id. art. 5, 30 I.L.M. at 1291.
\textsuperscript{317} Id. art. 1, 30 I.L.M. at 1296.
\textsuperscript{318} Id.
\textsuperscript{319} Id.
\textsuperscript{320} Id. art. 9, 30 I.L.M. at 1298-99.
\textsuperscript{321} Id. art. 10, 30 I.L.M. at 1299.
\textsuperscript{322} Id. art. 12, 30 I.L.M. at 1299.
\textsuperscript{323} Id. art. 14, 30 I.L.M. at 1299.
\textsuperscript{324} Id. art. 15, 30 I.L.M. at 1299.
\textsuperscript{325} Id. art. 16, 30 I.L.M. at 1299.
\textsuperscript{326} Id. art. 17, 30 I.L.M. at 1299.
national internal taxes;\textsuperscript{327} and (9) access to safeguards against double taxation.\textsuperscript{328} With respect to taxation, the member country in which an AME is established may not impose taxes on the portion of income or dividend remittances of the AME's profits obtained from branches in other member countries.\textsuperscript{329} Finally, in no member country, other than the country of establishment of an AME, may redistribution of dividends obtained from the AME be subject to income tax.\textsuperscript{330}

In 1992, the Commission issued Decision 322 regarding trade relations with members of LAIA and countries of Central America and the Caribbean.\textsuperscript{331} Under this Decision, the members of the Andean Pact are to act as a single unit in negotiations with these other countries.\textsuperscript{332} If this is not possible, two or more Andean Pact member countries may conduct bilateral negotiations with third countries and keep other member countries informed of the course of the negotiations.\textsuperscript{333} Agreements reached with third countries will be made within the context of the LAIA Treaty.\textsuperscript{334} Agreements based on non-reciprocal concessions may be reached with relatively less developed countries of the region.\textsuperscript{335}

It should be noted that for political reasons and because of discrepancies in the pace of trade liberalization, Peru was suspended from the obligations arising out of the subregional liberalization program and minimum common external tariff program until December 31, 1993.\textsuperscript{336} Nevertheless, Peru has become a party to the Trujillo Act and the Trujillo Protocol streamlining the Andean economic integration program institutions and is thus again fully participating in this economic integration scheme.

\begin{thebibliography}{9}
\bibitem{327} Id. art. 18, 30 I.L.M. at 1299.
\bibitem{328} Id. art. 19, 30 I.L.M. at 1300.
\bibitem{329} Id.
\bibitem{330} Id.
\bibitem{332} Id. art. 1.
\bibitem{333} Id. art. 4.
\bibitem{334} Id. art. 4.
\bibitem{335} Id.
\end{thebibliography}
2. General Assessment of the Andean Pact

The Andean Pact is an international economic cooperation and integration program that is theoretically equipped with supranational executive and legislative organs with the capacity to create norms directly binding on member countries and private individuals and to provide an autonomous forum for fashioning legal precepts in the context of integration objectives rather than petty national or "special" interests. But, the adoption of such norms by the Pact's organs may nonetheless be blocked by the negative vote of member states—even a relatively small minority of them.

The new institutional structure introduced by the Andean Community Treaty changes this situation only with respect to the majorities needed for the taking of decisions by the AC's Commission. Now, such decisions are taken by absolute majority vote rather than by two-thirds or unanimous vote, as was the case with the Commission under the Andean Pact Treaty. However, the powers of the AC's Commission have been reduced, and it is no longer the highest organ of the Andean integration program. It should also be noted that the AC, presently the highest authority under the Andean Community Treaty, must approve its directives by unanimous vote, and nothing would indicate that such directives, political in nature, will be subject to control by the Court. ACFAM also adopts its decisions by consensus rather than majority vote. Thus, the new evolution in the Andean integration program seems to follow the path opened by other economic cooperation experiences in Latin America, like MERCOSUR, that are based on maintaining members' important sovereign controls over the economic integration process to make sure that it does not interfere with other unilateral or minilateral actions or programs that such countries may individually wish to undertake to respond to the different challenges posed by the world economy. Nevertheless, unlike MERCOSUR and other similar Latin American economic cooperation schemes, the Andean Community Treaty still maintains the possibility of creating a supranational regional law through decisions or resolutions of certain of its organs whose precedence over national law is safeguarded by the Court. Only the future will show to what extent unilateral veto action at the level of the APC or ACFAM is likely to undermine collective undertakings of subregional interest within the context of the Andean Community Treaty.

The regional law of the Andean Pact preempts the application of incompatible national law of member countries. Its supremacy is ultimately ensured through the decisions of an international court, the
interaction between the court's preliminary rulings on regional law and the national judiciaries of the member countries, and the right of private individuals to sue member countries in violation of Andean Pact regional law before domestic courts. However, there have historically been problems in ensuring the direct application and supremacy of Andean Pact regional law in the member countries. Even today, the Venezuelan legislation implementing the Andean treaties may be interpreted as introducing limitations on the direct application and supremacy of Andean Pact law. Though non-compliance with Andean Pact law may give rise to international responsibility of the non-complying member country, public international law remedies such as retaliation may not be resorted to without going through Board and Andean Court non-compliance procedures. When a member seeks to file a claim against another member for non-compliance, board intervention introduces a seemingly unnecessary hurdle, especially if Board decisions require unanimity. It should be noted that despite the rich history of non-compliance by Andean Pact countries, no non-compliance action has ever been filed with the Andean Court. It remains to be seen whether this situation will be improved by the modifications that must necessarily be introduced into the Court Treaty as a result of the Andean Community Treaty and by the concomitant substitution of the GS for the Board. The Andean Court has not been significantly active in connection

337. Colombia passed legislation providing that decisions or resolutions of the Commission or the Board modifying Colombian legislation or governing issues or situations falling under the legislative jurisdiction of the Colombian Congress would require approval through a new law of Congress in order to be incorporated into Colombian law. This was not only inconsistent with the Andean Pact Treaty and delegations of national jurisdiction to organs such as the Commission or the Board, but also in violation of a provision of the Colombian Constitution authorizing the Colombian government, under conditions of equity and reciprocity, to enter into international agreements creating supranational institutions involving transfer of national sovereign powers or competencies for pursuing or consolidating economic integration with other states. See COLOM. CONST. art. 150(16). Two 1975 decisions of the Colombian Supreme Court finally declared that this Colombian legislation was unconstitutional. See Amador, supra note 257, at 34–40.

338. Present Venezuelan legislation for the implementation of the Andean Court Treaty requires legislative action before a Commission Decision that modifies Venezuelan law or governs issues or situations falling under the legislative jurisdiction of the Venezuelan Congress will be considered approved. See Amador, supra note 257. In addition, the legislation states that the decisions of the Venezuelan Supreme Court may not be subject to any further means of recourse. This provision may be read as limiting the jurisdiction of the Andean Court when it would invade the exclusive jurisdiction of the Venezuelan Supreme Court. See Castedo, supra note 275, at 49–50.

with annulment actions either. Colombia is the only member to have filed an annulment action regarding a Board resolution. The Andean Court has been more active in issuing preliminary rulings on the interpretation of norms constituting the Andean Pact legal framework, generally on the basis of submissions by national courts at the request of parties to judicial proceedings before such courts. \(^{340}\)

However, as with other international economic integration schemes, substantial formal delegation of national sovereign powers—namely jurisdictional powers—to supranational bodies may be found primarily in the dispute resolution mechanisms of the Andean Pact. In line with the inclination of open regionalism to emphasize the role of private ordering in achieving international economic integration, the Andean Pact permits private parties to trigger the Andean Court's intervention to protect individual rights. Whatever the ultimate effectiveness of the Court's mechanisms in ensuring the supremacy of Andean Pact law, the very existence of the Court operates to dissuade members from engaging in conduct that may be publicly questioned and that may lead to the finding of a breach, international responsibility, and a right to retaliatory action. \(^{341}\) Like similar adjudicatory bodies in other international economic cooperation and integration programs, the Andean Court has the potential power, if used more assiduously, to grant or deny legitimacy to member country conduct.

In this way, the Court may contribute to the legality of the system, formation of precise legal principles, and concrete clarification of the scope of Andean Pact law. To the extent that the Court's decisions are impartial and of high quality, it may create a body of case law that by its very existence would introduce actual limitations on uncontrolled sovereign action of member countries in disregard of the Andean Pact legal framework. The impressive recent proliferation of new Andean regional law, \(^{342}\) covering very broad and varied aspects of the region's

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340. One of the most recent of such decisions relates to the invalidation of Ecuadorean regulations considered incompatible with Decision 344 on industrial property rights. See Solicitud de Interpretacion Prejudicial, Formulada por el Tribunal Distrital No. 1 de lo Contencioso Administrativo, Sala Segunda de law Republica del Ecuador, Relativa a los Articulos 1, 2, 6, y 7 de la Decision 344 de la Comision del Acuerdo de Cartagena, Andean Court Decision of Dec. 9, 1994, REGISTRO OFICIAL, Apr. 13, 1995, at 7 (Ecuador). On the supremacy of Andean Pact regional or community law over the local laws of Andean Pact countries (but also on the need for formal domestic reception of regional or community law and domestic procedures for the internal "approval" or "implementation" of such laws), see F. GARCIA AMADO, EL ORDENAMIENTO JURIDICO ANDINO 184-222 (1977).

341. See Chamorro, supra note 339, at 111-12.

342. See supra Part III.B.1.
economic and business activities, is likely to lead to more judicial intervention—both by the Andean Court and domestic tribunals—with regard to application and interpretation of the law and to a more active role for private parties in instigating such actions. The aggregate effect may be to create an environment hostile to the unilateral exercise of sovereign state powers in contravention of the Andean Pact framework.

The drastic liberalization of Andean Pact regional law on trade and economic activity, accompanied in part by similar liberalization at the domestic level, has notably increased the influence and scope of private ordering in the economic decision-making process in the Andean Pact countries. Accordingly, the liberalization of the Andean Pact regional law has resulted in a *de facto* reduction in the influence of public ordering and of sovereign interference.

IV. RECENT AFRICAN EXPERIENCES RELATED TO REGIONAL ECONOMIC COOPERATION AND INTEGRATION

The experiences and institutions of the Andean Pact have traditionally been, and will continue to be, influential in the development of the legal framework of many African economic cooperation and integration programs, and thus these experiences should be borne in mind when considering the legal structure of African schemes.

African efforts towards economic cooperation and integration on the regional and continental level began to emerge in 1990 following a history of frustration and non-compliance with past attempts. The most significant factors contributing to this new development were the appearance of a post-apartheid South Africa eligible for incorporation into economic cooperation and integration programs and the realization by African countries that obstacles to development could not be tackled unilaterally and required a continental, regional, or subregional perspective.

A. Continental Efforts

The 1991 Treaty Establishing the African Economic Community (AEC) is an important example of the trend toward regional coopera-

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Sovereignty and Regionalism.

The treaty seeks to continue the economic cooperation and integration programs contained in the Monrovia Declaration, the Lagos Plan of Action, the Lagos Final Act, and other agreements. The AEC is composed of the members of the Organization of African Unity.

The premise underlying the AEC Treaty is that economic integration should focus on increasing production in member territories: local production must be placed on an economically sound basis and expanded in order to permit the expansion of trade among member countries. The treaty does not take a market approach to integration—immediate liberalization—but rather focuses on the development of an economically self-reliant industrial sector in each nation:

[T]he purpose of AEC is not just economic integration but also...
development in all its senses and global multi-sectorial integration. The method adopted for achieving integration, as advanced in the Treaty, is production-based as opposed to the market-based approach. The emphasis is on creating a sound infrastructure which would permit fuller exploitation of the potential capacity for integration available in such key sectors as industry, agriculture, transport and communication, trade, money, and finance. The argument is that the regional production base must first be consolidated and expanded in order to facilitate trade and other exchanges between African countries.  

Article 4 of the Treaty lists its ambitious objectives: promotion of economic, social, and cultural development and the integration of African economies; coordination and harmonization of the policies of existing and future African economic communities; promotion and strengthening of joint investment programs aimed at ensuring collective self-reliance; liberalization of trade among members through abolition of customs duties and non-tariff barriers; harmonization of national policies with respect to agriculture, industry, transport and communications, energy, natural resources, trade, money, finance, human resources, education, culture, science and technology, environment, mail, telecommunications, broadcasting, and tourism; adoption of a common trade policy vis-à-vis third states and common rules of origin; establishment and maintenance of a common external tariff; establishment of a common market; gradual removal of obstacles to the free movement of persons, goods, services, and capital among member countries and the right of residence and establishment; application of the most-favored-nation principle; harmonization of payment policies to facilitate intra-AEC trade, including privileging the use of members' national currencies for settling commercial and financial transactions (in order to reduce the use of external curren-

352. AEC Treaty, supra note 344, art. 4, 30 I.L.M. at 1253-54.
353. Id. art. 28, 30 I.L.M. at 1261-62.
354. Id. art. 46, 30 I.L.M. at 1267.
355. Id. arts. 48-66, 30 I.L.M. at 1268-74.
356. Id. arts. 29-31, 30 I.L.M. at 1262.
357. Id. art. 92, 30 I.L.M. at 1262.
358. Id. art. 33, 30 I.L.M. at 1263.
359. Id. arts. 43, 45, 30 I.L.M. at 1266-67.
360. Id. art. 37, 30 I.L.M. at 1264.
cies) and establishing multilateral payment systems; creation of national, regional, and subregional money markets through the coordinated establishment of stock exchanges and harmonization of laws; granting special treatment to Botswana, Lesotho, Namibia, and Swaziland; and adoption of special measures in favor of "less developed," landlocked, semi-landlocked, and island countries. Protocols to the treaty will provide more specifically for implementation of these objectives.

The most important organs of the AEC are the Assembly of Heads of State and Government; the Pan-African Parliament; the Council of Ministers; the Economic and Social Commission (ECOSOC); the Court of Justice; the General Secretariat; and the Specialized Technical Committees. The Assembly is the supreme organ of the AEC: it determines and implements general AEC policy, issues directives, and coordinates and harmonizes the economic, scientific, technical, cultural, and social policies of member countries. It also oversees the functioning of AEC's other organs and follows up on the implementation of AEC policies. Based on the recommendations of the AEC Council, the Assembly makes decisions and issues directives concerning regional economic communities to ensure the realization of the AEC's objectives. If the Assembly determines by majority vote that a member state or another AEC organ has overstepped its bounds, abused its power, or failed to honor its obligations, the Assembly will refer the matter to the AEC Court. Assembly decisions are adopted by consensus (or, failing that, by the vote of two-thirds of the AEC members) and become automatically enforceable thirty days after they are signed by the Assembly's president. Assembly decisions are binding on both member countries and AEC organs.

The AEC Council is composed of the ministers of the member countries and is responsible for the functioning and development of...

361. Id. art. 44, 30 I.L.M. at 1266-67.
362. Id.
363. Id. art. 78, 30 I.L.M. at 1277.
364. Id. art. 79, 30 I.L.M. at 1277.
365. Id. art. 7, 30 I.L.M. at 1256.
366. Id. art. 8, 30 I.L.M. at 1256.
367. Id.
368. Id.
369. Id.
370. Id. art. 10, 30 I.L.M. at 1257.
371. Id.

1996] 1129
the community. The Council makes recommendations to the Assembly on any action necessary to attain AEC objectives. It acts by issuing regulations that are binding on member countries, subordinate organs of the AEC, and regional economic communities after having been approved by the Assembly. If the Assembly has delegated its decision-making powers in a given area to the AEC Council, regulations issued by the AEC Council become binding immediately. Regulations are automatically enforceable thirty days after they are signed by the chairman of the Council. Regulations proposed by the council are adopted by consensus (or, failing that, by a two-thirds majority of the member countries).

The AEC's decision-making process has been hailed as a significant step toward reducing the sovereign interference in the adoption of community decisions that plagues other African international economic integration programs. In these other programs, decisions require an affirmative unanimous vote of all members and are often binding only on community organs, not member states. The Assembly and the AEC Council make supranational regional law that is directly and immediately binding on AEC member countries.

ECOSOC is composed of the ministers responsible for economic development, planning, and integration in each member country. Representatives of regional economic communities also participate in ECOSOC's meetings. In accordance with the Lagos Plan of Action and the Lagos Final Act, ECOSOC prepares "programs, policies, and strategies for cooperation in the fields of economic and social development" among African countries and between the AEC and the international community. It presents these proposals to the Assembly via the AEC Council. ECOSOC also coordinates the economic, social, cul-

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372. Id. art. 11, 30 I.L.M. at 1257.
373. Id.
374. Id. art. 13, 30 I.L.M. at 1258.
375. Id.
376. Id.
377. Id.
378. See, e.g., Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975, 14 I.L.M. 1200. Under the ECOWAS Treaty, all decisions had to be taken by unanimous vote and were binding only on ECOWAS Treaty organs. Id. arts. 5–6, 14 I.L.M. at 1201–02. See O. Anukpe Ovrawah, Harmonisation of Laws Within the Economic Community of West African States (ECOWAS), 6 APR. J. INT'L & COMP. L. 76, 88 (1994).
379. AEC Treaty, supra note 344, art. 15, 30 I.L.M. at 1258.
380. Id.
381. Id. art. 16, 30 I.L.M. at 1258.
382. Id.
tural, scientific, and technical activities of the AEC Secretariat, the AEC Committees, and any other subsidiary body.\textsuperscript{383}

The AEC Court interprets and applies the AEC Treaty.\textsuperscript{384} Actions before the AEC Court may be brought only by a member country or the Assembly for violations of the AEC Treaty or decisions thereunder or for abuse of powers by "an organ, an authority or a member state."\textsuperscript{385} The Court's decisions are binding on member countries and AEC organs.\textsuperscript{386} Though the role of the AEC Court is not fully developed in the AEC Treaty and it is likely to be the subject of an additional treaty or protocol, the Court clearly does play the role of ensuring the supremacy and uniform interpretation of AEC regional law.

Article 6 of the AEC Treaty provides that the AEC is to be established gradually in six stages of varying duration over a period not to exceed thirty-four years.\textsuperscript{387} The transition from one stage to the next takes place when the Assembly, on the recommendation of the AEC Council, confirms that the objectives set forth in the AEC Treaty (or by the Assembly) for the relevant stage have been achieved.\textsuperscript{388} The different milestones are the creation of a free trade zone, a customs union, a monetary union, a common market, and ultimately an economic union.\textsuperscript{389} The final stage would include the establishment of a single African Central Bank, a single currency, and African multinational enterprises in priority industries, as well as the general harmonization and coordination of all economic activities.\textsuperscript{390} In the area of industrial development, expansion of African capital and entrepreneurial activity is favored.\textsuperscript{391}

Article 5 of the AEC Treaty deals with the critical problem of transfer of sovereignty in an economic union and the tension between sovereignty and domestic jurisdiction.\textsuperscript{392} Under Article 5(1), member countries agree to "refrain from any unilateral action that may hinder the attainment" of AEC objectives.\textsuperscript{393} They also undertake to create "favour-
able conditions” for the development of the AEC and the attainment of its objectives. 394 Article 5(2) provides that each member country “shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislation as may be necessary for the implementation” of the provisions of the AEC Treaty. 395 Finally, Article 5(3) confirms that treaty violations will be considered an infringement of public international law entailing state responsibility: “any Member State which persistently fails to honour its general undertakings under this Treaty or fails to abide by the decisions or regulations of the [AEC] may be subjected to sanctions by the Assembly upon the recommendation of the Council.” 396 These sanctions “may include the suspension of the rights and privileges of membership.” 397 They may be lifted by the Assembly “upon the recommendation of the Council.” 398

B. Regional Efforts

On August 17, 1992, a number of African countries signed the Treaty of the South African Development Community (SADC Treaty), 399 which is closely modeled on the AEC treaty. Its precedents also include the Lagos Plan of Action. 400 The SADC seeks to achieve development and economic growth and to promote “self-sustaining development on the basis of collective self-reliance and the inter-dependence of member countries.” 401 The means are economic cooperation and integration, harmonization of social and economic policies, and elimination of the obstacles to the free movement of capital, labor, goods, and services among member countries. 402

Members agree to cooperate in all areas necessary to foster regional development and integration. 403 Through the appropriate SADC institutions, members will “coordinate, rationalize, and harmonize” their macroeconomic and sectoral policies and strategies, programs, and

394. Id.
395. Id. art. 5(2), 30 I.L.M. at 1254 (emphasis added).
396. Id. art. 5(3), 30 I.L.M. at 1254.
397. Id.
398. Id.
400. See id., Preamble, 32 I.L.M. at 122.
401. Id. art. 5, 32 I.L.M. at 124.
402. Id.
403. Id. art. 21, 32 I.L.M. at 129.
projects. The areas of cooperation include food security, land, and agriculture; infrastructure and services; industry, trade, investment, and finance; natural resources and environment; and human resource development, science, and technology. In each of these areas, members will enter protocols specifying the objective and scope of their cooperation and integration and the appropriate implementation mechanisms.

The SADC is headquartered in Gabarone, Botswana. It is an international organization with legal personality. To be admitted to SADC, a country must be unanimously accepted by the Summit of Heads of State or Government. In addition to the Summit, the other important SADC institutions are the Council of Ministers, the Commissions, the Standing Committee of Officials, the Secretariat, and the Tribunal. Meetings of all SADC institutions require a quorum of at least two-thirds of its members. Unless otherwise provided, decisions of all organs are made by consensus.

The Summit is made up of the heads of state or government of all member countries and is the supreme policy-making organ of SADC. It is responsible for the overall policy direction and control of the SADC and is charged with adopting legal instruments for the implementation of the SADC Treaty. Its decisions are taken by consensus and are binding.

The SADC Council consists of one minister from each member country, preferably the minister for economic planning or finance. Among other things, the Council oversees the functioning and development of the SADC, the implementation of its policies, and the proper execution of its programs. It advises the Summit on matters of policy and the efficient development and functioning of the SADC, and it

404. Id. art. 21, 32 I.L.M. at 130.
405. Id.
406. Id. art. 22, 32 I.L.M. at 130.
407. Id. art. 2, 32 I.L.M. at 123.
408. Id. art. 3, 32 I.L.M. at 123.
409. Id. art. 8, 32 I.L.M. at 125.
410. Id. art. 9, 32 I.L.M. at 126.
411. Id. art. 18, 32 I.L.M. at 129.
412. Id. art. 19, 32 I.L.M. at 129.
413. Id. art. 10, 32 I.L.M. at 126.
414. Id.
415. Id.
416. Id. art. 126, 32 I.L.M. at 126.
417. Id.
approves policies and programs of the SADC and supervises the institutions subordinate to it.\footnote{418} The Council also defines the target areas for cooperation and allocates to members the responsibility for coordinating cooperative activities.\footnote{419}

SADC Commissions are created to coordinate cooperation and integration policies and programs in designated sectoral areas.\footnote{420} Commissions report to the SADC Council.\footnote{421} The Standing Committee acts as the technical advisory committee for the SADC Council; it consists of one permanent secretary or an official of equivalent rank from each member country.\footnote{422} The SADC Tribunal ensures adherence to and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments; it adjudicates any disputes related to them.\footnote{423} Decisions of the Tribunal are final and binding.\footnote{424}

Another recent African program of economic cooperation and integration is the 1993 Treaty Establishing the Common Market for Eastern and Southern Africa (CMES Treaty).\footnote{425} One of the aims of the CMES Treaty is to create an overall context of economic cooperation and integration in Eastern and Southern Africa, including Botswana and post-apartheid South Africa.\footnote{426} Thus the treaty includes a provision stating that upon the fulfillment of proper requirements, Botswana and South Africa may become CMES member countries.\footnote{427}

Once the CMES Treaty is in force, its predecessor, the Preferential Trade Area for Eastern and Southern Africa (PTA), will be dissolved.\footnote{428} CMES will then assume all of PTA's assets and liabilities.\footnote{429} The PTA Tribunal will also be dissolved.\footnote{430} CMES is remarkable not only because of its ambitious objectives regarding development, economic coopera-
tion, and integration, but also for the emphasis it lays upon privatization of economic activities, market policies, and private investment (including foreign private investment) and the role it gives to the business communities of the member countries in the formulation of CMES policies. In this regard, the CMES Treaty can be clearly distinguished from most prior or existing economic cooperation and integration programs in Africa.\footnote{431. With the possible exception of the South African Development and Coordination Conference (SADCC) created in 1980. See Lusaka Declaration, Apr. 1, 1980, Angl.-Bots.-Malawi-Mozam.-Namib.-Swaz.-Tanz.-Zambia-Zimb., in BELAOUANE-GHERARI & GHERARI, supra note 345, at 342. The SADCC is merely aimed at coordinating production among and improving infrastructure in member countries and securing support from foreign donors. The SADCC is not regulated by treaty and constitutes a flexible and pragmatic cooperation framework operating on the basis of a small secretariat in Gabarone, Botswana, whose main role is coordination. SADCC policies are established annually through meetings of SADCC heads of state. These meetings select projects to undertake; projects must have a strong regional participation and impact. There is also an annual consultative conference with participation of foreign donors, having as its main end the mobilization of funds for SADCC projects. SADCC's main emphasis is on boosting production rather than trade. SADCC does not place restrictions on foreign capital. SADCC has taken important steps to facilitate cooperation with the private sector and to improve the foreign and domestic investment climate to attract business participation to SADCC projects. See A. DE LA TORRE & M. KELLY, REGIONAL TRADE AGREEMENTS 29 (Int'l Monetary Fund Occasional Paper No. 93, 1992).}

More specifically, CMES members will try to promote a continuous dialogue with private sector organizations at national and regional levels and provide an opportunity for entrepreneurs "to participate actively in improving the policies, regulations, and institutions" affecting them.\footnote{432. CMES Treaty, supra note 425, art. 151, 33 I.L.M. at 1105.} Member countries further undertake to improve their business environments by promoting conducive investment codes; protecting property and contract rights; regularizing the informal sector; encouraging sourcing of purchases by governments within CMES; strengthening the role of chambers of commerce in formulating national economic policies; establishing lending institutions primarily catering to entrepreneurs, particularly small-scale ones; and encouraging the use of the Eastern and Southern African Trade and Development Bank facility to finance the private sector.\footnote{433. Id.} The private sector is called on to play a central role in the development, progress, and reconstruction of the economies of member countries.\footnote{434. Id. art. 152, 33 I.L.M. at 1105-06.}

Member countries recognize the importance of encouraging the increased flow of private sector investment into CMES for development. To that end, member countries agree to accord fair and equi-
table treatment to private investors; adopt a program for cross-border investment; create and maintain a predictable, transparent, and secure investment climate in member countries; remove administrative, fiscal, and legal restrictions on intra-CMES investments; and accelerate the deregulation of the investment process.\textsuperscript{435} Member countries also agree to refrain from nationalizing or expropriating private investment unless necessary for the public interest and to pay adequate compensation if nationalization or expropriation does take place.\textsuperscript{436} Expropriation and nationalization are broadly defined so as to include "creeping expropriation."\textsuperscript{437} In addition, member countries agree to accede to multilateral agreements on investment dispute resolution and guarantee arrangements as part of their efforts to create a conducive investment climate.\textsuperscript{438} Among such agreements, specific reference is made to the 1965 International Convention on Settlement of Investment Disputes Between States and Nationals of Other States and the Convention Establishing the Multilateral Investment Guarantee Agency.\textsuperscript{439}

CMES organs include the Authority, the Council, the Court of Justice, the Secretariat, and the Consultative Committee.\textsuperscript{440} The Authority, made up of the heads of state or government of the member countries, is CMES's supreme policy organ and is responsible for the general policy, direction, and control of the CMES's executive functions and for the achievement of CMES's aims and objectives.\textsuperscript{441} Its directions and decisions are binding on member countries and all CMES organs except for the CMES Court, and they take effect upon notice.\textsuperscript{442} The Authority's decisions are made by consensus.\textsuperscript{443}

The CMES Council consists of ministers designated by member countries.\textsuperscript{444} Among other things, it monitors, constantly reviews, and ensures the proper functioning and development of CMES; it makes recommendations to the Authority on matters of policy for CMES's "efficient and harmonious functioning and development"; it gives directions to CMES subordinate organs other than the CMES Court; it makes regulations, decisions, and recommendations, issues directives,
and gives opinions as provided in the CMES Treaty; it requests advisory opinions from the CMES Court; it makes recommendations to the Authority on the designation of least developed countries; and it designates economically depressed areas within CMES. The CMES Council may also give non-binding opinions and recommendations. Council decisions are made by consensus, or, if consensus is not reached, by a two-thirds majority of its members. If a member state objects to a proposal submitted to the Council for decision, the proposal is referred to the Authority.

Thus, both the Authority's decisions and directions and the Council's regulations and decisions are immediately and directly binding and applicable in CMES countries and are the source of CMES supranational law conferring rights and obligations on the relevant CMES member countries and their citizens without requiring any further state action for approval or incorporation. Council directives, however, provide only a broad context and objectives that, though immediately binding on the member countries to which they are addressed, acquire full vigor and effectiveness only when implemented at the domestic level through national sovereign actions to that effect.

The CMES Court "ensure[s] adherence to law in the interpretation and application of the CMES Treaty." Members of the Court are appointed by the Authority. A member country who believes that another member or the CMES Council has failed to fulfill any obligation under the CMES Treaty or infringed a provision of the Treaty may refer the matter to the CMES Court. A member country may also ask the court for a determination about the legality of any act, regulation, directive, or decision of the CMES Council on the ground that it is ultra vires, unlawful, or an infringement of the CMES Treaty or any legal rule

445. Id.
446. Id. art. 9, 33 I.L.M. at 1077. Directives are binding only as to the results to be achieved, not as to the means to be used in achieving them. Id. art. 10, 33 I.L.M. at 1077.
447. Id. art. 10, 33 I.L.M. at 1077.
448. Id. art. 9, 33 I.L.M. at 1077.
449. Id.
450. As is also the case with directives within the context of European regional law. See HARTLEY, supra note 41, at 81-82.
452. Id. art. 20, 33 I.L.M. at 1080.
453. Id. art. 24, 33 I.L.M. at 1080.

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relating to it, or that it amounts to a misuse or abuse of power.454

If the CMES Secretary-General finds that a member has breached its obligations or infringed treaty provisions, it, too, may initiate a procedure that leads to Court decision of the case: the Secretary's findings are sent to the member country for its comment; if it fails to comment within two months or its comments are unsatisfactory, the Secretary refers the matter to the Council, which decides whether to authorize the Secretariat to refer the matter to the CMES Court or to consider the matter directly.455 If the Council opts to consider the matter itself but fails to resolve the matter, it must direct the CMES Secretariat to refer the matter to the CMES Court.456

Any resident of a member country may refer a matter to the CMES Court for a determination as to the legality of any act, regulation, directive, or decision of the CMES Council or a member country.457 If the challenged act or decision was made by a member country, however, prior exhaustion of local remedies before the judiciary of that country is required.458

At the request of the Authority, the Council, or a member country, the CMES Court may give advisory opinions on 'questions of law arising from the provisions of [the CMES Treaty] affecting the common market.'459

CMES Court decisions on the interpretation of the CMES Treaty have precedence over decisions of national courts.460 If a national court or tribunal is faced with a question concerning the application or interpretation of the CMES Treaty or the validity of CMES regulations, directives, and decisions, and the court considers decision on the matter necessary for judgment, then the national court must ask the CMES Court to provide a preliminary ruling in the question.461 In this situation, if national law provides no judicial remedy for the decision of the court, the national court must refer the matter to the CMES Court.462

The Council and member countries must take the measures re-

454. Id.
455. Id. art. 25, 33 I.L.M. at 1080.
456. Id.
457. Id. art. 26, 33 I.L.M. at 1081.
458. Id.
459. Id. art. 32, 33 I.L.M. at 1081.
460. Id. art. 29, 33 I.L.M. at 1081.
461. Id. art. 30, 33 I.L.M. at 1081.
462. Id.
required to implement a judgment of the CMES Court without delay.\footnote{463} The Court may prescribe necessary sanctions against a party that fails to implement the Court's decisions.\footnote{464} Thus, the Court has the fundamental role of ensuring the supremacy of CMES regional law over the laws of member countries and providing for its uniform interpretation and application throughout CMES. As is the case with the Andean Court, the CMES Court constitutes the pivotal component around which CMES's supranational legal structure has been erected.

The Secretariat is headed by the CMES Secretary-General, who is appointed by the Authority.\footnote{465} The Secretary-General represents CMES in the exercise of its legal personality, assists other CMES organs in performing their functions, continuously examines the functioning of CMES, and ensures that the objectives of CMES are attained.\footnote{466} To perform these functions, the Secretary-General may, on his own initiative or on the basis of a complaint, investigate any presumed breaches of the CMES Treaty, report accordingly to the CMES Council, and submit references to the CMES Court in case of treaty violations.\footnote{467}

The Consultative Committee\footnote{468} consists of representatives of the business community and other interest groups.\footnote{469} It provides a link and facilitates dialogue between the business community and other CMES interest groups and organs.\footnote{470} Among other things, the Consultative Committee is responsible for ensuring that the interests of the business community and other interest groups are taken into consideration by CMES organs.\footnote{471} It is also responsible for monitoring the implementation of the treaty provisions on Development of the Private Sector and Women in Development and Business.\footnote{472}

It should be noted that Article 171 of the CMES Treaty gives the Authority power to impose sanctions on member countries that default on their treaty obligations or whose conduct, in the Authority's opinion, is prejudicial to the attainment of the objectives of the common market.\footnote{473} This provision does not require any prior determination of

\footnotesize{\begin{tabular}{l}
463. \textit{Id.} art. 34, 33 I.L.M. at 1082. \\
464. \textit{Id.} \\
465. \textit{Id.} art. 17, 33 I.L.M. at 1079. \\
466. \textit{Id.} \\
467. \textit{Id.} \\
468. \textit{Id.} art. 18, 33 I.L.M. at 1079. \\
469. \textit{Id.} \\
470. \textit{Id.} \\
471. \textit{Id.} \\
472. \textit{Id.} \\
473. \textit{Id.} art. 171, 33 I.L.M. at 1109. \\
\end{tabular}
breach by the CMES Court before the Authority may impose sanctions. Sanctions may consist of suspension of rights under the common market, financial penalties, or suspension or expulsion from common market membership.\textsuperscript{474}

The aims and objectives of CMES are to attain sustainable growth and development of member countries by promoting “balanced and harmonious development of [CMES's] production and marketing structures”; to promote joint development in all fields of economic activity and joint adoption of macro-economic policies and programs to raise the standard of living and foster closer relations among members; to co-operate in creating an “enabling environment for foreign, cross-border, and domestic investment”; to work together in strengthening the relations between CMES and the rest of the world and adopting common positions in international fora; and to contribute toward the “establishment, progress, and realization” of the objectives of the AEC.\textsuperscript{475}

Thus it is recognized that CMES's essential objective is to implement the provisions of the AEC Treaty. CMES countries, together with the AEC and other regional economic communities, are to enter into a protocol on relations between the AEC and regional economic communities, and the provisions of the CMES Treaty are to be implemented with due consideration for the provisions of the AEC Treaty.\textsuperscript{476} Ultimately, CMES is to be converted into an “organic entity” of the AEC.\textsuperscript{477} Creation of an Economic Community for Eastern and Southern Africa is also an objective.\textsuperscript{478} The transition from CMES to an Economic Community is conditional upon finding that CMES's objectives have been substantially attained and that the obligations of CMES member countries have been fulfilled.\textsuperscript{479}

Article 4 of the CMES Treaty sets out the specific undertakings of CMES countries for achieving the aims and objectives of the common market.\textsuperscript{480} In the field of trade liberalization and customs co-operation, members commit to establish a customs union, abolish non-tariff barriers among members, adopt a common external tariff, establish rules of origin, and “recognize the unique situation of Lesotho,
Namibia, and Swaziland within the context of” CMES and grant them temporary exemptions from the full application of certain CMES Treaty provisions.\textsuperscript{481}

Within a transitional period of ten years, a customs union among member countries is to be established.\textsuperscript{482} By the year 2000, member countries shall have eliminated customs duties and other charges of equivalent effect on goods eligible for CMES treatment.\textsuperscript{483} Within this period, member countries may not impose new duties or taxes or increase existing ones on products traded within CMES.\textsuperscript{484} A member country is permitted to protect infant industries if it demonstrates that it has taken all reasonable steps to overcome difficulties related to the industry: for a limited time specified by the Council, the country may impose non-discriminatory quantitative or similar restrictions on associated goods from other countries.\textsuperscript{485}

The CMES Treaty prohibits dumping,\textsuperscript{486} condemns subsidies that in any form distort or threaten to distort competition by favoring certain undertakings or the production of certain goods, and permits the adoption of countervailing duties to neutralize such practices.\textsuperscript{487} More generally, it prohibits any practice that “negates the objective of free and liberalized trade.”\textsuperscript{488} Members agree to prohibit any business agreement or concerted practice that has as its objective or effect the prevention, restriction, or distortion of competition within CMES.\textsuperscript{489} Nevertheless, the CMES Council may grant an exemption in cases where an agreement, decision, or concerted practice “improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers [to receive] a fair share of the benefits.”\textsuperscript{490} The CMES Council is charged with regulating competition within member countries.\textsuperscript{491}

Member countries also agree to accord each other most-favored-nation treatment.\textsuperscript{492} However, nothing in the CMES Treaty prevents a

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{481} Id.
  \item \textsuperscript{482} Id. art. 45, 33 I.L.M. at 1082.
  \item \textsuperscript{483} Id. art. 46, 33 I.L.M. at 1082.
  \item \textsuperscript{484} Id.
  \item \textsuperscript{485} Id. art. 49, 33 I.L.M. at 1083.
  \item \textsuperscript{486} Id. art. 51, 33 I.L.M. at 1083.
  \item \textsuperscript{487} Id. art. 52, 33 I.L.M. at 1084.
  \item \textsuperscript{488} Id. art. 55, 33 I.L.M. at 1084.
  \item \textsuperscript{489} Id.
  \item \textsuperscript{490} Id.
  \item \textsuperscript{491} Id.
  \item \textsuperscript{492} Id. art. 56, 33 I.L.M. at 1084.
\end{itemize}
\end{footnotesize}
member country from maintaining or entering new preferential agreements with third countries as long as they do not impede or frustrate the objectives of the CMES Treaty. Any advantage, concession, privilege, or favor granted to a third party must be extended to member countries on a reciprocal basis. Member countries may enter new preferential agreements among themselves that aim at achieving CMES objectives, provided that any preferential treatment thereunder is extended, on a reciprocal and non-discriminatory basis, to all member countries. Member countries also commit to national treatment for other members: they may not enact legislation or apply administrative measures directly or indirectly discriminating against the same or like products of other member countries.

Member countries undertake various measures to promote trade within CMES. Members commit to (1) ensure the development and dissemination of market intelligence and trade information, spreading knowledge of intra-CMES trade opportunities and encouraging the development of exports and markets to meet public and private procurement needs; (2) encourage supply and demand surveys, organization of buyers and sellers meetings, and other multi-country promotion events “to further identify and exploit the potential” of intra-CMES trade; (3) remove measures that restrict the flow of goods and services to their markets; (4) identify possibilities for product adaptation and diversification to broaden their export base; and (5) improve services related to trade, such as export financing, quality control and standardization, packaging and specification aspects, warehousing, and storage operations to increase the flow of goods within CMES. The common external tariff for all goods imported from third countries shall be established within a ten-year period in accordance with a schedule to be adopted by the CMES Council.

In the field of industry and energy, member countries agree to create an “enabling environment” for the participation of the private sector.
in CMES economic development and co-operation,\(^499\) to provide a stable and secure investment climate for national and foreign investors, and to ensure the increased participation of the private sector in project development, promotion, and implementation.\(^500\) Cooperation in this area is aimed at promoting self-sustained and balanced growth, increasing the availability of goods for intra-CMES trade, improving the competitiveness of the industrial sector, and developing industrialists who will acquire ownership and management of industries.\(^501\) Members' industrial strategies are to work toward promoting linkages among industries through specialization and complementarity, "paying due regard to comparative advantage in order to enhance the spread effects on industrial growth and to facilitate the transfer of technology."\(^502\) In addition, member countries must promote and encourage the establishment of multinational industrial enterprises to further CMES's industrial development objectives.\(^503\)

In the field of monetary affairs and finance, member countries shall cooperate to gradually establish convertibility of their currencies and develop a payment union as a basis for the eventual establishment of a monetary union.\(^504\) Until a common central bank is created, member countries agree to settle all payments for all transactions in goods and services conducted within CMES through a clearinghouse.\(^505\) All CMES books of account and monetary instruments are to be denominated in the unit of account created by CMES, the Eastern and Southern Africa Currency Unit (ESACU).\(^506\)

Member countries also agree to adopt collective measures, in accordance with a monetary harmonization program, such as (1) removing all exchange restrictions on import and exports within CMES; (2) making adjustments in their exchange rates toward free market rates; (3) adjusting their fiscal policies and domestic credit to the government and private sector to ensure monetary stability and sustained economic growth; (4) liberalizing their financial sectors by freeing and deregulating interest rates; and (5) harmonizing their tax policies to remove tax distortions affecting commodity and factor movements to

\(^{499}\) Id. art. 4(3), 33 I.L.M. at 1075.
\(^{500}\) Id. art. 100, 33 I.L.M. at 1094.
\(^{501}\) Id. art. 99, 33 I.L.M. at 1094.
\(^{502}\) Id. art. 100, 33 I.L.M. at 1094.
\(^{503}\) Id. art. 101, 33 I.L.M. at 1094.
\(^{504}\) Id. art. 4, 33 I.L.M. at 1075.
\(^{505}\) Id. art. 73, 33 I.L.M. at 1088.
\(^{506}\) Id. art. 74, 33 I.L.M. at 1088.
bring about a more efficient allocation of resources within CMES.\textsuperscript{507} Members will make their currencies convertible into each other, create an exchange rate union, and accept the immutable fixing of the exchange rates of their currencies within a band to be prescribed by the CMES Council.\textsuperscript{508}

In addition, member countries agree to harmonize their macroeconomic policies and remove obstacles to the free movement of services and capital within CMES.\textsuperscript{509} This will be done by removing controls on the transfer of capital between member countries under a timetable to be fixed by the CMES Council, by ensuring that member state residents are allowed to acquire stocks, shares, and other securities or invest in enterprises in the territories of other member countries, and by encouraging cross-border trade in government securities within CMES.\textsuperscript{510} Member countries are to jointly finance projects in each other's territory, particularly those that facilitate regional integration, and cooperate in mobilizing foreign capital for the financing of national and regional projects.\textsuperscript{511}

To support development of a region-wide capital market, member countries shall take steps to achieve wider monetization of the region's economies under a liberalized market economy.\textsuperscript{512} They shall establish national stock exchanges, an association of national stock exchanges, a common market rating system of listed companies, and an index of trading performance to facilitate the negotiation and sale of shares within and outside the common market.\textsuperscript{513} Members will also develop a region-wide network of national capital markets and support harmonized stock-trading systems, monetary instruments, and the right of residents to acquire and negotiate monetary instruments.\textsuperscript{514}

In the field of economic and social development, members will promote the accelerated development of the least-developed countries and economically depressed areas by, among other things, creating a Special Fund for Cooperation, Compensation, and Development to tackle the special problems of these areas and other disadvantages arising from the integration process.\textsuperscript{515} They also commit to cooperate

\textsuperscript{507} Id. art. 76, 33 I.L.M. at 1089.
\textsuperscript{508} Id. arts. 78-79, 33 I.L.M. at 1089.
\textsuperscript{509} Id. art. 4, 33 I.L.M. at 1075.
\textsuperscript{510} Id. art. 81, 33 I.L.M. at 1089.
\textsuperscript{511} Id. art. 82, 33 I.L.M. at 1090.
\textsuperscript{512} Id. art. 80, 33 I.L.M. at 1089.
\textsuperscript{513} Id.
\textsuperscript{514} Id.
\textsuperscript{515} Id. art. 150, 33 I.L.M. at 1105.
in the development and management of natural resources, energy, and the environment,\textsuperscript{516} including creating a more favorable investment climate to encourage public and private investment in the energy sector,\textsuperscript{517} and to harmonize or approximate their laws to the extent required for the proper functioning of CMES.\textsuperscript{518} Other areas for joint cooperation include customs, transport and communications, science and technology, agriculture and rural development, and tourism.\textsuperscript{519}

On the basis of recommendations from the CMES Secretariat, the CMES Council is to approve a program for implementing the CMES Treaty, setting objectives to be reached every two years.\textsuperscript{520} Transition from one stage of the timetable to the next is dependent on the Council finding that the relevant objectives have been substantially attained and that the corresponding obligations have been fulfilled.\textsuperscript{521} To facilitate achievement of the treaty's objectives, members grant CMES legal capacity and personality for performing its functions and give Council regulations the force of law within member territories.\textsuperscript{522}

Part of CMES's heritage from PTA is the Charter on a Regime of Multinational Industrial Enterprises (MIEs), which was signed in 1990 by Angola, Burundi, Djibouti, Kenya, Lesotho, Malawi, Mozambique, Rwanda, Somalia, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.\textsuperscript{523} The Charter has been adopted by the PTA Authority. An MIE is a form of business enterprise with limited liability that may be established in a member country.\textsuperscript{524} To be eligible to use the MIE form, at least fifty-one percent of the capital of the enterprise must represent capital contributions from two or more member states or from nationals of two or more member states.\textsuperscript{525} No contribution may individually represent more than eighty percent of the total capital.\textsuperscript{526} The capital contribution from each participating member state (or investors from

\textsuperscript{516} Id. art. 4(6), 33 I.L.M. at 1076.
\textsuperscript{517} Id. art. 106, 33 I.L.M. at 1096.
\textsuperscript{518} Id. art. 4(6), 33 I.L.M. at 1076.
\textsuperscript{519} Id. arts. 65-66, 84-98, 127, 129-137.
\textsuperscript{520} Id. art. 173, 33 I.L.M. at 1110.
\textsuperscript{521} Id.
\textsuperscript{522} Id. art. 5, 33 I.L.M. at 1076.
\textsuperscript{524} MIE Charter, supra note 523, art. 3, 30 I.L.M. at 704.
\textsuperscript{525} Id. art. 5, 30 I.L.M. at 705.
\textsuperscript{526} Id. art. 5, 30 I.L.M. at 706.
each state) must be at least ten percent of the equity capital of the enterprise.\textsuperscript{527} Finally, the activities of the enterprise must involve undertaking specific projects in economic sectors falling within the scope of the Charter.\textsuperscript{528}

An MIE and the country in which it is established enter into a performance agreement specifying the benefits, guarantees, and obligations of the MIE, as well as the sanctions that will be imposed in case of infringement.\textsuperscript{529} The performance obligations include a program for gradually increasing the local value added to the products manufactured by MIEs, a program of exports, and a training program.\textsuperscript{530} MIE obligations also include producing goods of acceptable quality at competitive prices, assuring a minimum supply, and refraining from restrictive business practices that negatively affect the acquisition and transfer of technology and the competitiveness of other enterprises owned by nationals of member countries.\textsuperscript{531} The benefits an MIE receives include (1) free transfer of contributions by nationals of member countries to the MIE's country of establishment to pay for shares in the MIE; (2) the right to transfer profits from branches or subsidiaries to the country of establishment; (3) the right to remit royalties and other payments for the use of foreign technology; (4) the right to remit funds for the repayment of intra-company advances and loans from third parties; (5) the right to remit dividends to shareholders located outside the country of establishment; (6) exemption from import duties on capital equipment; (7) exemption from income tax in any member country for a period of five years after the date the MIE first derives income from its operations; (8) the right to receive domestic licenses and permits on an equal basis with local companies; (9) the right to receive the same treatment as local companies with respect to access to local credit and government procurement programs; (10) preferential tariff and non-tariff treatment in member countries for the MIE's products; and (11) a guarantee of compensation in accordance with generally accepted principles of international law when an MIE or its subsidiary or branch is expropriated or nationalized.\textsuperscript{532}

The Charter also introduces a special development tax for the

\begin{itemize}
\item \textsuperscript{527} Id.
\item \textsuperscript{528} Id.
\item \textsuperscript{529} Id. art. 12, 30 I.L.M. at 710.
\item \textsuperscript{530} Id. art. 17, 30 I.L.M. at 715.
\item \textsuperscript{531} Id.
\item \textsuperscript{532} Id. arts. 15–16, 30 I.L.M. at 712–15.
\end{itemize}
benefit of the less developed countries of the area. MIE branches or subsidiaries located in more developed PTA member countries that have derived income for at least five years are required to pay an annual tax equal to one percent of the preceding fiscal year's gross revenue. These tax proceeds are allocated to the less developed PTA countries.

Another important regional effort undertaken so far by francophone African countries, but open to the rest of Africa and even to non-African countries invited to join by common agreement of member countries, is the Treaty for the Harmonisation of Business Law in Africa (HBLA Treaty). The purpose of this treaty is to foster and create incentives for private business initiative by introducing a modern and predictable business law framework uniformly into member countries, accompanied by methods of dispute resolution ensuring the resolution of business disputes arising therefrom under conditions of expediency, fairness, and predictability. To this effect, the HBLA Treaty creates an Organization for the Harmonization of Business Law in Africa (OHBLA), comprising a Council of Ministers (CM) (composed of the Justice and Finance ministers of each member) and a Common Court of Justice and Arbitration (OHBLA Court) (composed of seven nationals of member countries elected by the CM).

Uniform acts on business law for all HBLA Treaty countries are adopted by the CM after consultation with member countries and the OHBLA Court. Uniform acts are directly applicable and enforceable in member countries irrespective of any prior or future contrary or incompatible municipal law provisions of the member countries. The OHBLA Court is a cassation court with the power to pronounce itself on all decisions rendered by courts of appeal of the member countries concerning application of uniform acts passed within the context of the Treaty, as well as on any decisions not subject to appeal rendered by any judicial authority of the member countries on such
Decisions of the OHBLA Court are assimilated to final decisions of the courts of member countries, have *res judicata* effect, and are directly and automatically enforceable in all member countries without need to resort to *exequatur* proceedings.\(^{541}\)

In addition, the OHBLA Court administers a commercial arbitration system that is applicable to transactions having at least one party domiciled or having his habitual residence in a member country or to be performed in full or in part in a member country if the parties have introduced an arbitration provision referring the resolution of disputes to this system. The OHBLA Court does not decide itself arbitral references within the OHBLA Court commercial arbitration system. Its functions are essentially limited to confirming or appointing arbitrators and scrutinizing arbitral awards rendered by arbitral tribunals constituted within the context of the OHBLA system.\(^{542}\) Arbitral awards rendered by such tribunals are final and have *res judicata* effects as court decisions of member countries.\(^{543}\)

C. General Assessment of Recent African International Economic Integration Schemes

With the exception of CMES, the African economic cooperation and integration programs created recently rely heavily on state action and import-substitution policies to develop the economies of participating states. The programs now being considered all create supranational organs with executive and legislative decision-making powers, and in some cases the decisions of these organs are immediately binding on member countries. Yet, like the Andean Pact, which is the inspiration for many of these schemes, the decisions of supranational organs under the new African programs almost invariably require consensus, or else a two-thirds majority vote, thus reducing the autonomy of these organs and inviting interference by national sovereigns. But the fact that, in the absence of consensus, a two-thirds vote is sufficient suggests embryonic efforts to reduce the possibility that collective action by supranational organs will be barred by unilateral vetoes.

This trend toward greater autonomy for supranational organs is confirmed by the fact that violations of international agreements or of the legal framework of the African integration programs are treated as

\(^{540}\) *Id.* art. 14.
\(^{541}\) *Id.* art. 20.
\(^{542}\) *Id.* art. 21.
\(^{543}\) *Id.* art. 25.
public international law violations. In cases involving violation of the AEC legal framework, the AEC Treaty provides that the Assembly may take action by consensus (or, failing that, by two-thirds vote).\textsuperscript{544} However, it has been contended that the Assembly should refer decision to the AEC Court if the case involves violation of the treaty by a member country or a claim that an AEC organ has acted \textit{ultra vires} or in abuse of its powers.\textsuperscript{545} In other cases, the Assembly may apply sanctions without a full adjudication before the AEC Court (though an advisory opinion from the Court is needed).\textsuperscript{546} In the case of CMES, the power granted to the Authority to sanction member countries for breach of integration obligations is put in such strong and unqualified terms that it does not seem to require a prior advisory opinion from the CMES Court that a violation has occurred. Such a provision might impose important limitations on the unilateral exercise of members' sovereign powers were it not for the fact that decisions of the CMES Authority (including sanctions imposed under Article 171) may be adopted only by consensus.

Dispute settlement entrusted to supranational organs plays a central role in the African international economic schemes at issue and thus may play an important role, if political and economic circumstances permit, in curtailing or dissuading unilateral sovereign action that is incompatible with the schemes' objectives. Nevertheless, technical problems—such as the requirement that private parties exhaust local remedies before the courts of the country whose actions are complained of before filing claims with the CMES Court, or the fact that the intervention permitted to the Council introduces chicanery and procrastination into the process for referral of claims against members from the Secretariat to the Court—may cast shadows on the real impact these organs will have in implementing community law and in overcoming member actions that conflict with community law.

It also remains to be seen if other less politicized initiatives, like the attempt to unify business law undertaken within the context of the HBLA Treaty, are likely to introduce a higher level of supranationality into the law-making and law-enforcing processes in Africa, leading to a reduction in unilateral sovereign interference in such fields. The presence of a supranational court (the OHBLA Court) should certainly

\textsuperscript{544} See supra text accompanying notes 370–71.
\textsuperscript{545} See Thompson, supra note 344, at 764.
\textsuperscript{546} Id.
play an extremely positive role in preventing local or parochial distortions in the interpretation and application of business law uniformly introduced within the context of the HBLA Treaty. HBLA Treaty uniform acts and the action of the OHBLA Court may rapidly acquire substantial macroeconomic importance for member countries, especially if uniform acts in tune with market policies multiply and extend to the different areas of economic and business activity with the aim of expanding private ordering in those fields. However, it seems premature to make any substantiated predictions in this respect at the present early stage of evolution of HBLA Treaty initiatives.

The presence in African regional cooperation schemes of adjudicatory institutions like the CMES Court does, nevertheless, reveal political resolve to treat the uniform interpretation of regional law as supreme over inconsistent or conflicting laws and regulations of member countries. Such institutions are evidence of the prevailing trend in recent African regional economic cooperation programs toward limiting national sovereign powers by delegating important legislative and decision-making powers to regional bodies.

CMES is clearly taking the lead in reducing state sovereign intervention in the regulation of the economies of participating states. It has led by favoring private ordering, carrying out cooperation and integration efforts in tune with open regionalism, directly inserting member economies into the world economy (within the context of GATT), and enhancing the role of supranational dispute resolution bodies. However, one should not overlook the AEC and its attempts to reach a modus vivendi with new globalization trends; AEC treaty provisions regarding trade liberalization stand in contrast to other AEC Treaty provisions, which favor local production.547

Most recent African economic cooperation and integration programs incorporate supranational courts charged with interpreting and applying the regional law framework through decisions that are binding on the member countries. The effectiveness of the dispute settlement bodies associated with these programs will depend on the inclination of member states (and, in the case of CMES, of their citizens) to resort to these courts to have their disputes resolved and to comply with the decisions. Like the other economic cooperation or integration schemes considered already, the degree to which these supranational decision-making bodies and dispute resolution bodies are able to carve

547. The promotion of trade, including trade in goods not produced locally, and the free movement of persons, rights of residence and establishment, are notably present in Chapters V through XI of the AEC Treaty. See Senghor, supra note 344, at 193.
out a decision-making sphere of their own—preempting, within limits, sovereign member actions—will depend on whether they become the accepted and necessary vehicle for reciprocal interaction, exchange of ideas, negotiations among member countries, and rendering even-handed and high-quality adjudicative decisions that legitimate the economic cooperation and integration process. These bodies will gain effective supranational presence to the extent that they become irreplaceable for achieving the objectives of economic cooperation and integration. The actual enforceability of their decisions will depend on a variety of different economic and political variables, including the importance and dynamics of market forces in today’s world economy,\(^\text{548}\) the real economic power of the participating states, and the political variables they face. The goals of the integration program, its legal mechanisms, and general strategies must be adapted to seek what is economically and politically feasible.\(^\text{549}\) Such strategies should include consistent action for achieving the convergence and harmonization of overlapping economic cooperation schemes in Africa and minimizing any risks of conflict between the determinations of the different jurisdictional organs already existing or being put in place in this continent.\(^\text{550}\)

V. NAFTA: Dispute Settlement Mechanisms

NAFTA is a good example of an open regionalism program. NAFTA creates minimum interference with the external economic policies of member countries, there is no delegation of sovereign powers to executive or legislative supranational organs, it provides ample room for private ordering of business circles, and it creates an ambitious free trade area. The free trade area is not limited to trading of goods; it also includes an original dispute resolution mechanism that requires a certain level of delegation of sovereign powers to international panels or arbitration tribunals. Only this last aspect of NAFTA will be addressed in this Article. A brief description of NAFTA’s dispute resolution mechanisms under Chapters 11, 19, and 20 will demonstrate the limitations placed on member states’ sovereign powers or competencies.\(^\text{551}\)

\(^{548}\) See Kiplagat, supra note 27, at 68.


\(^{551}\) See generally Gary N. Horlick & F. Amanda DeBusk, Dispute Resolution Under NAFTA, J. 1996]
A. **Chapter 11**

Chapter 11 covers investment within NAFTA and addresses, among other things, claims brought by an investor of one member country against another member country. It entrusts the resolution of such disputes to international arbitration under either the UNCITRAL Arbitration Rules or the World Bank Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). If only one of the member countries involved in the dispute is a party to the ICSID Convention or if the dispute does not fall within the purview of the Convention, arbitration under the rules of ICSID's Additional Facility is also permitted.

By signing NAFTA, members submit to the jurisdiction of Chapter 11 panels and agree to arbitrate claims filed by investors from other member countries that satisfy Chapter 11. This consent serves as the consent to arbitration required by the ICSID Convention, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the 1975 Inter-American Convention on International Commercial Arbitration. National courts are excluded from deciding disputes that fall within the scope of these agreements. Enforceability of Chapter 11 arbitral awards in national courts is ensured by the requirement that all arbitral tribunals sit in a country that has ratified the New York Convention and by specifying that the

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553. NAFTA, supra note 18, art. 1120, 32 I.L.M. at 643.

554. Id. In cases where multiple arbitral proceedings are consolidated under Article 1126, the sole intervening arbitral tribunal resulting from consolidation shall be governed by, and ensuing arbitral proceedings shall be exclusively conducted according to, the UNCITRAL Arbitration Rules. Id. art. 1126(1), 32 I.L.M. at 644.

555. Id. art. 1122, 32 I.L.M. at 644.

556. Id.

557. Id. art. 1130, 32 I.L.M. at 645.
award qualifies as a New York, Panama, or ICSID Convention award (whichever applies) for purposes of recognition and enforcement.  

Initiation of arbitration by the private investor must satisfy the prerequisites of Chapter 11: failure to resolve the dispute within six months; ninety-day advance notice to the other party of the intention to commence arbitration; and filing of the claim within three years after the cause of action came into existence or was first known to the claimant. The private investor’s choice of the arbitral option precludes national courts or authorities from deciding the dispute. State courts may be used, however, to seek injunctive relief or enforcement of interim protective measures dictated by the arbitral panel for preservation of the rights of the disputing party, evidence, or the tribunal’s jurisdiction. A state court may not order the defendant state to discontinue the actions or withdraw the measures alleged to be in breach of Chapter 11. This role for state courts is aimed at limiting the powers of the arbitral tribunal to impose restrictions on the exercise of sovereign rights by the host member country. This same goal is reflected in Article 1135, which allows damage compensation in lieu of specific performance when a sovereign state has been found in breach of its obligations under Chapter 11.  

The level of exclusion of state courts from deciding Chapter 11 disputes reflects the matters that may be arbitrated under Chapter 11. The chapter covers both direct and indirect investments. A special provision takes care of the “Barcelona Traction syndrome,” permit-

558. Id. art. 1136, 32 I.L.M. at 646.
559. Id. art. 1116, 32 I.L.M. at 642–43. This may be contrasted with the broad powers granted to arbitral tribunals under MERCOSUR’s Brasilia Protocol to order interim measures of protection. See supra text accompanying notes 141–42.
560. Id. art. 1121, 32 I.L.M. at 643.
561. Id. arts. 1121, 1134, 32 I.L.M. at 643, 646.
562. Id. art. 1134, 32 I.L.M. at 646.
563. Id. art. 1135, 32 I.L.M. at 646.
564. Indirect investments would be shareholdings or interests of investors from one member country in companies or enterprises of another member country.
565. See Barcelona Traction, Light and Power Co. (Belgium v. Spain), 1970 I.C.J. 4 (Feb. 5). In this case before the International Court of Justice, Belgium was denied legal standing to pursue a claim against Spain on the basis of actions taken by the Spanish government affecting investments in Spain by a company incorporated in Canada but controlled by Belgian shareholders. Id. at 7. Accordingly, only the Canadian government would be entitled to pursue an international claim against Spain on the basis of grievances inflicted on a Canadian company. From this case, some have concluded that in such a scenario, only the Canadian company would be able to pursue claims related to its assets arising from governmental interference by the host country, not the shareholders of such company. See John B. Houck, Restatement of the Foreign
ting investors who own shares or interests in companies or enterprises in the host country to file a claim with a NAFTA Chapter 11 arbitral tribunal to obtain compensation for damages suffered as a result of a taking by the host country. However, the range of investments covered and protected by NAFTA Chapter 11 is narrower than that contemplated in the bilateral investment treaties that have served as its model (e.g., the Argentina-U.S. Bilateral Investment Treaty). For instance, disputes arising out of loans or debt securities with a maturity of less than three years are excluded unless they are loans between affiliated companies or enterprises. Loans to state enterprises and credit obligations related to international sales or trade financing are also excluded. In all cases, domestic governmental measures that increase a debtor's costs, causing the debtor to default on loan obligations incurred vis-à-vis a creditor from another member country, are not considered takings. Therefore, international arbitration is not available for such a claim.

In an arbitral proceeding under Chapter 11, a state party facing a claim relating to financial services covered by Chapter 14 may raise the defense that the measures it has taken do not constitute a violation of foreign investment and investor guarantees because they are permitted under NAFTA Article 1410. If this happens, the Chapter 11 tribunal must defer decision on whether the actions are so excused to the Financial Services Committee established under Chapter 14 if so requested by the defendant. The decision of the Committee on whether there is a valid exception under Article 1410 is final and binding on the arbitral tribunal. If the Committee does not decide the issue within sixty days, either party may request that an arbitral panel constituted under NAFTA Chapter 20 decide the issue; its


566. NAFTA, supra note 18, art. 1117, 32 I.L.M. at 643.
568. NAFTA, supra note 18, art. 1139, 32 I.L.M. at 647-48.
569. Id.
570. Id. art. 1110, 32 I.L.M. at 641-42.
571. The exception is for reasonable measures adopted by the host member state for the protection of investors, depositors, financial market participants, policy-holders, etc.; for the maintenance of the soundness, safety, integrity, or financial responsibility of financial institutions or cross-border financial service providers; or for ensuring the stability of a member country's financial system. Id. art. 1410, 32 I.L.M. at 659.
572. Id. art. 1415, 32 I.L.M. at 661.
573. Id.
decision is binding on the Chapter 11 tribunal. If the intervention of a NAFTA Chapter 20 arbitral panel is not requested within ten days after the expiration of this sixty-day period, the issue is decided by the NAFTA Chapter 11 arbitral tribunal.

To be considered a national investor of a member country, and thus receive NAFTA Chapter 11 protection, a company must be incorporated in a member country. If a company is controlled by non-member investors and does not carry on substantial business activities in the member country of incorporation, it is not considered a national investor of a member country. A company is also excluded from Chapter 11 protection if it is controlled by persons from a non-party country that does not have diplomatic relations with the member country against whom protection is sought or if such member country has adopted measures prohibiting transactions with enterprises of the investor’s non-party country or measures that would be circumvented if Chapter 11 benefits were accorded to the company.

There are other aspects of international arbitral proceedings under NAFTA Chapter 11 that are extremely relevant to establishing the true dimension of the sovereign powers delegated to NAFTA Chapter 11 arbitral tribunals. First, if a party to a Chapter 11 arbitral proceeding raises the defense that the state measures being contested fall within the scope of authorized exceptions or reservations set out in the Annexes to Chapter 11 (thus requiring interpretation of NAFTA), the issue must be deferred to the NAFTA Free Trade Commission (FTC) under Chapter 20. Unlike Chapter 11 tribunals, the FTC may not make determinations enforceable before national courts. If the FTC fails to make a determination on the issue within sixty days, the tribunal will decide the issue. In general, FTC interpretations of NAFTA provisions are binding on Chapter 11 arbitral tribunals.

Second, though NAFTA Chapter 11 arbitral tribunals may grant specific performance or restitution as a remedy for government expropriation, the defendant state may discharge its obligations thereunder.

574. Id.
575. Id.
576. Id. art. 11, 32 I.L.M. at 647.
577. Id. art. 11, 32 I.L.M. at 642.
578. Id.
579. Id. art. 11, 32 I.L.M. at 645.
580. Id.
581. Id. art. 11, 32 I.L.M. at 645.
by paying damage compensation.\textsuperscript{582} This provision takes into account the belief of developing countries that international tribunals granting specific performance orders against developing countries would infringe upon their national sovereignty. A specific performance order would require in many cases the withdrawal or modification of national legislation or state action taken in the national interest through the exercise of sovereign powers.

Third, should a member state fail to comply with a NAFTA Chapter 11 arbitral award, the member state of the private claimant may resort to international state-party arbitration to determine if failure to enforce the award constitutes an infringement of the recalcitrant state's obligations under Chapter 11 and to seek a recommendation that the recalcitrant state comply with the award.\textsuperscript{583} An award adverse to a state's position would create a responsibility under public international law and thus permit recourse to public international law sanctions such as retaliatory action against the state or the suspension of NAFTA benefits pursuant to NAFTA Chapter 20.

Fourth, Chapter 11 arbitration panels decide the merits of a dispute based on NAFTA provisions and public international law.\textsuperscript{584} Consequently, the host state's domestic laws are not applied if they are incompatible with NAFTA or international law, giving rise to a further detachment of Chapter 11 arbitration procedures from the influence of the sovereign powers of members.

Fifth, NAFTA Chapter 11 arbitral awards are not immediately enforceable or recognizable. An unchallenged ICSID panel award will not be enforced until 120 days after it is rendered; if a disputing party has requested revision or annulment of the award, it will not be enforced until such proceedings are completed.\textsuperscript{585} An unchallenged award under the ICSID Additional Facility Rules or UNCITRAL Arbitration Rules will not be enforced until three months after it is rendered (or, again, until appeal proceedings are completed).\textsuperscript{586} This delay, which clearly favors the host country, is not commanded by general arbitral practice or present in other international agreements on commercial or foreign investment arbitration.

\textsuperscript{582} Id. art. 1135, 32 I.L.M. at 646.
\textsuperscript{583} Id. art. 1136(5), 32 I.L.M. at 646.
\textsuperscript{584} Id. art. 1131, 32 I.L.M. at 645.
\textsuperscript{585} Id. art. 1136(3), 32 I.L.M. at 646.
\textsuperscript{586} Id.
B. Chapter 19

NAFTA Chapter 19 provides dispute resolution mechanisms for antidumping and countervailing duty cases.\(^{587}\) It recognizes the right of each member country to apply its antidumping and countervailing duty legislation to goods imported from another member country.\(^{588}\) Chapter 19 permits parties to request two forms of action from binational panels: (1) a declaratory opinion stating whether another party's amendment to its antidumping or countervailing duty statute conforms with NAFTA and GATT;\(^ {589}\) or (2) a determination whether a final antidumping or countervailing duty recommendation of a member's investigating authority is in agreement with the member's domestic legislation on the topic.\(^ {590}\)

If a declaratory opinion is issued by a Chapter 19 panel recommending modifications to an amending statute, there is a ninety-day consultation period, designed to encourage the parties to achieve a mutually satisfactory solution.\(^ {591}\) An additional nine-month period follows; if the breaching state does not pass correcting legislation to remedy the treaty violations within that period, the other state party is entitled to retaliate by taking comparable executive or legislative action or to terminate NAFTA vis-à-vis the infringing party.\(^ {592}\)

Chapter 19 panels that make determinations on domestic legislative recommendations are unique in several ways. First, the binational panel review system replaces domestic judicial review of final antidumping or countervailing duty determinations.\(^ {593}\) Second, while establishment of a panel and panel review must be requested by a member country, a country is required to make such a request when desired by a private party otherwise entitled under domestic legislation to judicial review of its complaint.\(^ {594}\) The private party and the administrative


\(^{588}\) NAFTA, supra note 18, art. 1902, 32 I.L.M. at 682.

\(^{589}\) Id. arts. 1902–1903, 32 I.L.M. at 682–83.

\(^{590}\) Id. art. 1904, 32 I.L.M. at 683–84.

\(^{591}\) Id. art. 1903(3), 32 I.L.M. at 682–83.

\(^{592}\) Id.

\(^{593}\) Id. art. 1904(1), 32 I.L.M. at 683.

\(^{594}\) Id. art. 1904(5), 32 I.L.M. at 683.
authority whose decision is being questioned are also parties to the panel proceedings and may invoke the extraordinary challenge procedure available under Chapter 19. Third, panel review must be requested within thirty days following the challenged determination’s publication in an official journal of the member country. If the establishment of a Chapter 19 panel is requested within this period, prior exhaustion of local remedies is not needed. Moreover, a determination being reviewed by a Chapter 19 panel may not be reviewed by the judiciary of the country whose administrative authority is being challenged. Consequently, if a member country has requested the establishment of a panel, a private party is precluded from attacking a final determination before the courts of that country. Fourth, Chapter 19 panels are required to adopt the standard of review that would be used by a court sitting in the member country. Accordingly, the scope and depth of panel review is determined by the member country’s legal system and is not based on uniform standards applicable to all member countries. Finally, Chapter 19 panel determinations are binding on the involved member countries.

The intervening panel may either uphold the local administrative authority’s determination or remand it to the authority for action in compliance with the panel’s determination within a reasonable time. Panel proceedings should result in a final decision within a period of 315 days.

Panels are composed of five members selected from a roster that contains at least seventy-five names; two are chosen by each party (after consultation with the other party) and a fifth is chosen jointly. Each member names twenty-five people for the roster, all of whom must be nationals of one of the member countries. Roster members may not be affiliated with or take instructions from any member country.

595. Id. art. 1904(7), 32 I.L.M. at 683.
596. Id. art. 1904(13), 32 I.L.M. at 683.
597. Id. art. 1904(4), 32 I.L.M. at 683.
598. Id. art. 1904(11), 32 I.L.M. at 684. Chapter 19 panel decisions are also not subject to appeal in national courts. Id.
599. Id. art. 1904(3), 32 I.L.M. at 683.
600. The relevant standard of review for each NAFTA country is set out in Annex 1911.
601. NAFTA, supra note 18, art. 1904(9), 32 I.L.M. at 683.
602. Id. art. 1904(8), 32 I.L.M. at 683.
603. Id. art. 1904(14), 32 I.L.M. at 684.
605. Id.
606. Id.
the fullest extent practicable,” the roster should include judges or former judges. Members must name their panelists for a given dispute within thirty days after a party has requested a panel. Up to four panelists proposed by any one of the parties may be peremptorily challenged by the other parties within a forty-five-day period. If a party fails to appoint its panelists in time, they will be selected by lot from the roster members appointed by that party. Within fifty-five days after the establishment of the panel, the parties must appoint the fifth panelist; if the parties are unable to agree on the selection of the fifth panelist, then one party will be chosen by lot to make the appointment. However, that party will not be able to select a panelist that has been peremptorily challenged. The panelists then choose the chairman by majority vote; if no one garners a majority vote, the chairman is appointed by lot from among members of the panel.

Under the extraordinary challenge procedures, a party may contest a Chapter 19 panel determination before a challenge committee. The challenge committee is composed of three members selected by the parties from a roster of fifteen persons, with preference again given to former judges. The committee must decide the dispute within ninety days after the establishment of the panel. This challenge procedure is only available if a party claims that (1) a panel member is guilty of gross misconduct, is biased, or has a serious conflict of interest; (2) the panel seriously departed from a fundamental rule of procedure; or (3) the panel seriously exceeded its powers, authority, or jurisdiction (e.g., by failing to apply the appropriate standard of review) and this flaw materially affected the panel’s decision and threatened the integrity of the binational panel review process. The challenge committee examines the legal and factual analysis underlying the findings and conclusions of the panel to determine if any of the grounds for review under Article 1904.13 have been established.

607. Id.
608. Id.
609. Id.
610. Id.
611. Id.
612. Id.
614. The U.S.-appointed members of the roster for the challenge committee are current or former federal judges. Id.
615. Id.
616. Id. art. 1904(13), 32 I.L.M. at 683.
This review mechanism is an exceptional one. It is not a regular appeal proceeding for revising Chapter 19 panel determinations on the merits or on the basis of procedural defects.

Article 1905 contains provisions for safeguarding the Chapter 19 panel review system. The provisions apply when a party alleges that the application of another party's domestic law has (1) prevented the establishment of a panel requested by the complaining party; (2) prevented the panel from rendering its final decision; (3) prevented the implementation of a decision made by a panel requested by the complaining party or denied the decision binding force and effect; or (4) resulted in a failure to provide an opportunity for meaningful review of a final determination by a panel or court of competent jurisdiction. To be meaningful, review must be independent of the investigating authority, examine the basis for the investigating authority's determination and whether the authority properly applied domestic antidumping and countervailing duty law in reaching the challenged determination, and employ the adequate standard of review under Article 1911.

The safeguarding provisions first call for consultations, and then, if the matter cannot be resolved through consultations within forty-five days, a special committee will be established in accordance with the rules for extraordinary challenge committees under Annex 1904. If the committee makes an affirmative finding regarding any of the grounds listed above, binational panel or extraordinary challenge committee review is stayed, and the parties will attempt, through new consultations, to reach a mutually satisfactory solution. If no solution is reached within sixty days, or if the party complained against has not demonstrated to the satisfaction of the committee that it has corrected the problems that the committee found, then the complaining party may either suspend application of appropriate benefits to the other party or suspend the operation of Article 1904 with respect to the other party.

If Article 1904 is suspended, the binational panel or extraordinary challenge committee review that had been stayed as a result of the affirmative finding is terminated. In addition, if the review was

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618. Id. art. 1905, 32 I.L.M. at 684.
619. Id. art. 1905(1), 32 I.L.M. at 684.
620. Id.
621. Id. art. 1905(2)–(5), 32 I.L.M. at 684.
622. Id. art. 1905(7), 32 I.L.M. at 684.
623. Id. art. 1905(8), 32 I.L.M. at 684–85.
624. Id. art. 1905(12), 32 I.L.M. at 685.
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requested by the complained against party, then either party (or a party to the panel review) may request that the challenge to the final determination of the local authority be referred—irrevocably—to the appropriate domestic court for decision. If the review was requested by the complaining party, then only the complaining party (or a party to the panel review from the complaining party's state) may request this referral.

C. Chapter 20

Chapter 20 provides procedures for avoiding or settling disputes in cases involving interpretation or application of NAFTA and in cases where a party contends that another's actual or proposed measure is inconsistent with NAFTA or would cause nullification or impairment of benefits derived from NAFTA (i.e., "non-violation infringements"). With certain limitations, all disputes arising under NAFTA not falling under Chapters 11 or 19 are to be settled under Chapter 20 procedures. Thus, disputes related to the environment, health, sanitary and phytosanitary standards, intellectual property, and financial services may be excluded from unilateral sovereign determination to the extent they are covered by NAFTA provisions. In this respect, NAFTA limits sovereign rights to a not insignificant degree. In general, disputes arising under both GATT and NAFTA may be settled in either forum at the choice of the complaining party. Chapter 20 disputes that cannot be resolved through consultation

625. *Id.*

626. *Id.*

627. *Id.* art. 2004, 32 I.L.M. at 694.

628. *Id.* art. 2001, 32 I.L.M. at 693. Article 2021 clearly establishes that "no party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement." *Id.* art. 2021, 32 I.L.M. at 698. Thus, such disputes may be decided only under Chapter 20 procedures. However, there is no mechanism to ensure the supremacy of FTC determinations over the laws, courts, or authorities of member countries (though a member is permitted to consult the FTC on NAFTA interpretation, either on its own initiative or prompted by a request of its courts or administrative bodies, in accordance with the rules of the forum). *Id.* art. 2020, 32 I.L.M. at 698. This can be contrasted with the preliminary ruling mechanism of the Andean Court and the right of private parties to sue Andean Pact countries before domestic courts in cases of violation of Andean pact regional law. *See supra* text accompanying notes 259, 273-76.

629. *Id.* art. 2005(1), 32 I.L.M. at 694.
between the parties\textsuperscript{630} are referred to NAFTA's Free Trade Commission, which will attempt to help the parties reach a mutually satisfactory resolution.\textsuperscript{631} The FTC is composed of cabinet-level representatives from member countries.\textsuperscript{632} If the FTC is unable to resolve the dispute within thirty days or any other period agreed to by the parties, the dispute may be submitted at the request of either party to an arbitral panel established by the FTC.\textsuperscript{633} Requests for consultation or dispute settlement are also communicated to the third non-disputing NAFTA party.\textsuperscript{634} Any party believing it has a substantial interest in the controverted matter is entitled to join the proceedings as a complaining party or otherwise participate.\textsuperscript{635}

FTC arbitral panels have five members, chosen from a roster of up to thirty people.\textsuperscript{636} Roster members are appointed by consensus and must be independent of any party.\textsuperscript{637} Each party to a dispute selects two panelists, who must be citizens of the other party.\textsuperscript{638} If a party fails to select its panelists, the appointment is made by lot from the roster members of the other party's nationality.\textsuperscript{639} The disputing parties agree on the panel chair; if they cannot agree, one party will be chosen by lot to select a chairman, who must not be a citizen of that party.\textsuperscript{640}

The arbitral panel shall present the parties with an initial report containing its findings of fact and its determination as to whether the challenged measures are inconsistent with NAFTA obligations or would cause any nullification or impairment of NAFTA benefits (non-violation infringements).\textsuperscript{641} After considering any further comments submitted by the parties and, if necessary, reconsidering its report or making any further examinations it deems appropriate,\textsuperscript{642} the panel shall transmit its final report to the FTC.\textsuperscript{643}

Unlike determinations by Chapter 19 panels, Chapter 20 panel

\begin{itemize}
\item \textsuperscript{630} Id. art. 2006, 32 I.L.M. at 694.
\item \textsuperscript{631} Id. art. 2007, 32 I.L.M. at 695.
\item \textsuperscript{632} Id. art. 2001, 32 I.L.M. at 693.
\item \textsuperscript{633} Id. art. 2008, 32 I.L.M. at 695.
\item \textsuperscript{634} Id.
\item \textsuperscript{635} Id. arts. 2008, 2013, 32 I.L.M. at 695, 696.
\item \textsuperscript{636} Id. art. 2009, 32 I.L.M. at 695–96.
\item \textsuperscript{637} Id.
\item \textsuperscript{638} Id. art. 2011, 32 I.L.M. at 696.
\item \textsuperscript{639} Id.
\item \textsuperscript{640} Id. Slightly different procedures for selecting panels apply when there are more than two disputing parties. See id. art. 2011(2), 32 I.L.M. at 696.
\item \textsuperscript{641} Id. art. 2016, 32 I.L.M. at 697.
\item \textsuperscript{642} Id.
\item \textsuperscript{643} Id. art. 2017, 32 I.L.M. at 697.
\end{itemize}
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determinations are not subject to further challenge or appeal. Upon reception of the final panel report, the parties must agree on the resolution of the dispute. The resolution will normally conform, on the basis of the panel's "moral influence," with the panel's determinations and recommendations. Thus, Chapter 20 panel resolutions are not directly binding on the parties. Whenever possible, resolution of a dispute should involve removal of the non-conforming measure or the measure causing nullification or impairment; failing this, compensation should be granted. If no agreement is reached, the complaining party may suspend the application of benefits of equivalent effect to the other party until the parties reach an agreement on the resolution of the dispute. In considering which benefits to suspend, the complaining party should first focus on benefits in the same sector as the disputed measure. If the party considers such action impracticable or ineffective, it may suspend benefits in other sectors.

D. General Assessment of NAFTA Dispute Resolution Mechanisms

Though no substantial transfer of executive or legislative sovereignty to supranational organs is noticeable in NAFTA, the agreement favors a substantial level of delegation of sovereign jurisdiction to adjudicate NAFTA-related disputes. All of the NAFTA methods of dispute resolution—Chapters 11, 19, and 20—are, once resorted to, mandatory on member countries without the intervention of domestic courts and, if not observed, lead to treaty violation and eventual sanctions. Sanctions for not complying with panel determinations may include suspension of benefits; termination of NAFTA; suspension of the dispute settlement mechanism (i.e., Article 1904) and referral of the resolution of the dispute to the appropriate domestic court jurisdiction; and state responsibility under public international law.

644. Id. art. 2018, 32 I.L.M. at 697.
645. Id.
646. See Horlick & DeBusk, supra note 551, at 35, 39. This can be contrasted with the binding nature of arbitral awards under MERCOSUR's Brasilia Protocol. See supra text accompanying note 134.
647. NAFTA, supra note 18, art. 2018, 32 I.L.M. at 697.
648. Id. art. 2019, 32 I.L.M. at 697.
649. Id.
650. Id.
651. However, only Chapter 11 arbitral decisions—particularly those made within the context of the ICSID Convention—have the force of final adjudicatory decisions at the municipal law level, have res judicata effects, and are susceptible to enforcement by domestic courts.
Nevertheless, the relief available to private parties before Chapter 11 and Chapter 19 panels is closer to the type of relief that may be obtained before domestic courts. For instance, in the case of a claim under Article 1904, relief may consist of the immediate revocation of the questioned order issued by a member country's competent authority (specific performance) and repayment of all duties unduly assessed. On the other hand, since only member countries may be parties to Chapter 20 panel proceedings, the normal relief under Chapter 20 consists of either removal or non-implementation of the questioned measure, compensation (to the affected member country, but not to the affected private party), or retaliation. It could be said that the process under NAFTA Chapter 19 is more adjudicative in nature with enhanced private party participation, whereas the process under NAFTA Chapter 20 is aimed at permitting an amicable, negotiated, or conciliatory settlement of differences at the interstate level, with no private party participation, and contemplating only classical public international law relief.

Chapter 19 panels are particularly interesting: they are international in their integration, must observe a strict timeframe in discharging their duties, are not subject to the review of national courts, and are formed of panelists whose appointment is not exclusively controlled by any member country. Furthermore, Chapter 19 panels are entrusted with the final interpretation of domestic national laws and have the power essentially to overrule decisions by public authorities of a member country. This creates a substantial limitation on the sovereign nation's right to have its own national judiciary—governed by constitutional law and forming an essential part of the nation's system of democratic controls—interpret its own legislation and determine the definitive meaning and scope of its law. A loss of sovereign control over the composition of dispute resolution panels is clear in the cross-selection process used to compose Chapter 20 panels. Under Chapter 11 or Chapter 20 proceedings, the potential intervention of a third interested member country—not as claimant, but simply as monitor of the outcome of proceedings that may have wide-ranging

effects as to the interpretation and application of NAFTA provisions—emphasizes the fundamental institutional role played by supranational dispute settlement bodies within the context of NAFTA.

However, the delegation of sovereign adjudicatory powers in the context of Chapter 19 and Chapter 20 panels is not unlimited. Their decisions cannot command the support of the national courts or authorities and, if not honored, can lead only to retaliatory measures (such as suspension or cancellation of benefits to the infringing party). It should be noted that the U.S. legislation implementing NAFTA provides that U.S. laws are not preempted by NAFTA provisions, at least when applied by federal courts (and possibly state courts). Thus, NAFTA dispute settlement mechanisms and panel decisions are not automatically binding and enforceable in the United States. Other

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654. Whether an international agreement should be considered "self-executing" or "statute-like" domestic law in the United States is to be determined through construction and interpretation by U.S. courts on a case-by-case basis. Of course, failure by U.S. courts to ensure the supremacy of international agreements over U.S. laws may give rise to international responsibility for the United States. See John H. Jackson, US Constitutional Law Principles and Foreign Trade Law and Policy, in National Constitutions and International Economic Laws, 65, 75–77 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993). Absent a clear indication from Congress in the implementing legislation, international obligations that conflict with federal law will not be given effect under U.S. law. The NAFTA Implementation Act provides that (1) no provision of NAFTA or application of any such provision to any person or circumstance, which is inconsistent with any law of the United States, shall have effect; and (2) nothing in the Act shall be construed to amend or modify any law of the United States or to limit any authority conferred under any law of the United States. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 102(a), 107 Stat. 2057, 2062 (1993) [hereinafter NAFTA Implementation Act]. Section 102(b)(2) provides that no state law or application thereof may be declared invalid on the ground of being inconsistent with NAFTA except as a result of an action brought by the United States for that purpose. Id. § 102(b)(2), 107 Stat. at 2063. See Dillon, supra note 34, at 390–91. With regard to the enforcement of WTO provisions in the United States, the situation is essentially the same. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102, 108 Stat. 4809, 4815 (1994); Gary Horlick, Dispute Resolution Mechanism: Will the United States Play by the Rules?, J. World Trade, Feb. 1993, at 163, 165–67.

655. NAFTA Implementation Act, supra note 654, § 102(c), 107 Stat. at 2063. This section also provides that no person other than the United States may challenge any action or inaction by any department, agency, or instrumentality of the United States, any state, or political subdivision thereof on the ground that such action or inaction is inconsistent with NAFTA. Id. These provisions can be contrasted with the rights granted to private persons under the Andean Pact's Court Treaty to sue member states before domestic courts on the basis of Andean Pact regional law. See supra text accompanying note 259.

However, the general prohibition on private rights of action arising from NAFTA "does not preclude the right to challenge on constitutional grounds certain provisions under section 516A(g)(4) of the Tariff Act of 1930, or preclude a private party from seeking to enforce an arbitral award against the United States pursuant to provisions of Chapter 11 of the NAFTA." H.R. Rep. No. 103-361(I), at 18–19, reprinted in 1993 U.S.C.C.A.N. 2552, 2568–69.
member countries could take the same approach. In addition, by favoring active or retired Article III judges in appointing Chapter 19 panels, the United States has, to the greatest extent possible, attempted to control the interpretation and construction of U.S. legislation submitted to Chapter 19 panels.656

The Chapter 19 dispute resolution mechanism is erected on the basis of a difficult coexistence between national sovereignty and internationalization policies, as evidenced by the fact that domestic legislation is to be interpreted by international panels bound by domestic law standards, with no regular appeal system. Any limitations on sovereign rights brought about by Chapter 19 were cautiously negotiated and only sparingly granted. Chapter 19 is a good illustration of the suggestion that limitations on sovereign rights brought about by dispute settlement mechanisms depend on the "constellation of interests" at stake and the "substance" (domestic or universal) of the legal norms being implemented: Chapter 19 disputes directly affect competing private and public interests, and the mechanism privileges the application of domestic laws according to domestic standards, even though applied within international adjudication.

Notwithstanding the foregoing, NAFTA panels constitute a significant step toward the supranationalization of settlement of disputes related to international economic cooperation treaties, with concomitant creation of a favorable transnational environment for the elaboration of legal rules and principles with no state court participation or interference. As such, their legitimacy will depend on the evenhandedness and quality of their decisions, which in the long run will have an impact on national decision-making, in the same way that international commercial arbitration, often detached from state support, has favored formation or consolidation of international rules and principles, exerting an increasing influence on national courts and legislation. The direct access private parties are given to Chapter 11 and Chapter 19 panels is also consistent with the pivotal role assigned to private ordering and private interests in open regionalism structures and the associated imperative of reducing the scope of national sovereign adjudicative powers to permit the creation of international dispute settlement mechanisms that facilitate this role.

NAFTA has also set the stage for a progeny of minilateral or plurilateral treaties or international agreements pursuing similar open regionalism objectives and replicating, to a large extent, the same level of delegation of sovereign powers to independent and international dispute settlement bodies. For example, the NAFTA dispute settlement mechanisms are followed very closely by the G-3 Treaty among Colombia, Mexico, and Venezuela. The G-3 Treaty, inspired by open regionalism strategies, seeks the development of productive forces within the member countries in order to permit insertion of regional economies into international markets in compliance with GATT and the WTO. Though not as comprehensive as NAFTA, the G-3 Treaty contains provisions for the resolution of disputes related to investment, financial services, and the interpretation or application of the G-3 Treaty that closely follow the NAFTA provisions.

However, in certain respects, delegation or abdication of sovereign rights to international dispute settlement bodies under the G-3 Treaty is less pronounced than in NAFTA. For instance, Colombia does not join in the commitment not to expropriate or nationalize investments from other members (except for a public purpose, on a non-discriminatory basis, and with appropriate compensation) or the standards established for determining and paying compensation. Colombia does agree not to establish any measures relating to nationalization, expropriation, and compensation that are more restrictive than those in effect at the time the treaty entered into force. Consequently, until Colombia withdraws this reservation, takings made by Colombia affecting private investors or investments from another member country will be evaluated by an international arbitral panel constituted under Chapter 17 of the G-3 Treaty according to Colombian law as it stood on the date the Treaty went into effect. No such reservation is permitted under NAFTA. Also, the G-3 Treaty does not include loans or credit transactions within the definition of protected investments and thus disputes arising out of loans or credit transactions may not be submitted to international arbitration as provided in the Treaty.

Nevertheless, the G-3 Treaty's provisions on settlement of disputes

657. G-3 Treaty, supra note 16.
658. Id. ch. 17.
659. Id. ch. 12.
660. Id. ch. 19.
661. Id. art. 17-08 & Annex.
662. Id.
663. Id. art. 17-01.
arising out of the interpretation and application of the Treaty or out of incompatible member country measures apparently go further than the equivalent NAFTA provisions in making arbitral determinations binding. Chapter 19 awards are binding on the states that are parties to the dispute. Under NAFTA, final panel reports are not binding on the parties, though parties are expected to agree on resolution of the dispute in conformance with the award. NAFTA permits the winning party to resort to suspension of treaty benefits if such agreement is not reached.

VI. THE WORLD TRADE ORGANIZATION AND DISPUTE SETTLEMENT

A. General Introduction

The WTO is an international organization created by the Agreement Establishing the World Trade Organization to facilitate the implementation, administration, operation, and further objectives of the various agreements that are (or may become) part of the WTO framework. The WTO is generally charged with providing "the common institutional framework for the conduct of trade relations among its members." Ratification of the WTO Agreement is necessarily accompanied by ratification of the Multilateral Agreements; ratification of the Plurilateral Agreements is optional.

The WTO structure includes the Ministerial Conference, the General Council, the Dispute Settlement Body (DSB), and the Trade Policy Review Body (TPRB). The Ministerial Conference, with one representative from each WTO member, is essentially the ultimate decision-making organ of the WTO. It interprets the covered agreements and makes decisions related to them at the request of member countries, and it has the power to authorize new multilateral negotiations among
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WTO members and adopt their results.672 The Ministerial Conference meets biannually; when not meeting, its functions are performed by the General Council.673

The General Council, also composed of representatives of each WTO member, is charged with conducting the WTO's daily business.674 The DSB and TPRB are under the control of the General Council.675 In fact, the DSB is only a facet of the General Council's different functions: the DSB materializes as a special meeting of the General Council in its dispute settlement role.676

Decisions of the WTO Conference and the General Council on substantive—not merely procedural—matters are generally taken by consensus. If consensus is not obtained, the issue is decided by a majority of the votes cast, except where otherwise provided.677 If consensus is not obtained on adopting a waiver of an obligation, an amendment, or an interpretation of the covered agreements, the decision generally is made by a three-fourths majority vote.678 The vote required for deciding other substantive matters in the absence of consensus, such as, for instance, the modification of the dispute settlement procedure contained in Annex 2 of the WTO Agreement, is not clear.679

B. WTO Dispute Settlement Understanding

Annex 2 of the WTO Agreement contains the Understanding on Rules and Procedures Governing the Settlement of Disputes.680 It is

672. See id. art. IX, at 11-12.
673. See id. art. IV(1)-(2), at 8.
674. See id. art. IV(2), at 8.
675. See id. art. IV(3)-(4), at 8.
676. See id.
677. See id. art. IX(1), at 11.
678. See id. art. IX(2)-(4), at 11-12.
679. See Dillon, supra note 34, at 365-67.
described as "a central element in providing security and predictability to the multilateral trading systems," and its task is to "preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The Understanding controls the resolution of any disputes arising out of the covered agreements and the WTO Agreement.

The first priority of the dispute resolution mechanism set out in the Understanding is to find a solution that is mutually acceptable to the parties to a dispute and that is consistent with the covered agreements. If such a solution is not possible, the mechanism leads to withdrawal of the measures found to be in violation of the covered agreements. Compensation may be resorted to only temporarily and only in exceptional cases: when immediate withdrawal is impossible, it is voluntarily agreed to by the disputing parties, and it is consistent with the covered agreements. If authorized by the DSB, retaliation is available as a last resort solution. Retaliation would involve suspending concessions or other obligations under the covered agreements on a discriminatory basis against the member in breach.

If the member in breach objects to the level of suspension or claims that the principles for determining suspensions have not been complied with, the matter is referred to mandatory arbitration. Arbitration is limited to deciding whether the level of suspension awarded is equivalent to the level of the nullification or impairment at stake. The arbitration must be terminated within sixty days, and the panel’s award is final. The arbitration is carried out by the members of the intervening panel, if available, and if not, by an arbitrator appointed by the WTO Director-General. At the request of the interested party, the DSB will authorize suspensions in agreement with the arbitral


681. WTO Understanding on Dispute Settlement, supra note 29, art. 3(2), at 405.
682. Id. art. 1(1), at 404.
683. Id. art. 3(4), at 406.
684. Id. art. 3(7), at 406.
685. Id. arts. 3(7), 22(1), at 406, 422.
686. Id. art. 3(7), at 406.
687. Id. art. 22(2), at 422.
688. Id. art. 22(6), at 424.
689. Id. art. 22(7), at 424.
690. Id. art. 22(6)–(7), at 424–25.
691. Id. art. 22(6), at 424.
award unless the DSB agrees, by consensus, to reject the request.\textsuperscript{692} Member countries may not resort to unilateral retaliation: Article 23 of the Understanding provides that member countries must resort to the Understanding’s dispute settlement procedures before adopting retaliatory measures.\textsuperscript{693}

Infringement of an obligation of one of the covered agreements is \textit{prima facie} a nullification or impairment, and is thus presumed to have an adverse impact on other members; the burden to rebut this presumption falls on the member complained against.\textsuperscript{694} However, the burden of proving nullification or impairment falls on the complaining party when the case involves a non-violation complaint (i.e., when the party alleges that benefits accruing to it under a covered agreement are being impaired or nullified or that the attainment of an agreement objective is being impeded by a member’s application of any measure, whether it conflicts or not with a provision of the agreement).\textsuperscript{695} In a non-violation case, the party complained against is not obligated to withdraw the measure at issue; the intervening panel will recommend that an adjustment be mutually agreed upon by the involved member countries.\textsuperscript{696} Notwithstanding Article 22 of the Understanding, this adjustment may include the payment of compensation.\textsuperscript{697} In arbitration of non-violation infringements, the arbitral panel is entitled to determine the level of benefits nullified or impaired and make non-binding recommendations for reaching an adjustment that is mutually satisfactory to the parties.\textsuperscript{698}

To summarize the Understanding’s procedures, there are two distinct stages in dispute resolution: first, the consultation stage,\textsuperscript{699} and second, if consultation has not been successful, the stage in which a multinational panel makes findings of fact and legal determinations regarding the solution of the dispute.\textsuperscript{700} Only member states may initiate or participate in dispute settlement proceedings under the Understanding; private parties are excluded.\textsuperscript{701}

\textsuperscript{692} Id. art. 22(7), at 425.
\textsuperscript{693} Id. art. 23, at 425.
\textsuperscript{694} Id. art. 3(8), at 406.
\textsuperscript{695} Id. art. 26(1), at 427-28.
\textsuperscript{696} Id.
\textsuperscript{697} Id.
\textsuperscript{698} Id.
\textsuperscript{699} See id. art. 4, at 407-09.
\textsuperscript{700} Id. arts. 6, 22, at 410, 422-25.
\textsuperscript{701} Id. art. 2(1), at 405.
The consultation stage should not last more than sixty days.\textsuperscript{702} If consultation fails, any party may ask the DSB to establish a panel.\textsuperscript{703} Panels may have either three or five members,\textsuperscript{704} who need not be lawyers but must be independent and experienced.\textsuperscript{705} Citizens of parties to the dispute may not serve as panel members unless the parties agree.\textsuperscript{706} The parties must agree on the appointment of members to the panel. If there is no agreement, the WTO Director-General, in consultation with the parties, the DSB Chairman, and the chairman of the relevant Council or Committee, will appoint the panel members.\textsuperscript{707} Panelists serve in their individual capacity and not as representatives of their governments or any organization; member countries may not give instructions to or otherwise seek to influence panelists.\textsuperscript{708} Third parties that have a substantial interest in matters before a panel and that notify the DSB of their interest may participate in the consultation and panel proceedings stages, be heard by the panel, and provide written submissions.\textsuperscript{709} Panel proceedings and decisions are confidential, and only under special circumstances may the positions of the parties be disclosed to the public.\textsuperscript{710}

Panel proceedings result in a report containing the panel's determinations and rulings about the matter on the basis of an objective assessment of matters submitted to it, including the facts of the case and conformity with covered agreements.\textsuperscript{711} The intervening panel first issues the fact and argument sections of its report.\textsuperscript{712} After receiving the parties' comments, the panel will issue an interim report containing its conclusions and determinations.\textsuperscript{713} Only after the parties have an opportunity to comment on the interim report and the panel has considered any requests for reviewing its decision will the interim report become final or a revised final report be issued.\textsuperscript{714}

\begin{itemize}
  \item \textsuperscript{702} Id. art. 4(7), at 408.
  \item \textsuperscript{703} Id.
  \item \textsuperscript{704} Id. art. 8(5), at 412.
  \item \textsuperscript{705} Id. art. 8(1)-(4), at 411-12.
  \item \textsuperscript{706} Id. art. 8(3), at 411.
  \item \textsuperscript{707} Id. art. 8(7), at 412.
  \item \textsuperscript{708} Id. art. 8(9), at 412.
  \item \textsuperscript{709} Id. arts. 4(11), 10, at 409, 413.
  \item \textsuperscript{710} Id. arts. 14, 18, at 416, 419.
  \item \textsuperscript{711} Id. art. 11, at 413-14.
  \item \textsuperscript{712} Id. art. 15(1), at 416.
  \item \textsuperscript{713} Id. art. 15(2), at 416-17.
  \item \textsuperscript{714} Id.
\end{itemize}
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Unless a party opts to appeal,\textsuperscript{715} the panel report is submitted to the DSB for consideration, and it is automatically adopted if not rejected by adverse consensus of the DSB.\textsuperscript{716} Panel proceedings should last a total of three to six months; in exceptional cases, as long as nine months.\textsuperscript{717} If there is an appeal, the entire procedure may not exceed twelve months.\textsuperscript{718}

Panel and appellate body reports may recommend that the party in breach bring the measure at issue into conformity with the relevant covered agreement and suggest ways to implement its recommendations.\textsuperscript{719} Panel reports may not add to or diminish the rights provided under the covered agreements.\textsuperscript{720} If the DSB does not reject the panel report, then within thirty days the party in breach must inform the DSB when it will implement the rulings and recommendations contained therein.\textsuperscript{721} If there is no agreement with the DSB on a reasonable period, and if no agreement on a timetable is reached with the other party to the dispute within forty-five days after adoption of the panel report, then the implementation period will be fixed by binding arbitration (which must take place within ninety days).\textsuperscript{722} The implementation period should not exceed fifteen months.\textsuperscript{723}

The Understanding contains special provisions to address the situation of developing or less-developed countries. Claimants are expected to show due restraint in asking for compensation or suspension of concessions from less-developed countries.\textsuperscript{724} If no solution is reached through consultation, the WTO Director-General or the DSB Chairman will, at the request of a party that is a less-developed country, act as mediator or conciliator or interpose its good offices with a view toward helping the parties find a solution to the dispute before a request for establishing a panel is made.\textsuperscript{725} When one of the disputing parties is a

\textsuperscript{715} Appeal would be before a standing seven-member body set up by the DSB. See id. art. 17, at 417–19. Appeal proceedings are limited to deciding issues of law or of legal interpretation and should normally last no more than sixty days (in exceptional cases 90 days). \textit{Id.} art. 17(5)–(6), at 418.

\textsuperscript{716} \textit{Id.} art. 16(4), at 417.

\textsuperscript{717} \textit{Id.} art. 12(8)–(9), at 415.

\textsuperscript{718} \textit{Id.} art. 20, at 420.

\textsuperscript{719} \textit{Id.} art. 19, at 420.

\textsuperscript{720} \textit{Id.}

\textsuperscript{721} \textit{Id.} art. 21(3), at 420–21.

\textsuperscript{722} \textit{Id.}

\textsuperscript{723} \textit{Id.}

\textsuperscript{724} \textit{Id.} art. 24, at 426.

\textsuperscript{725} \textit{Id.}
developing country, the panel report must make clear how it has taken account of any relevant agreement provisions granting differential or more favorable treatment to developing countries that might excuse the developing country of its violation. In the course of consultations, member countries are required to give special attention to the particular problems and interests of developing country members. When a dispute concerns a developing and a developed country and a panel is to be established, the panel must include at least one developing country member if so requested by the developing country. In implementing measures, the DSB must take into account the interests and circumstances of developing countries and the impact of the measures on the economies of the developing member countries involved.

C. General Assessment

As has been correctly pointed out many times, the WTO is a "minimalist organization" primarily introducing procedural or institutional rules rather than substantive rules. The WTO does not enjoy any larger delegation of national sovereignty than did the original GATT agreement formed in 1947. In fact, the consensus or majority vote rules that govern the Ministerial Conference and the General Council demonstrate that there is still ample maneuvering room for member states to take unilateral sovereign action, even if it creates problems for the adoption of substantive decisions by WTO organs. However, it should be pointed out that when consensus is not obtained, majority rules apply and permit the adoption of substantive decisions without unanimity or consensus. As indicated with respect to other international economic cooperation or integration agreements, this option evidences an erosion of the idea that supranational or international organs' decision-making is only possible with unanimous sovereign state consent, and it creates some protection against unlimited sovereign state interference with the adoption of decisions by WTO bodies.

Nevertheless, the WTO now has a number of traits that in practice should allow it to operate with greater independence from the bureaucracies of its member countries and enhance the enforceability of

726. Id. art. 12(11), at 415.
727. Id. art. 4(10), at 409.
728. Id. art. 8(10), at 412.
729. Id. art. 21(2), (7)–(8), at 420–22.
730. See Dillon, supra note 34, at 355.
commitments made under the covered agreements or more broadly within the WTO framework. The very existence of the covered agreements—imposing substantial obligations on member states in vital areas not previously regulated by such broad and wide-ranging international agreements, and providing resort to independent international dispute resolution bodies—coupled with the fact that member countries may resort to retaliatory action for breach of WTO obligations only after having gone through, and only to the extent authorized by, the Understanding introduce additional limitations on members' exercise of sovereign powers in conflict with such obligations, and create potential public international law responsibility if such obligations are violated.

Among the traits enhancing the independence and enforceability of the WTO framework, several are particularly important. First, the WTO is now an international organ with its own structure endowed with international legal personality. Second, members are obligated under public international law to introduce legislation to enforce the WTO and Multilateral Agreements at the municipal law level and to bring their domestic legislation in conformity with the WTO and other agreements.\footnote{731} And third, the dispute resolution system contained in the Understanding, though it does not result in awards directly enforceable in member countries, does indisputably lead to determinations that are binding on the parties and that, if not honored, may lead to substantive sanctions (though it is true that substantive sanctions will be more effective if adopted against a developing or less-developed country\footnote{732}) and in any case to international responsibility.\footnote{733}

\footnote{731} WTO Agreement, supra note 2, art. XVI(4), at 17.


\footnote{733} Under the WTO Understanding on Dispute Settlement, arbitration is only binding when used to determine the time period in which a party will comply with a panel report or to establish whether the level of sanctions is appropriate. See WTO Understanding on Dispute Settlement, supra note 29, arts. 21(3), 22(6)-(7), at 421, 424-25. Arbitration on any other issue is voluntary and requires agreement of the parties involved. Id. art. 25(2), at 427. This stands in contrast to arbitration under MERCOSUR's Brasilia Protocol, which parties agree to by simply ratifying the Protocol. See supra text accompanying note 134.

Nevertheless, the delegation of sovereign adjudicatory powers to non-arbitral panels under the Understanding has been thought substantial enough in the United States to create apprehensions about the "loss of sovereignty" that may be occasioned by the Understanding's dispute settlement mechanisms. Such fears have prompted draft U.S. legislation that would create a Dispute Settlement Review Commission composed of federal appellate judges, which would review all panel and appellate body reports considered adverse to the United States. Should this Commission find a report inappropriate on account of grave procedural or substantive defects, a
The fact that panel determinations are immediately binding unless rejected by negative consensus of the DSB—i.e., one vote in favor of the panel decision makes approval automatic—and that panel and arbitral proceedings are subject to stringent time constraints and are carried out by independent experts contributes substantially to the legitimacy of the dispute resolution system. It also adds to the strength and persuasiveness of the decisions or determinations made through the system and increases the power of these determinations to dissuade or deter incompatible sovereign action or inaction. The fact that panel and arbitral determinations under the Understanding are made primarily on the basis of substantive law provisions included in the covered agreements, which are binding on the participating member countries, *de facto* limits the sovereign rights of member countries by excluding the application of national norms (created by exercising national legislative jurisdiction) to determination of matters under the agreements. This is a distinctive trait of the WTO dispute resolution system.

Nevertheless, the WTO dispute settlement mechanism is more conciliatory than adjudicative in nature, particularly when compared to NAFTA Chapter 11 or Chapter 19 dispute settlement procedures. However, the WTO dispute settlement mechanism may have an advantage over its NAFTA counterparts, in that the diplomatic pressure of WTO members may be brought to bear to ensure the enforceability of WTO panel determinations when retaliation would not be effective or the recalcitrant state is powerful. From the standpoint of developing and less-developed countries, the Understanding contains procedural rules granting a certain degree of preferential treatment, which is absent from the dispute settlement mechanisms existing under other regional economic integration agreements. Also, in certain ways, the WTO dispute resolution system may be considered more judicial in nature, since it provides a regular appeal procedure; appeal is available only in exceptional cases under NAFTA Chapter 19 and is never available under NAFTA Chapter 20. These advantages suggest that the WTO dispute settlement scheme may engender a consistent body of procedure would begin that might ultimately lead to the United States' withdrawal from the WTO. See Gary N. Horlick, *WTO Dispute Settlement and the Dole Commission*, J. WORLD TRADE, Dec. 1995, at 45.

734. For instance, in an antidumping or subsidies case, a WTO panel would apply WTO substantive antidumping or subsidies law, whereas a NAFTA Chapter 19 panel would apply the domestic antidumping or subsidies law of the defendant country.

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precedent leading to generally accepted and binding principles and rules, which, because of their international character and world-wide approval, would introduce limitations on state sovereignty.\textsuperscript{736}

On the other hand, certain aspects of the WTO dispute settlement mechanisms—like the confidentiality of panel decision-making, the absence of a binding mechanism for enforcing panel determinations,\textsuperscript{737} the existence of rules inducing WTO panels to defer too much to determinations of local authorities or imposing rigid interpretation and construction criteria,\textsuperscript{738} or the lack of access of private parties to dispute settlement under the Understanding\textsuperscript{739}—may detract from the

\textsuperscript{736} See Castle, supra note 732, at 756, 820–21. However, for a show of skepticism about the actual enforceability of such body of precedent, see Claudio Cocuzza & Andrea Forabosco, Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy, 4 Tul. J. Int'l & Comp. L. 161 (1996).

\textsuperscript{737} Retaliation, the primary remedy for obtaining enforcement, is available only as provided in the Understanding. See supra text accompanying notes 686–87. To date, retaliation has been of doubtful practical utility. See Castle, supra note 732, at 797, 799.

\textsuperscript{738} For example, the Agreement on Implementation of Article VI of GATT 1994, dealing with anti-dumping measures, provides that panels sitting to settle disputes arising out of the Agreement must accept facts established by the local authorities if they were properly determined in an unbiased and objective way, even if the panel might have reached a different conclusion in that regard. See Agreement on Implementation of Article VI of GATT 1994, Apr. 15, 1994, art. 17(6), WTO Agreement, Annex IA, in RESULTS OF THE URUGUAY ROUND, supra note 2, at 168, 193. The Agreement is to be interpreted in accordance with customary rules of interpretation for public international law, and if more than one interpretation is permissible, the panel must follow the interpretation that leads to the conclusion that the local measure at stake is in conformance. Id.; see Gastle & Castel, supra note 656, at 890–92. On the difficulties of attaining a proper balance between international public policy values to be advanced by WTO dispute settlement mechanisms and a certain degree of deference for determinations of local authorities, see Steven P. Croley & John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 Am. J. Int'l L. 193 (1996).

\textsuperscript{739} Of course, members may opt to enact domestic legislation that creates mechanisms triggering the filing of claims under the Understanding at the instigation of private parties and permitting the cooperation of private parties. In the United States, this has been done under the Uruguay Round Agreements Act. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127, 108 Stat. 4835.

On the other hand, Section 301 of the Tariff Act of 1974 (as amended in 1988) permits interested persons to trigger U.S. Trade Representative investigations of unfair foreign trade practices; these investigations may eventually lead to the initiation of dispute settlement proceedings under international agreements that have been breached. See Fred L. Morrison & Robert E. Hudec, Judicial Protection of Individual Rights Under the Foreign Trade Laws of the United States, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAWS, supra note 654, at 91, 131; Martin Lukas, The Role of Private Parties in the Enforcement of the Uruguay Round Agreements, J. World Trade, Oct. 1995, at 181, 186, 191–92. It should be noted that private parties may not invoke WTO agreements before U.S. courts to challenge the validity of U.S. laws and that they may not bring legal actions on the basis of such agreements before U.S. courts. See Lukas, supra, at 192–95. For
ability of these mechanisms to play an effective and decisive role in the formation of a truly autonomous and transnational case law.\textsuperscript{740}

VII. CONCLUSIONS

There is no universal dogma or magic formula determining what degree of limitation on or delegation of national sovereign powers will best serve, or is required for the advancement of, international economic cooperation and integration strategies adopted by developing countries. As I hope I have demonstrated by the foregoing analysis of different aspects of existing integration or economic cooperation schemes, the international arena is currently seeing experimentation with all possible options.

Inclination toward one or the other option will depend on political momentum, changing interests, and the degree of economic development of the participants or would-be participants in any such scheme. A single country (e.g., a Latin American country) may be willing to accept different amounts of sovereign power delegation in different schemes if, say, it is simultaneously contemplating joining MERCOSUR or the Andean Pact and seeking integration into a hemispheric free trade zone. The choice is not likely to depend decisively on the degree of delegation to supranational bodies presented by any of those options. Whether insertion into the global economy may be better achieved directly by participating in multilateral economic cooperation programs requiring less delegation or through the intermediation of minilateral or plurilateral international integration programs requiring more delegation is more likely to be decided on the basis of strategies conditioned by political and economic circumstances. However, if it is true that existing international economic cooperation and integration schemes rely substantially on the private ordering of business operators for achieving collective economic cooperation and integration objectives, then it is hard to imagine that when participating countries exercise their sovereign powers or erect omnipotent supranational organs they do not reduce the sectors reserved to heteronomous or public ordering.

\textsuperscript{740} On the potential creation of transnational law within the context of the WTO agreements, see Alberto Tita, \textit{A Challenge for the World Trade Organization: Towards a True Transnational Law}, J. WORLD TRADE, June 1995, at 83.
On the other hand, considerable delegation of sovereign powers to international organs may have the advantage of providing an international economic cooperation or integration program with a self-contained legal framework and institutions that will seek to effectuate the program's objectives with minimum interference or contamination by sovereign political maneuvering or national "special" interests. Delegation may also offer, or appear to offer, more stability, predictability, and permanence for both sovereigns and private operators. Nevertheless, providing so much "life of its own" to an international program may seriously reduce a member country's autonomy to explore other cooperation or integration opportunities in a rapidly changing world where the possibility of seeking new alignments or of redefining the mechanisms and objectives of existing ones without regional, continental, or ideological limitations is in a state of flux. As the MERCOSUR experience indicates, countries participating in a regional integration scheme may prefer to increase the delegation of sovereign powers to regional organs on the basis of progressive approximations determined by the gradual deepening of the integration process, rather than on the basis of some principled dogma.

In fact, the success of regional economic integration schemes depends on attaining a balance, necessarily based on some previously agreed upon idea of reciprocity between the benefits and burdens of the integration process, that would "minimize the impact of clashing or conflicting interests" and maximize "complementary, converging interests." The degree and perpetuation of limitations or delegations of sovereign power required by each regional integration program must be aimed at creating, enhancing, or at least maintaining this balance if a program is to endure the inevitable frictions. The legal superstructure or "constitution" of regional economic integration programs should be made an expression of this balance, flexible enough to cope with its oscillations within limits. Failure to do so will

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741. Opting for flexible and open-ended approaches to international economic integration rather than espousing integration programs tied to rigid constraints or drastically reducing the autonomy of member countries through different devices, including an asphyxiating legal framework comprised of supranational organs or bodies, is a course of action for developing countries that seems to carry substantial support in the specialized literature. See, e.g., McCarthy, supra note 1, at 20; Abbott & Bowman, supra note 7, at 518–27; Giuseppe Schiavone, La Cuenca del Pacifico: Un Nuevo Modelo de Cooperacion Economica Multilateral?, INTEGRACION LATINOAMERICANA, Mar. 1991, at 44.


743. Id.
invariably endanger the effectiveness of regional law and the credibility and authority of regional organs or bodies, particularly those charged with dispute settlement, and may prompt participating countries not to seek their intervention or to ignore their enactments or determinations.

In any case, and rightly so, international economic cooperation or integration programs increasingly incorporate methods for the resolution of disputes arising out of the legal framework on which the program is structured. In order not to defeat the very purposes underlying the introduction of such methods, international dispute resolution institutions and their decisions should be provided with sufficient legal and factual legitimacy, jurisdictional scope, independence, binding force, and enforceability to permit them to effectuate the objectives of such programs. When such programs also create autonomous supranational executive or legislative organs, the simultaneous existence of independent and equally supranational adjudicatory bodies seems indispensable; such adjudicatory bodies give member states and private parties access to international jurisdictions capable of redressing any grievances arising out of abuses of authority by the executive or legislative organs, and they ensure that the supranational norms that form the program's legal framework will be interpreted and applied without state interference. In varying degrees, dispute resolution mechanisms require national sovereigns to limit national competencies or jurisdiction, and it is in this area where delegation of national sovereign powers to supranational bodies appears to be most substantial, where the application and effectiveness of legal rules appear to depend less on (or be subject to less interference from) state action, and where recent evolutions in that direction are richest and most noticeable.