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1. Introduction

This paper examines the role national sovereignty plays in three regional groups: Mercosur, ASEAN and NAFTA. It looks in particular at their dispute settlement mechanisms and bodies that are designed to respect the domestic sovereignty of the member states. The aim of the paper is to show that, in order to avoid the possibility of any supranational constitutional moment of the type fostered by the Court of Justice of the European Union, these three groups have studiously avoided modelling their dispute resolution processes on Luxembourg and have instead preferred an anti-model in the form of the World Trade Organisation's adjudicatory system.

In addition, the paper subsequently discusses the extent to which any neo-functionalist institutional "spillover"[1] has or has not been contained, as a regional organisation matures and develops over time. It thus questions the possible existence –despite the determined aims of the participating states in Mercosur, ASEAN and NAFTA to maintain an intergovernmental regional integration ideal– of an inherent evolutionary propensity in DSMs (Dispute Settlement Mechanisms) of these organisations to evolve further along the quasi-adjudicative route towards a completely adjudicative DSM.

Moreover, the research poses the further question as to whether or not deepening regional integration ultimately requires as a sine qua non of guaranteed continued success the creation or existence, inter alia, of a permanent regional judicial body charged with settling disputes, whether directly or indirectly, between litigants whether Member States, regional institutions, or private parties.

This Working Paper consequently begins with a contextualising of the present research (section 2), before seeking to provide a categorisation of international and regional courts, tribunals and dispute settlement mechanisms (section 3). The focus then shifts to the EU and deals with the CJEU as a model together with the European "supranational constitutional moment" (section 4), before looking at the role of a CJEU anti-model in the guise of the WTO DSM (section 5).

Having provided the overall context for the research, the following three sections deal with the DSMs of the studied regional economic organisations: Mercosur (section 6); ASEAN (section 7); and NAFTA (section 8). Each organisation is examined for the same points, viz., the treaty framework, issues of sovereignty, and dispute settlement mechanisms (both initial and current models). The aim is to juxtapose concerns over continuing state sovereignty in the face of demands for regional co-operation and/or integration. The Conclusion (section 9) attempts to argue that even if neofunctional spillover can be contained, absent a central judicial organ regional economic groupings are likely "to come apart at the seams."

2. General context of the present research

The preservation of national sovereignty in the face of the perceived threat to its continued existence from the forces of globalisation as well as regionalisation has been the subject of much academic discourse over recent years[2]. For example, in the field of jurisdictional authority, states have experienced an increasing migration of

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1 For a full discussion of neofunctionalism in the EU context, see W. Sandholtz & A. Stone Sweet (eds.), *European Integration and International Governance*, OUP, Oxford (1998).

2 Early globalisation theorists posited the demise or obsolescence of the nation-state; they claimed it was leaking authority and sovereignty upwards (to

their traditional powers in judicial adjudication – through the increase in the number and scope of regulatory treaties and development of transnational regimes– to internationally-and regionally-based courts and tribunals[3]. Such transnational regulatory regimes not only ensure the legalisation or judicialisation of dispute settlement processes within their purview[4] but also radically redefine the nature of these processes by conferring on non-state actors procedural rights to access the relevant dispute settlement system in order to enforce their substantive rights guaranteed under the relevant treaty: this individualisation of remedies under transnational regimes is one of the legal indicators of globalisation[5].

Within this evolving, judicially-pluralist international legal order, the EU model of integration has proven to be a great attraction and has consequently been emulated throughout the world; its focus on integration through law and the operation of the Court of Justice of the European Union ("CJEU") as the exemplary integrationist regional court and the creator of a supranational regional legal system has been widely lauded.

Nevertheless, abnegation of sovereignty – even for the stated ideals of regional economic integration– has been strongly eschewed by state participants in a number of regional organisations, in their search for an acceptable and workable paradigm that preserves their independent status while allowing economic, financial and even political rapprochement between them. In this sense, the EU model is rejected –rather than emulated– as being the "anti-model" par excellence of certain groupings, with the CJEU considered as the judicial "*bête noire*" to the preservation of the vestiges of national constitutional sovereignty in the face of the perceived supranational pretensions that inure in the Union. In searching for a workable paradigm, some regional entities emphasise amicable settlement, conciliation and arbitration and rather look for inspiration to predominantly or exclusively political dispute settlement mechanisms ("DSMs"). In such cases, it is strongly arguable that the participants in such intergovernmental regional integration mechanisms intend to avoid or eliminate any type of supranational constitutional moment as has already occurred in the EU.

In this research, the DSMs of regional organisations in the Americas and South East Asia are particularly relevant since they tend to reject the sort of judicial contextualisation of integration as has been allowed to be formulated by the CJEU. To varying degrees, Mercosur, NAFTA and ASEAN all strive to avoid any replication of the "success" of supranationality by preserving the role of national sovereignty as a necessary brake on issues of regional (economic) integration in their treaty-based communities. Instead they currently reaffirm the centrality of political or intergovernmental means in their DSM institutional set-up.

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supranational organisations), downwards (to sub-national units) and sideways to markets (and dominant players in them, like multinational corporations) and emerging players, such as international civil society: for the classic exposition of the obsolescence of the state, see K. Ohmae, *The borderless world: power and strategy in the interlinked economy*, Harper Business, New York (1990). Subsequent entrants to the discussion discredited the extreme version of this thesis as it was apparent that states, rather than being the passive victims of external processes, were the architects, authors or "midwives of globalization": J. Brodie, "New State Forms, New Political Spaces," in R. Boyer & D. Drache (eds.), *States Against Markets: The Limits of Globalization*, Routledge, London (1996), 383, at 386.

3 See generally: A. Del Vecchio, "Globalization and its Effect on International Courts and Tribunals" (2006) 5 L. & Practice of Intl. Courts & Tribunals 1.

4 R.O. Keohane, A. Moravcsik & A.-M. Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 International Organization 457. For a historical perspective on this field, see C. Kröner, "Crossing the Mare Liberum: The Settlement of Disputes in an Interconnected World," speech delivered at the IV Conferencia Internacional Hugo Grocio de Arbitraje, Centro Internacional de Arbitraje, Mediación y Negociación ("CIAMEN"), Instituto Universitario de Estudios Europeos, Universidad CEU San Pablo, 15 June 2011, CEU Ediciones, Madrid (2011).

5 M.A. Luz & C.M. Miller, "Globalization and Canadian Federalism: Implications of the NAFTA's Investment Rules" (2002) 47 McGill L.J. 951, at 954-971.

3. International and Regional Courts, Tribunals and DSMs

Before embarking on an analysis of the various international (regional) judicial or dispute settlement organs, it might be of some assistance to define these terms[6].

On the one hand, "international courts and tribunals" or "international judicial organs" fulfil Romano's five criteria[7], themselves based on the work of Tomuschat[8]. These five criteria provide that the relevant judicial organ must be: (i) permanent[9]; (ii) established by an international legal instrument[10]; (iii) in deciding the cases before them, they must resort to international law[11]; (iv) they must decide those cases on the basis of pre-existing rules of procedure which the parties usually cannot change[12]; and (v) the outcome of the process must be legally binding[13]. To these five criteria Romano adds two further (although they could be subsumed within them)[14], viz., the international judicial body must be composed (at least in its majority) of judges appointed –through an impartial mechanism– before a case was submitted; and the body must decide cases between two or more entities, of which at least one is a sovereign state or international organisation.

Within this species of entity, a genus of "regional court or tribunal" or "regional judicial organ" exists[15] whose jurisdiction is restricted to a geographically-defined, regionally-based organisation which is established by the relevant regional treaty and applies regional law in its decision-making. Such regional judicial bodies may also decide cases (directly before it or indirectly through a reference procedure from Member States courts) where either or both parties can be private (natural or legal) persons.

On the other hand, dispute settlement mechanisms[16] of an international or regionally-based organisation consequently fail to satisfy the five criteria to be considered as the judicial organ of such an organisation. Traditional notions under public international law have differentiated between political and adjudicative DSMs[17] which division is dependent (1) on the political or legal basis upon which the actors solve their disputes; and (2) on whether or not the decision is binding and definitive[18]. According to the principle of "free choice of means," the parties can employ such means to resolve their disputes by creating their own DSM[19].

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6 Among those who seek to provide categorisation in this area, see A.K. Schneider, "Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations" (1998-1999) 20 Mich. J. Intl. L. 699-773.

7 C. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1999) 31 N.Y.U. J. Intl. L. Pol. 709, at 713-715. That author's more recent work in the field aims to provide a definitive characterisation and categorisation of all international and regional DSMs: C. Romano, "A taxonomy of international rule of law institutions" (2011) 2(1) J.I.D.S. 241-277.

8 C. Tomuschat, "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction," in Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht (ed.), *Judicial Settlement of International Disputes, 62 Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Springer Verlag, Berlin/Heidelberg/New York (1974), 285-416.

9 Tomuschat (1974), at 307-311.

10 Tomuschat (1974), at 293.

11 Tomuschat (1974), at 290-294.

12 Tomuschat (1974), at 311-312.

13 Tomuschat (1974), at 299-307.

14 Romano (1999), at 715.

15 See generally, Tomuschat (1974).

16 On DSMs generally, see J. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences" (2003) 38 Tex. Intl. L.J. 405.

17 A. Remiro Brotons & R.M. Riquelme Cortado, J. Diez-Hochleitner, E. Orihuela Calatayud & L. Pérez-Prat Durbán, *Derecho Internacional*, McGraw-Hill, Madrid (1997), at 827; J.A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, 9th ed., Tecnos, Madrid (2003), at 566; and J.G. Merrills, *International Dispute Settlement*, 3rd ed., CUP, Cambridge (1998), at 1-169.

18 Brotons et al. (1997), at 831.

19 UN Charter, Art. 33.

The nature of these DSMs can be either political or adjudicative, or a combination of both (i.e., quasi-adjudicative[20]). While adjudicative DSMs leave the final definitive decision-making to a dispute in the hands of a permanent judicial institution, political DSMs cover negotiations, inquiry, mediation and conciliation as well as good offices and consultations[21]. Quasi-adjudicative DSMs can be viewed either as a paradigm shift from purely political DSMs –amounting to another step on the way to a full-blown adjudicative DSM– or as the projected final stop of a regional or international organisation's DSM institutional concept.

4. The CJEU as a Model

4.1. Nature of the model

Before turning to discuss the nature of the anti-model, it is important to define what serves as the model. In this sense, a model should not be considered as a mere copy or reproduction of what has occurred before but might rather be regarded as "a general source of ideas, concepts, examples, and even specific constitutional arguments"[22]. However, while it may be argued that the pure adoption or cloning of a particular model cannot guarantee any particular outcome[23], nevertheless it would appear that the ideas behind, operation of and general jurisprudential development of a judicial model can be viewed as a counter-example, as a source of difference, or even categorically rejected in the form of an anti-model.

In the present work, the hallmark of the EU concept[24] of integration is its use of law as a prominent tool to achieve its aims[25]. The main element of such concept is the CJEU, created as a permanent and independent judicial body charged with ensuring the proper interpretation as well as the validity of EU law: although, like classical international courts, Member States may bring actions before it, the CJEU is also accessible by Union institutions such as the European Commission and European Parliament and even, where they are the ultimate addressees of EU rules and decisions, companies and individuals.

Perhaps most importantly, national courts may engage in a judicial dialogue with the CJEU through the preliminary reference procedure. In this process national courts, seised of a case with an EU legal element and brought before them by natural or legal persons, may (or, if a last instance court, must) refer questions to the CJEU on the interpretation of EU law, the answers to which they are bound to apply in the case before them. This mechanism has allowed the CJEU to develop, over the years, many of the basic principles of the EU legal order: the supremacy of EU law; direct effect; indirect effect; general principles of law (including human rights, absent the present EU Charter on Fundamental Rights); state liability for breach of EU law; the need for national remedies to protect breaches of rights derived from EU law, etc[26]. The model of the CJEU is accordingly a vital component and purveyor of the EU model of integration, a paradigm adjudicative DSM of a regional (international) organisation.

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20 See E. Ramírez Robles, "Political & Quasi-adjudicative Dispute Settlement Models in European Union Free Trade Agreements: Is the quasi-adjudicative model a trend or is it just another model?," *Staff Working Paper* ERSD-2006-09, Economic Research and Statistics Division, World Trade Organization, Geneva, November 2006, at 2-5.

21 *Handbook on the Peaceful Settlement of Disputes between States*, United Nations, New York (1992), at 7-55; and J.G. Merrills (1998), at 1-87.

22 H. Klug, "Model and Anti-Model: The United States Constitution and the 'Rise of World Constitutionalism'" 2000/3 Wisconsin L.R. 597, at 599.

23 Klug (2000), at 599-600.

24 "Exporting the EU Model: A Judicial Dimension for EU International Relations?" (2010) LXIII *Studia Diplomatica* No. 3-4, 137-158.

25 J. Ziller, "The Challenges of Governance in Regional Integration. Key Experiences from Europe," Second Annual Conference of the Euro-Latin Study Network on Integration and Trade (ELSNIT), Florence, 29-30 October 2004, *EUI Law Working Paper* No. 2005/11, at 44.

26 See generally, A.F. Tatham, *EC Law in Practice: A Case-Study Approach*, HVG-ORAC, Budapest (2006), chap. 1, 1-43; chap. 2, 44-95; and chap. 3, 96-147.

Nevertheless, its activism in creating –by judicial fiat– the Union legal order, through a steady and almost inexorable process of the constitutionalisation[27] of the founding (and amending) Treaties has not gone unchallenged, either by national courts or by the Member States themselves[28]. In developing the Union legal order, issues of national sovereignty and the priority/supremacy of EU law over it has proved to be a contentious issue with one of the most recent and stark examples of national superior court challenge being the decision of the German Federal Constitutional Court ruling in the *Lisbon Treaty* case[29]. Nevertheless, despite these apparent challenges, the CJEU has (in general) been very successful in having its approach to multilevel constitutionalism in the EU accepted by national judiciaries.

4.2. The EU supranational constitutional moment

The understanding of a "constitutional moment" has come to be applied in various circumstances, including to the creation of the European Union[30], but was first used by Ackerman within the context of US constitutional development. In his original formulation, a constitutional moment was a brief and rare constitutional episode[31] was characterised both (a) by discontinuity, being a short period of "constitutional" politics which was to be sharply distinguished from the "ordinary" politics which preceded and succeeded that moment; and (b) by transformation, through its role in altering the framework within which ordinary politics unfolded and thereby ensuring that the two phases of ordinary politics –before and after the relevant moment– were sharply distinct from one another.

In such case, it is claimed[32] that the constitutional moment: (i) is a highly infrequent event, one restricted to foundational episodes or other similarly abrupt shifts in the constitutional landscape; (ii) is not constitutionally trivial, otherwise it would be neither discontinuous with nor transformative of ordinary politics; (iii) is of considerable constitutional significance since it is not merely ephemeral or transient: thus if it is transformative, then its significance clearly has long-term effects on the constitutional framework of ordinary politics, even though the constitutional moment itself is merely a bounded episode.

Applied to the present work, "the supranational constitutional moment" –it could be argued– occurred with the founding of the EU through the 1951 ECSC Treaty and the 1957 EEC and EAEC Treaties in which the original six Member States agreed, inter alia, to the establishment of a number of institutions: these were endowed with independent law-making powers or judicial decision-making powers. The latter institution, the CJEU, was created as a permanent tribunal to resolve disputes not only variously between Member States

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27 See e.g. T.C. Hartley, "Federalism, courts and legal systems: the emerging constitution of the European Community" (1986) 34 AJCL 229-247; J.H.H. Weiler, "The Transformation of Europe" (1991) 100 Yale LR 2403; J.L. Seurin, "Towards a European Constitution? Problems of Political Integration" [1995] PL 625; E.-U. Petersmann, "Proposals for a new constitution for the European Union: Building-Blocks for a constitutional theory and constitutional law of the E.U." (1995) 32 CML Rev. 1123; K. Lenaerts "Constitutionalism and the Many Faces of Federalism" (1990) 38 AJCL 205; F. Mancini, "The Making of a Constitution for Europe" (1989) 26 CML Rev. 595; E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution" (1981) 75 AJIL 1; A. Weale, "Democratic Legitimacy and the Constitution of Europe," in R. Bellamy, V. Bufacchi & D. Castiglione (eds.), *Democracy and Constitutional Culture in the Union of Europe*, Lothian Foundation Press, London (1995),103; F. Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays*, Hart Publishing, Oxford (2000); and P. Beaumont, C. Lyons & N. Walker (eds.), *Convergence and Divergence in European Public Law*, Hart Publishing, Oxford (2002).

28 K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, OUP, Oxford (2001); B. de Witte, "Direct effect, supremacy, and the nature of the legal order," in P. Craig & G. de Búrca, *Evolution of EU Law*, OUP, Oxford (1999), chap. 5, 177-213; N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, OUP, Oxford (1999); J. Rideau (ed.), *Les Etats membres de l'Union européenne. Adaptations – Mutations – Résistances*, L.G.D.J., Paris (1997); A.M. Slaughter, A. Stone Sweet & J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford (1998); A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, OUP, Oxford (2000).

29 *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

30 E. Christodoulidis, "European constitutionalism: The improbability of self-determination" (2008) 5 No Foundations 71, at 76.

31 Ackerman noted only three in American history, viz., the Founding, the Reconstruction (after the Civil War) and the New Deal (of the 1930s): B. Ackerman, "Constitutional Politics/Constitutional Law" (1989) 99 Yale L.J. 453, at 486-515 and at 545.

32 N. Walker, "The Legacy of Europe's Constitutional Moment" (2004) 11 Constellations 368, at 368-369.

and Community institutions but also between individuals and companies (either directly or indirectly through the preliminary reference procedure). Of course, the importance of that "moment" can only be seen in retrospect from the vantage point of the subsequent activism of the CJEU that was heralded in the early 1960s with its rulings in *Van Gend en Loos*[33] and *Costa v. ENEL*[34] which together mark a watershed in the judicialisation and constitutionalisation of the founding Treaties.

In defining the supranational constitutional moment as the decision by the signatory states to the ECSC Treaty to establish the CJEU as a permanent judicial body endowed with a jurisdiction in disputes involving application of the Treaty and the interpretation and application of the law created under it, with the subsequent and concomitant expansion of the scope of its powers under the later treaties, it is possible to acknowledge the clear reticence on the part of the state parties to entities such as Mercosur, ASEAN and NAFTA to allow for such a body to be founded at the centre of their regional governance structures.

5. The CJEU as an Anti-Model

5.1. The nature of the anti-model

The notion of an "anti-model" is not, in itself, a novel idea[35]. As indicated earlier, it will be used in this work to identify a counter model to the judicial dispute resolution component of the EU concept of integration. The drafters of the frameworks of Mercosur, ASEAN and NAFTA evidently regarded the CJEU as being inimical to their preferred notions of state-centric or intergovernmental integration, especially in view of its constitutionalisation of the EU legal system and the resultant challenge to traditional notions of sovereignty. Rejection of the CJEU model is thus justified on the grounds of fear of possibly allowing for the replication of its judicially-created supranational principles which remain antithetical to the type of integration pursued by these regional groups.

However while the anti-model to the CJEU contains, at its core, the fundamental rejection of a judicial challenge to state independence in an integrating regional community, this does not, of itself, necessarily carry with it a complete rejection of the need to provide some form of dispute resolution in a regional system. Since disputes will inevitably arise between states in regional integrations, a pacific settlement system needs to be in place to cope with these eventualities since negotiations will not always be sufficient to settle inter-state disputes. An alternative to the CJEU is thus needed, leading to the adoption of anti-models based loosely on conciliatory and arbitral-type processes for dispute resolution. It therefore confirms the participating states' policy preference for a political or, at most, a quasi-adjudicative DSM.

Evidently, with hindsight born in the context of over 30 years of judicial activism in the CJEU, the three CJEU anti-model regional regimes examined in this study have purposefully striven to avoid the possibility of a "supranational" constitutional moment and have thus been resolute in their enhanced protection of national sovereignty. While rejection of the CJEU model as anti-model currently points to the maintenance of the levers of power in the hands of the Member States of Mercosur, ASEAN and NAFTA as well as to the need for

33 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Tariefcommissie* [1963] ECR 1.

34 Case 6/64 *Costa v. ENEL* [1964] ECR 585.

35 Klug (2000), at 604-612.

consensus, conciliation and arbitration as the prime motors for resolution of disputes involving state as well as private parties, such approach covers various understandings of sovereignty for the states concerned that are linked to differing legal, cultural, and political reasons as will be examined later in this work.

Of course, the temporal dimension of any comparative analysis between the CJEU and the DSMs of other regional economic communities must not be ignored and due account taken of it[36]: "Arguably, if we compared the EU in 1963 with NAFTA and the WTO today, that would be a more valid comparison of the states' intentions in creating a dispute resolution regime." In fact, it could well be argued, that the time factor is pivotal in this work as it is precisely because the CJEU has already constitutionalised the various Treaties over a period of decades, building up a substantial case-law in this respect, that Mercosur, ASEAN and NAFTA are intent upon avoiding the implications of the creation of a similar-styled court for their regional communities, *at this stage* of their economic, political and legal integration.

In respect of Mercosur, ASEAN and NAFTA, the major anti-model that has so far profoundly influenced the development of these systems' individual DSM was that formerly provided for under the General Agreement on Tariffs and Trade ("GATT"), and subsequently superseded by the 1995 Dispute Settlement Understanding ("DSU") of the World Trade Organisation ("WTO"). Consequently it will be argued that, despite its obvious international and non-regional integrationist setting, the GATT/WTO DSM has currently established itself as the CJEU anti-model for the three regional communities under discussion, thereby allowing them to avoid (at least in the short term) the constitutional moment of supranationality.

5.2. The form of the anti-model: the GATT / WTO DSM

The basic goal of GATT (1947) was to promote free international trade by setting down rules that limited national barriers to such trade[37], through encouraging contracting parties to set maximum tariff rates[38] and holding subsequent, periodic rounds of negotiations to reduce them; banning quotas[39]; and requiring most-favoured-nation treatment in trade[40].

The WTO[41] emerged from the seven-year Uruguay Round of Trade Negotiations whose Final Act was approved in December 1993 and signed in Marrakech, Morocco, in April 1994. The Final Act introduced various innovations to the GATT, strengthened its structure with the creation of the WTO, provided a compulsory DSM and opened the erstwhile GATT to new areas such as intellectual property, foreign investments, public procurement, the environment and services.

As regards the DSMs in particular, this mechanism had started out as a purely political one under the GATT. However, over time, it experienced many changes that ultimately laid the foundations for the introduction of the WTO DSM, a quasi-adjudicative process. The GATT/WTO DSM[42] has thus itself been subject to

36 Schneider (1998-1999), at 771.

37 GATT Preamble.

38 GATT, Art. II.

39 GATT, Art. XI.

40 GATT, Art. I.

41 On the WTO, see generally P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd ed., CUP, Cambridge (2008); T.J. Dillon, "The World Trade Organization: A New Legal Order for World Trade?" (1995) 16 Mich. J. Intl L. 349; and R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 Duke L.J. 829.

42 For a general outline of the GATT and WTO DSMs, see C. Cocuzza & A. Forabosco, "Are States Relinquishing their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy" (1996) 4 Tul. J. Intl. & Comp. L. 161-188.

evolutionary pressures in order to cope with the increasing demands of international trade[43]. For that reason, it is important to describe both the GATT DSM as well as the WTO DSM which replaced it[44], since the development from one to the other system has also influenced developments in the DSMs of the three regional entities under consideration in the present work.

5.2.1. Initial model: GATT

The GATT contained many provisions designed to resolve disputes between contracting parties[45], most of which provided initially (and sometimes exclusively) for consultations between the relevant parties[46]. If, however, these parties were unable to settle their differences through negotiations, they could resort to GATT, Arts. XXII and XXIII[47]: together they formed the framework of the main GATT DSM.

On the one hand, Article XXII regulated consultations, initially between the parties to a dispute under GATT and then, if such consultations failed, the GATT contracting parties could – at the request of a party – consult with any party or parties in respect of the continuing dispute. On the other hand, Article XXIII could be invoked, *inter alia*, when one party claimed that a benefit accruing to it under GATT had been nullified or impaired by another party so that it had suffered some detriment. In such a case, all the GATT contracting parties, acting as a group[48], were required to investigate the matter and to make appropriate recommendations or rulings. If the contracting parties found that the circumstances were serious enough, they might authorise the complainant to take retaliatory action against the respondent to compensate the complainant for its damages.

These rather brief provisions did not provide for the formal procedures of a typical DSM but such shortcomings were nevertheless rectified over the period of operation of GATT from 1947 to 1994[49]: "[T]he GATT Contracting Parties 'transformed', in a highly pragmatic manner over a period of five decades, what was initially a rudimentary, power-based system for settling disputes through diplomatic negotiations into an elaborate, rules-based system for settling disputes through adjudication".

It was clear from the very beginning that a general meeting of all the GATT Contracting Parties would not be suited to resolving disputes between parties. At first, disputes were considered by working parties that consisted of the contending parties and several other GATT Contracting Parties. Working party reports usually stated the views of each member of the working party but did not reach decisions on the merits of the dispute. However, the views of the majority of the working party were often clear and, with the effluxion of time, the

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43 A. Reich, "From Diplomacy to Law: The Juridicization of International Trade Relations" (1996-1997) 17 Nw. J. Intl. Bus. & L. 775, at 777.

44 For the similarities and differences between the two systems' DSMs, see B. Zangl, "Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO" (2008) 52 Intl. Studies Q. 825-854.

45 J.H. Jackson, *World Trade and the Law of GATT*, Bobbs-Merrill Co., Indianapolis (1969), at 164-166.

46 GATT, Arts. VII:1, VIII:2, XIX:2, and XXII. Other provisions which might have played a role in dispute settlement included those allowing for a waiver of obligations (GATT, Art. XXV:5); and periodic renegotiation of concessions (GATT, Art. XXVIII:1).

47 W.J. Davey, "Dispute Settlement in GATT" (1987) 11 Fordham Intl. L.J. 51, at 54-57; J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed., MIT Press, Cambridge (MASS)/London (1997), at 114-115; and A.F. Lowenfeld, *International Economic Law*, OUP, Oxford (2002), at 138-140.

48 GATT was never intended to be an independent international organisation. It was expected to be subsumed under the umbrella of the International Trade Organisation ("ITO") which however never came into existence because the U.S. Congress failed to ratify it. Consequently, the GATT Agreement did not provide an organisational structure for GATT except by specifying that all of the contracting parties might, in certain circumstances, meet and take action: Van den Bossche (2008), at 78-80. The contracting parties typically met towards the end of each year. In order to deal with matters arising between these annual meetings, the GATT Council was created. It met more or less monthly and was open to all contracting parties willing to participate. It was delegated all the powers of the contracting parties, except the power to grant waivers. Its decisions might be appealed to the contracting parties, acting as a group. Although no provision was made for it in the Agreement, a GATT Secretariat existed, headed by a Director-General, comprising several hundred persons. It is headed by a Director-General. Technically, the staff was employed by the Interim Commission of the defunct ITO: Jackson (1969), at 37-38.

49 Reich (1996-1997), at 794-799.

reports came to be treated as having reached definitive decisions. In the early 1950s, working parties came to be replaced by the use of panels in GATT Art. XXIII cases[50]. It became the standard practice for the contracting parties to appoint a panel of individuals to consider a dispute and prepare a report so that the contracting parties could take appropriate action. Disaffection with many aspects of the panel process and disagreement between Contracting Parties as to the essentially political or adjudicative nature of such panels led to extensive discussions on the GATT DSM in the Tokyo Round of negotiations, resulting in the adoption of an Understanding on Dispute Settlement 1979. This Understanding effectively summarised the DSM as developed by GATT and affirmed its continuance[51], in fact, although objections continued with respect to use of panels, their use was confirmed in the GATT Ministerial Declaration on Dispute Settlement that largely reiterated the 1979 Understanding.

In the context provided by these documents and the developed practice[52], then where two Contracting Parties were unable to resolve their dispute through consultations and negotiations the aggrieved party could request appointment of a panel to rule on the dispute. The request would be lodged with the GATT Council, a body open to all GATT Contracting Parties and to which these parties had collectively delegated the authority to act on their behalf.

While there was no absolute right to a panel, vigorous pursuit of such establishment usually resulted in its setting-up although considerable delay could ensue between the initial request and the actual establishment. This delay could result, e.g., from the fact that it was accepted that the Contracting Parties had the right to be consulted on the composition of the panel and to reject panel members to whom they objected. According to the 1979 Understanding, parties were required to lodge such objections within seven days of the GATT Director General's nomination of a panel member, it being understood that they should do so then only for compelling reasons. Panel members were usually ministry or other public officials responsible for GATT and international trade matters, especially those based in Geneva who represented their states at GATT. In reaching their decisions, panel members were required to be independent and thus to act as individuals rather as representatives of their own states' interests.

The panel examined the dispute and made such findings as to assist the Contracting Parties in making recommendations or rulings as set out in GATT Art. XXIII. The panel received written and/or oral submissions from the contending parties and could receive submissions from other interested parties. Initially, it would issue a proposed report on which the contending parties could comment. Having considered such comments, the panel would submit its report to the GATT Council: such report would usually resolve the main issues in dispute (or at least those necessary upon which to make a decision) and, if it had found nullification or impairment, would order (1) removal of the offending measure; or (2) if that were not possible, then compensation for the injured party; or (3) as a last resort, the injured party could be authorised to retaliate against the offending party. Nevertheless, throughout the entire panel process, the contending parties were urged to resolve their dispute amicably.

A panel report in and of itself had no force and had first to be adopted by the GATT Council on behalf of the contracting parties. Since the Council did not usually act without consensus, the "losing" party (at least an important losing party) might hold up adoption of a panel report indefinitely while it allegedly attempted to analyse it and to explore possible negotiated solutions with the winning party.

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50 Jackson (1997), at 115-116; Lowenfeld (2002), at 141.

51 Jackson (1997), at 116-117; Lowenfeld (2002), at 145-148.

52 Davey (1987), 58-60.

5.2.2. Current model: WTO

The WTO replaced all previous settlement procedures based on Articles XXII and XXIII of GATT 1947 by the 1995 Understanding on Dispute Settlement ("DSU"[53]) which now represents the general DSM for all agreements within the WTO, including GATT, GATS, and TRIPs. The evolution of the political-based system of the GATT into the rules-based system of the WTO with its quasi-judicialisation of the dispute settlement process, may be seen as symptomatic of a general juridification of the international system, both within and without the field of global trade, which was noted earlier.

Use of the WTO DSM[54] is available only after the parties to the dispute have failed to settle their differences through consultations. Where such failure occurs, the complaining state can request the setting up of an *ad hoc* panel by the Dispute Settlement Body ("DSB"), an entity which comprises all state parties and which enjoys overall responsibility for the administration and operation of the DSM. The DSB establishes panels of three (or five) persons from a roster of possible panellists maintained by the Secretariat: selection of panellists is made with a view to ensuring their independence, as well as providing for a sufficiently diverse background and a broad spectrum of experiences. Panels address issues of both law and fact, and their deliberations remain confidential: the panel's finalised report is sent to the DSB for adoption. Where a panel finds that the challenged measure infringes a WTO agreement, it must recommend that the measure comply (either through amendment or removal) and may suggest ways of doing so. The DSB must adopt the panel's report as a decision unless either a disputing state party appeals or if it decides by consensus not to adopt the report.

Appeal lies to the Appellate Body ("AB") whose review is limited to matters of law and legal interpretation by the panel. The AB is made up of seven persons appointed for a four-year term, renewable once and who possess expertise in law, international trade and agreements to the WTO generally. Unlike panellists, AB members deal continuously with matters submitted to the AB and an appeal is heard by three of the seven members. In such cases, the AB can uphold, modify or reverse the report of the panel and, like the panel, where appropriate recommend that the measure conform and the ways in which to accomplish this. The DSB must then adopt the AB's report unless it declines to do so by consensus.

Where the complained-against (respondent) state party fails to follow the recommendation within a reasonable period, it may negotiate with the complainant state for a mutually agreeable form of compensation (e.g., the grant of a concession on a good or service of the complainant state vis-à-vis trade with the respondent). Where this fails, the complainant can then request the DSB to permit it to take retaliatory measures (e.g., withdrawal of concessions or other obligations under the relevant WTO agreement) until such time as the respondent complies with the panel or AB recommendations.

The "automatic" adoption of either the panel or AB report –unless the DSB establishes a consensus against it– is a marked improvement over the prior GATT "diplomatic" practice whereby a state party complained against could effectively block the adoption of a report against it. In fact, it is this "automatic" aspect of the adoption of a report –making it virtually impossible to block– that made state parties most nervous about the actual potential of the process.

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53 J.H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, CUP, Cambridge (2000), at 162-192.

54 Jackson (1997), at 124-127; Lowenfeld (2002), at 152-179; Van den Bossche (2008), at 168-316.

The WTO DSM thus provides a functioning regime to resolve covered disputes between states while, to a very great extent, respecting their national sovereignty: in this way, it may be seen as a moderately successful quasi-adjudicative anti-model to the CJEU's adjudicative regime. As will be seen in the following parts, the WTO DSM has profoundly influenced the creation and/or evolution of regional DSMs in Mercosur, ASEAN and NAFTA; on an evolutionary level, it may be argued that the WTO DSM has guided its regional counterparts along a road from being mild political to quasi-adjudicative mechanisms.

6. Mercosur

6.1. Treaty framework

The 1991 Treaty of Asunción[55] between Argentina, Brazil, Paraguay and Uruguay established the Common Market of the Southern Cone, known in its three official languages as "*Mercado Común del Sur*" or "Mercosur" (Spanish); "*Mercado Comum do Sul*" or "Mercosul" (Portuguese); and "*Ñemby Ñemuha*" (Guaraní)[56]. Venezuela sought admission in 2006 but its membership is currently blocked by the refusal of the Paraguayan Congress to ratify the relevant accession treaty.

Within the general context of the long progeny of South American integration[57], the foundation of Mercosur has its roots in the overall political and security rapprochement between Argentina and Brazil in the late 1980s that initially focused on matters of nuclear energy and policy and formed the basis of a bilateral programme of sectoral integration[58]. This subsequently led to their signing in 1988 of the Treaty of Integration, Co-operation and Development[59] that contained the seeds for the establishment of a common market.

Mercosur may thus be seen to be the outgrowth of this original bilateral co-operation that, as has been suggested[60], mirrors a similar rapprochement between France and Germany in the late 1940s and early 1950s which led to the creation of the ECSC and later the EEC and EAEC. Clearly, Mercosur is a broader-based agreement not only in geographical terms but also in policy reach and institutional set up.

Its main objectives[61] are the free movement of goods, services and factors of production between Member States through gradual elimination of customs duties and non-tariff restrictions and equivalent measures; the establishment of a common external tariff; and the adoption of a common trade policy vis-à-vis third parties. In addition, Mercosur is to co-ordinate macroeconomic and sectoral policies among Member States as well as the harmonisation of Member States legislation on the relevant matters in order to strengthen the integration process.

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55 Treaty of Asunción, 26 March 1991: (1991) 30 I.L.M. 1042.

56 Under Art. 140 of the Constitution of Paraguay, this Amerindian language (of some five million speakers in various groups) has been an official language there since 1992 and became Mercosur's third official language in November 2006: CMC Dec. No. 35/06.

57 A. Colomer Viadel, "El zigzagueante proceso de la integración latinoamericano: Potencialidades e insuficiencias," in A. Colomer Viadel (ed.), *La Integración Política en Europa y en América Latina*, Ugarit Comunicación Gráfica SL, Valencia (2007), 157, at 167-190; and A. Martínez Puñal, "El Mercado Común del Sur (Mercosur): Antecedentes y Alcance del Tratado de Asunción," in J. Pueyo Losa & E. J. Rey Caro (eds.), Mercosur: *Nuevos Ámbitos y Perspectivas en el Desarrollo del Proceso de Integración*, Ciudad Argentina/USAL, Buenos Aires (2000), 15-74.

58 A. Zelada Castedo, "Los acuerdos del Programa de Integración y Cooperación Económica entre Argentina y Brasil y el ordenamiento jurídico de la ALADI" (1987) 12 (129) Integración Latinoamericana 16-26.

59 Treaty of Integration, Cooperation and Development Between Argentina and Brazil, signed on 29 November 1988 in A. Alterini & M. Boldorini (eds.), *El Sistema Jurídico en el MERCOSUR*, Vol. 1: *Estructura general. Instrumentos fundacionales y complementarios*, Abeledo-Perrot, Buenos Aires (1994), at 319.

60 S. Gratius, "Introducción," in S. Gratius (ed.), Mercosur y NAFTA: *Instituciones y mecanismos de decisión en procesos de integración asimétricos*, Iberoamericana, Madrid/Vervuert, Frankfurt am Main (2008), 13, at 25-26 and at 28-29.

61 Treaty of Asunción 1991, Art.1.

Mercosur has experienced three discernible stages of evolution and this has led it to evolving from a purely free-market based integration concept to one with more determined social and political aims[62]. The first period (1991-1998) was marked by the common interests of the states in ensuring the liberalisation of infra-regional trade and the pursuit of rapid economic development. In contrast, during the second period (1999-2003), economic development occurred at different paces and Argentina and Brazil were constantly in dispute over trade matters, caused by the devaluation of the Brazilian real and its resulting impact on the severe financial crisis in Argentina which ensued. Lastly, the current period (from 2003), has seen a re-energising of Mercosur, with the election of new presidents in Argentina, Brazil and Paraguay: co-ordination in macroeconomic and social policies, new objectives for migration within the bloc and institutional innovation. Despite these developments, the projected expansion to include Venezuela represents an inherent challenge to Brazilian leadership of Mercosur; moreover it has yet to fulfil the promise of its founders, and is currently neither a free trade area nor a completed customs union.

6.2. Issues of sovereignty

In creating the regional group, the Mercosur states were clearly more animated in retaining national sovereignty than in "pooling" it and were accordingly averse to supranational legislation and institutions. This aversion is, in part, evinced by the main legal sources of Mercosur: the 1991 Treaty of Asunción the protocols, and the various decisions and resolutions of the different bodies. Mercosur legal acts are only directly binding for the Member States, and not for legal or natural persons, and only gain effect once they are implemented or incorporated into national law[63]: even then, Mercosur rules enjoy no supremacy, direct applicability or direct effect[64]. Further, there is no hierarchy between the different legal sources with the result that Mercosur protocols and legal acts can revise the Treaty[65].

Moreover, the stress on flexible intergovernmentalism is a hallmark of Mercosur integration and persists to this day: it can be seen in the design of the common institutions and in the preference for presidential diplomacy to solve intra-Mercosur problems.

First, the states clearly resolved not to endow regional institutions with any supranational power but rather created permanent intergovernmental organs with decision-making capacity; while each was endowed with capacity to issue binding rules this was to be achieved only through consensus[66], and not by majority votes. In such matter, a large role was played by the Brazilian fear of being subject to (or at least, having its power to act limited) by the organisation itself and supranational law created by it[67]. The three decision-making institutions are the Common Market Council ("CMC") and the Common Market Group ("CMG"), provided for originally under Treaty of Asunción, to which the 1994 Ouro Preto Protocol added the Mercosur Trade Commission ("MTC").

62 Gratius (2008), at 16-19.

63 Articles 41-42 of the Protocol of Ouro Preto ("OPP"), 17 December 1994: (1995) 34 I.L.M. 1244.

64 M.T Moya Domínguez, *Derecho de la integración*, EDIAR, Buenos Aires (2006), at 210-211.

65 R. Bouzas, H. Coronado, A. Ortiz Mena & H. Soltz, "La eficacia de los mecanismos de solución de controversias," in Gratius (2008), chap. II, 97, at 176-177.

66 Treaty of Asunción, Art. 16 and now superseded by the wording of OPP, Art. 37.

67 Interestingly, a move towards a Mercosur with a stronger institutional set-up (including a parliament) and improved intra-regional integration was enunciated by the government of Brazilian President Luiz Ignacio "Lula" Da Silva on coming into office in 2003: R. Bouzas, S. Gratius, H. Soltz & S. Sberro, "Teoría y práctica de las instituciones y procesos de decision," in Gratius (2008), chap. I, 33, at 91-95.

The CMG[68], the executive body of Mercosur, consists of four official members and four alternates from each Mercosur state; the membership also includes representatives from national ministries of foreign affairs and of finance, as well as from domestic central banks. The CMG is charged with supervising the application of the Treaty of Asunción, its protocols, and the agreements signed within its framework; supervising Mercosur working groups; and issuing binding Resolutions in line with its mandate.

The CMC[69] is the most important decision-making body in Mercosur and is composed of the foreign ministers and finance ministers of the different states. It is responsible for supervising the integration process, has negotiating authority to conclude agreements, and formulates policies for Mercosur through formal Decisions. The main purpose of the CMC is to ensure that the Member States comply with the Treaty of Asunción, its protocols and agreements.

The MTC[70] is co-ordinated by the Mercosur states' foreign ministers and is responsible for dealing with issues related to commercial relations between the Member States, and implementing common commercial policies. The MTC issues binding Directives within its field of competence.

Secondly, from a high political perspective, concerns over sovereignty have been reflected by the way in which the presidents of the different Mercosur states who – with their governments were instrumental in assuring its creation – have never relinquished their power and have used it at times of crisis to ensure its continued survival. Moreover, this type of "inter-presidentialism"[71] has its roots deeply embedded in the political mores of the Mercosur states themselves where the norm is the presidentialist tradition[72], as opposed to the largely parliamentary traditions of the EU Member States. This is especially true of Argentina and Brazil where politics and history have engendered a particular presidentialist character[73].

Through their diplomacy, Mercosur state presidents have acquired the popular legitimacy and determination to intervene in Mercosur issues in order to promote regional integration and to resolve more effectively disputes between the Member States: examples of such diplomacy may be seen in the way in which President Raúl Alfonsín of Argentina and President José Sarney of Brazil actively pursued inter-presidential diplomacy in the late 1980s to lay the basis for the reduction of tension between the two states in the political and security fields and pave the way for deepening co-operation. It was also evident in the way in which the Argentinian and Brazilian heads of state determined to maintain Mercosur in the teeth of the severe economic crisis of 1999-2001 on a political basis rather than an economic one: both states resorted to presidential diplomacy to resolve the bitter differences between them rather than creating supranational institutions through or by which to do so.

Presidential diplomacy may accordingly be seen to reflect the will of Member States not to abandon their national sovereignty and independence to Mercosur, thereby underlining their reluctance to construct supranational community institutions that can decide and manage common policies, and so promote integration. It also underlines the power of Argentina and most particularly Brazil in seeking to run the four-

68 Treaty of Asunción, Arts. 13-15 and OPP, Arts. 10-15.

69 Treaty of Asunción, Arts. 10-12 and OPP, Arts. 3-9.

70 CMC Decisions 13/93 and 9/94 and OPP, Arts. 16-21.

71 A. Malamud, "Presidentialism and Mercosur: A Hidden Cause for a Successful Experience," in F. Laursen (ed.), *Comparative Regional Integration: Theoretical Perspectives*, Ashgate, Aldershot (2003), 53-73.

72 M. De Almeida Madeiros, "O Mercosul e a Uniao Européia: Uma abordagem comparada do processo da formacao de instituicoes" (1996) 18/1 Contexto Internacional 96.

73 P. Sondrol, "The Presidentialist Tradition in Latin America" (2005) 28/5-6 International Journal of Public Administration 517-530.

state Mercosur without undue recourse to the two smaller states: as will be seen below, Brazil's constitutional provisions also remain an effective veto on any purported move to supranational institutions and law with the bloc. Nevertheless, were Venezuela to become a full member, it remains to be seen how the pre-existing dynamic of inter-presidentialism between Argentina and Brazil would be played out[74].

In addition, there are national constitutional limitations to permitting the establishment of a regional integration regime through Mercosur, sufficient to create a community law[75]. On the one hand, Argentina and Paraguay are ostensibly open up to Mercosur integration. The Argentine Constitution recognises as part of the powers of Congress[76] to "approve integration treaties that delegate authority and jurisdiction to supranational organisations under conditions of reciprocity and equality and that respect the principles of democracy and human rights." Paraguay[77], on condition of equality with all other states, "accepts a supranational legal order that guarantees the observance of human rights, peace, justice, co-operation and development in the political, social and economic planes."

On the other hand, Brazil and Uruguay have no provisions for granting supremacy to treaties with respect to national laws but both do refer to integration. Brazil undertakes[78] to "strive for economic, political, social, and cultural integration of the peoples of Latin America in an effort to establish a Latin American community of nations," while Uruguay[79] seeks "the social and economic integration of Latin American states, especially as regards the joint defence of their products and raw materials." It is therefore clearly arguable that, barring constitutional amendment in Brazil and Uruguay, further integration in the Mercosur system may prove to be elusive, especially in the absence of a means to overcome any problem with accepting the hierarchy of Mercosur legal acts.

6.3. Dispute Settlement Mechanism

In addressing the dispute resolution system of Mercosur[80], it is important to stress its own evolutionary character from what was originally conceived as having a temporary nature with immediate executive institutional oversight to a more permanent judicial-type body with modest jurisdictional scope. The further expansion or modest "spillover" of jurisdictional supervision into labour disputes involving Mercosur institutions will also be addressed. As with the subsequent example of ASEAN, changes to the dispute settlement mechanism of the GATT/WTO have impacted directly on the development of Mercosur's own mechanism.

74 K.L. Brown, "Venezuela Joins Mercosur: The Impact Felt Around the Americas" (2010) 16 Law and Business Review of the Americas 85, at 90-93.

75 On these issues generally, see Moya Domínguez (2006), at 263-316.

76 Constitution of Argentina (as amended in 1994), Art. 75(24).

77 Constitution of Paraguay 1992, Art. 145.

78 Constitution of Brazil 1988, Art. 4.

79 Constitution of Uruguay 1966, Art. 6.

80 E. J. Rey Caro, "Los mecanismos y procedimientos para la solución de controversias en el Mercosur. Antecedentes, realidad y perspectivas," in Pueyo Losa & Rey Caro (2000), at 122-146.

6.3.1. Initial models

6.3.1.1. Provisional system

Under the 1991 Treaty of Asunción, Annex III[81] provided for the implementation of a provisional dispute resolution system[82] between the Mercosur Member States, designed to expire at the end of 1994 and thereafter be replaced by a permanent system. The provisional system comprised a three-stage process: (1) the necessity for starting negotiations between the parties to the dispute; (2) where the first stage failed to find a resolution, the dispute would then be submitted to the CMG. In addressing the case, the CMG could call upon a panel of experts (if technical advice were needed) and make the relevant recommendations within a maximum 60-day period; and (3) if the CMG could not resolve the dispute, then lastly the CMC could examine the case and adopt its own recommendations. Of particular interest is that, until the end of the transition period under the Treaty (technically the end of 1994[83] but in fact eventually extended until the beginning of 2005), the CMC and CMG had to take their decisions by consensus during meetings where all Mercosur states were present[84]. Considering the roles of the CMG and CMC, the system in implementing any recommendations was, in effect, subject to a national veto. Moreover, even though the steps taken under the Annex III procedure were compulsory, the CMG and CMC recommendations were not intended to be binding. Thus, the precarious nature of the system involving direct negotiations between Mercosur states was a corollary of a persistent political need to obtain their consensus as the foundation for the common market[85].

6.3.1.2. Brasilia Protocol

Created in December 1991 and entering into force in 1993, the Brasilia Protocol[86] created a very rudimentary system for the settlement of disputes for the transition period[87] (which, as noted above, remained in effect up to 2005). It built on the terms of Annex III to the Treaty of Asunción setting out a process to be initiated by direct negotiations and culminating in arbitration, and introduced two new features: (a) it provided natural and legal persons from Mercosur states with the possibility of accessing the system; and (b) it established a judicial method of dispute resolution through *ad hoc* arbitration tribunals to settle disputes concerning the interpretation or application of Mercosur law.

First, individuals and companies ("private parties") could commence a claim for violation of Mercosur law[88] where a state or states have adopted or applied "legal or administrative measures which have a restrictive, discriminatory or unfairly competitive effect, in violation of the Treaty of Asuncion, of the agreements celebrated within its framework, the Decisions of the Common Market Council or the Resolutions of the Common Market Group".

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81 D. Lopez, "Dispute Resolution Under MERCOSUR from 1991 to 1996: Implications for the Formation of a Free Trade Area of the Americas" (1997) 3 NAFTA Law & Bus. Rev. Am. 3, at 14; and Moya Domínguez (2006), at 322-323.

82 Rey Caro (2000), at 122-123.

83 Treaty of Asunción, Art. 3.

84 Originally in Treaty of Asunción, Art. 16 and now superseded by OPP, Art. 37.

85 Vinuesa at 79.

86 Protocol of Brasilia for the Settlement of Disputes ("BP"), 17 December 1991: (1997) 36 I.L.M. 691.

87 Bouzas, Coronado, Ortiz Mena & Soltz, in Gratius (2008), chap. II, 97, at 98-107; Lopez (1997), at 15-18; Moya Domínguez (2006), at 323-329; and Rey Caro (2000), at 123-133.

88 BP, Art. 25.

It was clear from the wording then that private parties could only challenge the actions of states and not their omissions to comply with Mercosur law, and also they could not challenge the various measures adopted by the Mercosur institutions.

In addition, the right could only be exercised indirectly since the claim had to be submitted and accepted by the National Section of the CMG where the private party resided or was headquartered[89]. Were the National Section of the CMG to accept the claim it could either directly negotiate with the corresponding National Section of the Mercosur state allegedly responsible for the violation or submit the claim to the CMG[90].

In fact, where the negotiations failed between the National Sections within 15 days, the dispute was then elevated to the full CMG which, in turn, referred the claim to a three-member panel of experts charged with producing binding recommendations within 30 days of being named[91]. If these experts were to find in favour of the private party, then any other state might request the violating state to adopt corrective measures or annul the challenged rule[92]. Failure by the violating state party to comply (including its refusal to adopt the experts' recommendations within a 15-day period), then the claim could only continue on to binding arbitration[93] if the private party's complaint were adopted by a state party as its own and a formal request were made for the formation of a three-person *ad hoc* arbitral panel (as discussed below).

Secondly, if direct negotiations failed to resolve a dispute, it could be referred to the CMG in order for it to give its recommendations to settle the dispute. Where this also failed, any state could commence arbitral proceedings. The award of the *ad hoc* arbitral tribunal (whose three arbitrators would be selected from a list of 40, ten having been elected by each state[94]) had to be made within 90 days[95]; moreover, the arbitrators were expressly granted the power to issue preliminary provisional measures in order to prevent severe and irreparable damages[96]. The award was made by majority vote, was binding on the state parties from the time of its notification and could not be appealed[97]. Non-compliance of a state with an arbitral award permitted the remaining Mercosur states to adopt temporary compensatory measures (e.g., the suspension of preferential tariff treatment or other concessions[98]).

6.3.1.3. Ouro Preto Protocol

The 1994 Protocol of Ouro Preto introduced important changes[99] and created a new body, the Mercosur Trade Commission ("MTC") that was charged with ensuring the application of common trade policy instruments vis-à-vis intra- and extra-regional trade[100].

89 BP, Art. 26.

90 BP, Arts. 27 and 28.

91 BP, Art. 29.

92 BP Art. 32.

93 BP, Art. 32.

94 Each state party or parties on each side of a dispute selects an arbitrator from pre-submitted lists of candidates. The third arbitrator is chosen by mutual consent and becomes the President of the arbitration panel and cannot be a national of one of the state parties involved in the controversy. If a consensus cannot be reached as to the third arbitrator, then the Mercosur Administrative Secretariat in Montevideo chooses him or her by lottery. Each state party or parties pays for the arbitrator it (they) chose. The cost of the third arbitrator is shared in equal parts by each side to the dispute: BP, Arts. 7, 9, 11, 12, 14 and 24.

95 BP, Art. 20.

96 BP, Art. 18.

97 BP, Arts. 8 and 21. The actual vote was kept confidential and no dissenting opinions were allowed: BP Art. 20(2).

98 BP, Art. 23.

99 Moya Domínguez (2006), at 329-335.

100 OPP, Art. 19.

As regards the dispute settlement system, the MTC was authorised to consider complaints presented by the National Sections of the MTC originating with state or private parties that came within its jurisdiction[101]. In addition, the Directives issued by the MTC were added to the legal norms upon which a party can base a complaint for violation of Mercosur law[102].

Annex I to the Protocol of Ouro Preto contains the procedure[103] to follow when a state party opts to file a complaint with the MTC. If the MTC cannot resolve the matter at its next regular meeting, then it is forwarded to a one of ten permanent technical committees that assist the MTC in its work[104]. That committee has 30 days to make a recommendation or, if there is a difference of opinion, to forward the conclusions of the different experts[105]. Where the MTC is still unable to resolve the dispute, then it is elevated to the full CMG (together with the different remedies proposed by the experts) for decision within 30 days[106]. Failure on the part of the CMG to make a final decision on the dispute or failure on the part of the violating state party to accept –within a reasonable time– a final decision of the CMG or, if previously made, of the MTC, permits the claimant state party to initiate the binding arbitral procedure under the Brasilia Protocol[107].

6.3.2. Current models

6.3.2.1. Olivos Protocol

The 2002 Protocol of Olivos contains the new transitional dispute settlement system for Mercosur, replacing the Protocol of Brasilia but leaving in situ the changes made under the Protocol of Ouro Preto[108]. The Olivos Protocol introduces a number of innovations: (i) it sets up a Permanent Review Tribunal ("PRT"), designed to "guarantee the correct interpretation, application and fulfilment of the fundamental instruments of the integration process" and Mercosur norms "in a consistent and systematic manner"; (ii) it introduces a new choice of forum rule into the Mercosur legal order; (iii) it gives the arbitral panels greater oversight capabilities in order to help ensure compliance with their decisions; and (iv) it provides state parties with a faster route to final-stage arbitration: thus where direct negotiations between the states fail, there is now no need to go through the MTC and/or CMG before initiating arbitral proceedings.

However, it should be noted that the innovations under the Olivos Protocol have not touched, in any way, the resolution of disputes between Mercosur states and private parties which are thus still governed by the former rules of the Brasilia Protocol (as re-enacted under the Olivos Protocol) and those of the still extant Ouro Preto Protocol.

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101 OPP, Art. 21.

102 OPP, Art. 43.

103 Rey Caro (2000), at 133-138.

104 OPP, Annex I, Article 2: the ten technical committees are: (i) Tariffs, Nomenclature and Product Classification; (ii) Customs Matters; (iii) Trade Norms; (iv) Public Policies that Distort Competition; (v) Safeguard of Competition; (vi) Unfair Trade Practices & Safeguard Measures; (vii) Consumer Protection; (viii) Non-tariff Barriers; (ix) Automotive Sector; and (x) Textile Sector.

105 OPP, Annex I, Art. 3.

106 OPP, Annex I, Art. 5.

107 OPP, Annex I, Arts. 6 and 7.

108 Bouzas, Coronado, Ortiz Mena & Soltz, in Gratius (2008), chap. II, 97, at 107-110; and Moya Domínguez (2006), at 335-354.

The Olivos Protocol[109] recognises that state parties have the option, when appropriate, to use either the Mercosur or WTO system for resolving disputes between them but, once the choice of forum has been made, they are not allowed to commence other proceedings in another forum concerning the same dispute[110].

While, as ever, state parties should initially try to resolve their disputes through direct negotiation[111], failure to do so within 15 days[112] allows the matter to be referred (as previously) to the CMG (but now only by common agreement between the parties[113]) or to proceed straightaway to arbitration[114] or even to the PRT[115]. The "new" procedures for the CMG and the *ad hoc* arbitration panels in these situations remain basically the same as those in the Brasilia Protocol.

As noted earlier, the major institutional innovation of the Olivos Protocol is the PRT[116] which comprises five members, with each Mercosur state choosing one judge (and a supplement) for a two-year period subject to renewal for two consecutive terms[117]. The fifth judge, who becomes the President of the Tribunal and must be a Mercosur national, is chosen for a three-year term through a common decision of all Member States[118]. When there is a bilateral dispute, the PRT is limited to three judges, with one judge from each country to the dispute and the third, a non-national to the dispute, chosen to be President[119].

A state party has 15 days to respond to any petition requesting review, and the PRT must usually issue its decision within 30 days although one 15-day extension is permitted[120]. The PRT[121] has the power to "confirm, modify or revoke the legal basis and decisions" of an *ad hoc* arbitral panel and the PRT's decisions take precedence over those of the panel[122]. In addition, as noted above, state parties may request the PRT to review a dispute within its jurisdiction if they are unable fully to resolve the matter through direct negotiations[123].

Like the decisions of the *ad hoc* arbitration panels, those of the PRT are adopted by majority vote[124] and have the force of *res judicata*[125]. While *ad hoc* arbitral awards are generally subject to review by the PRT, PRT decisions are final and cannot be appealed although state parties can always request clarification of decisions emanating from the PRT (as they can from the *ad hoc* arbitration panels[126]). However, the reasons of appeal must be strictly related to issues of law and to the legal interpretations developed within the decisions:

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109 Article 1 of the Protocol of Olivos ("OP"), 18 February 2002: (2003) 42 I.L.M. 1.

110 OP, Art. 1(2).

111 OP, Art. 4.

112 OP, Art. 5(1).

113 OP, Arts. 6-8.

114 OP, Arts. 9-16. Interestingly, a State not involved in a dispute is now able to request referral of a dispute to the CMG (although this will not necessarily delay use of the binding arbitration option chosen by at least one the parties to the dispute): OP, Art. 7(2).

115 OP, Arts. 4-5 and 23.

116 OP, Arts. 17-24.

117 OP, Art. 18(1) and (2).

118 OP, Art. 18(3) and (4). If a consensus is not possible, then the Director of the Mercosur Administrative Secretariat selects the fifth judge by lottery from a pre-submitted list of eight candidates: OP, Art. 18(3).

119 Again, this is done by the Director of the Administrative Secretariat through a lottery from among the arbitrators whose state is not a party to the dispute: OP, Art. 20.

120 OP, Art. 21.

121 OP, Art. 22.

122 In reviewing *ad hoc* arbitral awards, the role of the Permanent Review Tribunal is limited to insuring a consistent interpretation of the law applied by the arbitration panel as developed by the Tribunal itself and in previous *ad hoc* arbitral awards: OP, Art. 17(2).

123 OP, Art. 23.

124 As with *ad hoc* arbitral awards, the actual votes are kept secret and no dissenting opinions are permitted: OP Art. 25.

125 OP Art. 26.

126 OP Arts. 22, 23, 26 and 28.

arbitration awards issued on the basis of equity and the principle of *ex aequo et bono*[127] cannot be appealed[128]. Again, as with the decisions of the *ad hoc* tribunals, where a violating state partially or totally fails to comply with a PRT decision, the claimant state party or parties may impose retaliatory measures within one year from the end of the designated period for implementing such decision[129].

The PRT is additionally endowed with an advisory jurisdiction[130]. This allows not just the Member States (conjointly) but also Mercosur institutions –the CMC, the CMG, the MTC and the Mercosur Parliament– to ask the PRT for an advisory opinion on legal questions concerning the interpretation of Mercosur norms. This right is also granted to domestic superior courts of Mercosur states that enjoy nationwide competence, provided that such opinions relate to cases on trial and involve the interpretation of Mercosur norms. Nevertheless, such PRT opinions are not binding nor are they compulsory, and in any event cannot refer to issues already under consideration in the Mercosur dispute settlement system.

6.3.2.2. Labour disputes with Mercosur institutions

The provision of judicial procedures to protect against infringements of rights of persons employed by regional institutions is a matter recognised, e.g., by the EU from its very inception as the ECSC Treaty when it granted exclusive jurisdiction to the CJEU to hear staff cases. Such jurisdiction remained with the CJEU under the EEC Treaty and was only altered, at least at first instance, with the creation through the Single European Act 1986 of the General Court. Since 2004, such jurisdiction is now exercised by the European Union Civil Service Tribunal[131].

As for Mercosur, the General Rules for the Administrative Secretariat Servants were issued in 1997[132] and provided for the resolution of labour disputes by an administrative judicial body where they failed to be resolved by administrative appeal. This body, the Administrative Labour Court of Mercosur ("*Tribunal Administrativo Laboral*" or "TLC") was created in 2003[133] and has the jurisdiction to hear and determine disputes in employment and administrative matters between Mercosur and its servants or other workers contracted by Mercosur for specific tasks in the Mercosur Secretariat or in other organs of its institutional structure. The Court has four judges appointed by the CMG[134].

The Court can hear these disputes only after the exhaustion of the administrative sphere, i.e., hierarchical review so that the affected servant or contracted worker will have to address their claim to their immediate superior in the Administrative Secretariat and also to the Director of the Administrative Secretariat or, in the case of other organs, to the administrator responsible for the respective organ[135].

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127 Latin maxim: "according to what is right and good."

128 OP Art. 17(3).

129 OP Art. 31.

130 OP, Chapter III and CMC Decision No. 37/03, Chapter II.

131 Before entry into force of the Lisbon Treaty, Art. 225a EC empowered the Council alone, acting unanimously, to set up "judicial panels": under this authority, the Council adopted Decision 2004/752/EC establishing the European Union Civil Service Tribunal: OJ 2004 L333/7. Article 257 TFEU now empowers the European Parliament and the Council to establish "specialised courts" and the Civil Service Tribunal has thus been renamed as such.

132 Resolution 42/97 of the CMG on the General Norms concerning the Civil Servants of the Mercosur Administrative Secretariat: <www.mercosur.int>. Article 56 provides: "All claims concerning labour issues that cannot be solved by an administrative appeal will be able to be presented to an administrative jurisdictional instance that will be created and regulated by a Resolution of the Common Market Group."

133 Resolution 54/03 of the CMG on the Administrative Labour Court of Mercosur: <www.mercosur.int>. The Annex to this Resolution is the Statute of the Administrative Labour Court of Mercosur.

134 Resolutions 15/04 and 35/06 of the CMG: <www.mercosur.int>.

135 Article 1 of the Statute of the Administrative-Labour Court, Resolution 54/03 of the CMG, Annex. When deciding cases, the Court has to observe the rules of the Main Office Agreement of the Administrative Secretariat (CMC Decision 04/96: <www.mercosur.int>), the Mercosur rules applicable to Administrative Secretariat Servants and also the service instructions issued by the Director of the Administrative Secretariat (Article 3 of the Statute of the Administrative-Labour Court).

7. ASEAN

7.1. Treaty framework

The Association of Southeast Asian Nations ("ASEAN") was established in 1967[136] at the height of the Cold War with the signing of the Bangkok Declaration by the five original Member States: Indonesia, Malaysia, Philippines, Singapore and Thailand[137]. At the time of its foundation –with the Vietnam War still raging and engulfing neighbouring states– ASEAN served as a diplomatic grouping and a political bulwark for its members in the face of potentially destabilising superpower competition in the region while allowing most of them to maintain a security link with the West.

The Bangkok Declaration united the ASEAN states in a joint effort to promote economic co-operation and the welfare of the people in the region, setting out guidelines for ASEAN's activities and defining its aims, viz.: promoting the economic, social and cultural development of the region through co-operative programmes; safeguarding the political and economic stability of the region against big power rivalry; and serving as a forum for the resolution of intra-regional differences.

During the First Summit Meeting in Bali, Indonesia in 1976, the then five states signed the Treaty of Amity and Co-operation in Southeast Asia and the Declaration of ASEAN Concord. Both documents signified ASEAN's aims of ensuring regional peace and stability and to foster economic and social growth as well as enhancing the need for co-operation with all peace-loving nations and ensuring the peaceful settlement of disputes between ASEAN states. At this meeting, a small permanent secretariat was also established in Jakarta to provide administrative support and to help in co-ordination of ASEAN activities: its position has been strengthened under the 2007 ASEAN Charter (see below) but has not become the European Commission of the organisation, partially due to presence of only a few hundred secretariat employees when considered against the thousands of Eurocrats.

Over the years ever more agreements have been signed between the ASEAN states, promoting trade and stability in the region. As part of the strengthening of the organisation following the end of the Cold War, the ASEAN Free Trade Area ("AFTA") was initiated in 1992 although it still remains to be completed. Moreover, the impact of the WTO on the development of a more rules-based approach to economic co-operation in ASEAN must also be highlighted. With the idea of progressive economic integration and the concomitant emergence of transnational problems, it was envisaged that ASEAN would need to move away from the informal understandings encompassed under the concept of the "ASEAN Way," detailed below, towards the provision of more legally binding agreements to help resolve inter-state disputes[138].

Further development ensued culminating in a new treaty, the ASEAN Charter[139], signed in 2007 and establishing the organisation's legal personality under international law[140]. As part of its reformation under that

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136 For an outline of the early history of ASEAN and its legal and economic implications, see R.H. Folsom, "ASEAN as a Regional Economic Group – A Comparative Lawyer's Perspective" (1983) 25 Mal. L.R. 203-224.

137 Brunei Darussalam joined in 1984; Vietnam in 1995; Laos and Burma (Myanmar) in 1997; and Cambodia in 1999. One of the last remaining South East Asian states outside ASEAN, Timor Leste, applied to join in 2006 but its application has so far proved to be unsuccessful.

138 Report of the Secretary-General of ASEAN to the 32nd ASEAN Ministerial Meeting, Singapore, 22-24 July 1999.

139 D. Seah, "The ASEAN Charter" (2009) 58 ICLQ 197-212.

140 L. Leviter, "The ASEAN Charter: ASEAN Failure or Member Failure?" (2010) 43 N.Y.U. J. Intl. L. & Pol. 159-210.

Charter, ASEAN is now based on a three-pillar structure[141]: (i) ASEAN Political-Security Community; (ii) ASEAN Economic Community; and (iii) ASEAN Socio-Cultural Community. Despite the great promise of ASEAN, it still has to deliver on its economic aims[142] and continues to manage its economic regionalism through a co-operative and relationship-based approach[143] rather than a rules-based, market integration by law[144].

7.2. Sovereignty issues

From its inception, ASEAN has been committed to promoting interdependence between its members, preserving their individual national sovereignty and maintaining the sovereign equality among them. Creation of an organisation endowed with its own law- and decision-making powers separate from that of the states was therefore studiously avoided as it would have led to the imposition of limits on and compromise the exercise of national sovereignty[145]. For example, the ASEAN member states have long objected to the creation of an independent organ that can issue decisions which are binding and enforceable against them and their instrumentalities[146]. Specifically, they oppose an institution in the ASEAN structure which would perform functions similar to that undertaken by the CJEU.

ASEAN's distinct form of regionalism has not, unlike other regional organisations, eroded national sovereignty but has rather reinforced it (as understood in the classical sense from the UN Charter). ASEAN's sovereignty-reinforcing regionalism, which has strengthened rather than weakened national state capacity, has consequently underpinned much of the economic dynamism and political stability in the region[147].

The primary responsibility for the continuing viability of ASEAN has therefore been to vest it equally between the state parties rather than in supranational institutions, thus leading to a highly decentralised organisational framework that promotes co-operation rather than integration between states. This approach is particularly useful in keeping the disparate members of ASEAN moving forward together (although not always in unison[148]).

The pivotal role national sovereignty plays in ASEAN co-operation is linked to and expressed in a number of ways. First, it needs to be emphasised that the issue of sovereignty and security are intimately intertwined in the Southeast Asian psyche[149] and led the ASEAN states to consider state sovereignty as an essential element of national and regional security[150]. Indeed, the heightened protection afforded to state sovereignty is itself a product of the region's history[151], steeped as it is in the legacy of colonial domination of the region (except Thailand) from the 19th century until after the end of the Second World War. The process of decolonisation gathered pace from 1945, with the majority of Southeast Asian states gaining independence in the ensuing 20

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141 S.S.C. Tay, "The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment" (2008) 12 Sing. Y.B. Intl. L. 151, at 155-56.

142 Leviter (2010), at 172-183; and P.J. Davidson, "The Role of International Law in the Governance of International Economic Relations in ASEAN" (2008) 12 Sing. Y.B. Intl. L. 213-224.

143 M. Ewing-Chow, "Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?" (2008) 12 Sing. Y.B. Intl. L. 225-237.

144 P.J. Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation" (2004) 8 Sing. Y.B. Intl. L. 165, at 169-171 and 174-176.

145 On the marked differences between ASEAN and the EU, see L. Henry, "The ASEAN Way and Community Integration: Two Different Models of Regionalism" (2007) 13 E.L.J. 857-879.

146 J. Sedfrey S. Santiago, "A Postscript to AFTA's False Start: The Loss of Sovereignty Issue" (1995) 12/1 ASEAN Economic Bulletin 18, at 21.

147 T. Ginsburg, "The State of Sovereignty in Southeast Asia" (2005) 99 Proceedings of the Annual Meeting (American Society of International Law) 419, at 420.

148 Leviter (2010), at 160-188.

149 See generally, S.M. Makinda, "Security and Sovereignty in the Asia-Pacific" (2001) 23/3 Contemporary Southeast Asia 401-419.

150 H. Katsumata, "Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the 'ASEAN Way'" (2003) 25/1 Contemporary Southeast Asia 104, at 112.

151 M. Beeson, "Sovereignty under siege: globalisation and the state in Southeast Asia" (2003) 24/2 Third World Quarterly 357, at 364-366.

years. Historical memories of a common colonial past have thus made ASEAN states respectful of each other's sovereignty[152].

The emergence of these fledgling states[153] onto the international scene did not, however, occur in the most auspicious of circumstances: it coincided with the start of the Cold War and the intense inter-power rivalry that was played out in the region, internally through communist insurgencies in various ASEAN states and externally through the threat posed by the Vietnam War and its (potential) spillover into neighbouring states. Nation building and economic development were both severely hampered in context of another wave of external interference, pitting communist China and the Soviet Union against the USA and their proxies in the region. The concern of ASEAN states to protect their sovereignty in the face of these new, external threats exercised a strong influence over the development of their norms of interaction and led them to evolve a sovereignty-respecting regional co-operation in Southeast Asia that has been attributed, to varying extents, to the so-called "ASEAN Way." This concept[154] entails two components, the first being a set of behavioural norms encapsulated in a code of conduct and the second, a set of procedural norms[155]. The former contains standard norms of international law and diplomacy[156] (as contained in the UN Charter) and are set out in the 1976 Treaty of Amity and Co-operation: (1) respect for state sovereignty; (2) freedom from external interference; (3) non-interference in internal affairs; (4) peaceful dispute settlement; (5) renunciation of the use of force; and (6) co-operation[157]. Of these, ASEAN states particularly emphasise non-interference in each other's internal affairs[158].

The latter are more unique to ASEAN, and are procedural norms that prescribe decision-making procedures characterised by an informal, working style that ASEAN leaders and diplomats are expected to follow[159]. Policymakers and politicians is more about resolving problems through informal, pacific, co-operative and inclusive measures than by use of ostensibly divisive and confrontational, public, judicial proceedings. The underlying principle to decision-making and decision-enforcing in ASEAN is the consensus approach embodied in the Malay terms "*musyawarah*", the process of making decisions through discussion and consultation, and "*mufakat*", the unanimous decision that is arrived at through such consensus. These terms have been associated with the traditional cultural approach to decision-making in the region for centuries, particularly in the villages of Java/Indonesia, Malaysia and the Philippines[160].

The "ASEAN Way" thus promotes intensive informal discussions, beyond the glare of publicity, to work out a consensus that can act as the basis for a unanimous decision at formal meetings. In an organisation covering a heterogeneous region of different ethnic, religious, economic and political affiliations, the ASEAN Way of consensus has helped to foster concord between the states parties. Indeed consensus here does not necessarily require unanimity[161]: consensus can be arrived at without explicit consent from each ASEAN state

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152 P.J. Katzenstein, "Introduction: Asian Regionalism in Comparative Perspective," in P.J. Katzenstein & T. Shiraishi (eds.), *Network Power: Japan and Asia*, Cornell University Press, Ithaca (1997), at 32.

153 For an exposition of constitutional development in Southeast Asia throughout the postwar period, see K. YL Tan, "The Making and Remaking of Constitutions in Southeast Asia: An Overview" (2002) 6 Sing. J. Intl & Comp. L. 1-41.

154 T.I. Nischalke, "Insights from ASEAN's Foreign Policy Co-operation: The 'ASEAN Way', a Real Spirit or a Phantom?" (2000) 22/1 Contemporary Southeast Asia 89, at 90.

155 A. Acharya, "Ideas, Identity and Institution-Building: From the 'ASEAN Way' to the 'Asia Pacific Way'?" (1997) 10/3 Pacific Review 319, at 328-329.

156 H. Katsumata, "Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the 'ASEAN Way'" (2003) 25/1 Contemporary Southeast Asia 104, at 106-108.

157 Leviter (2010), at 161 and 167-171.

158 Seah (2009), at 199-200.

159 Seah (2009), at 198-199.

160 This argument is propounded by P. Thambipillai & J. Saiavanamuttu, *ASEAN Negotiations: Two Insights*, Institute of Southeast Asian Studies, Singapore (1985), at 11-13.

161 Seah (1999), at 199.

since states are allowed to agree but are not bound to put the common decision into practice until, e.g., they can financially afford to do so.

ASEAN remains today, it is argued[162], essentially what it was when it was founded, an association of sovereign states created to achieve the limited purpose of maintaining regional order. Since the objective of ASEAN Member States has been to co-operate with each other in order to ensure national independence and mutual benefit for all members, and not to integrate within a supranational structure, the EU model remains unsuitable for ASEAN[163]. Moreover, the Bangkok Declaration, which is the basis of ASEAN's existence, guarantees the supremacy of the Member States' sovereignty over ASEAN.

7.3. Dispute Settlement Mechanism

Given the basic tenets of the ASEAN Way, it would come as little surprise that informality and consensus still form the general approach for resolving disputes in ASEAN. Nevertheless, its gradual evolution into a more rules-based integration has been necessitated in response to developments in the WTO[164]. Such a change in approach with respect to rule enforcement and dispute settlement in certain areas of ASEAN co-operation is likely to develop incrementally, and more slowly, than it has done in the EU or even Mercosur.

7.3.1. Initial models

The matter of dispute settlement in ASEAN was not mentioned in the founding treaty of 1967 but rather made its first appearance in both the 1976 Declaration of ASEAN Concord and the 1976 Treaty of Amity and Co-operation, which latter provides in Chapter IV for the "Pacific Settlement of Disputes". Nevertheless, these provisions were only aimed at settling political disputes between ASEAN states[165]: where direct negotiations[166] failed[167], recourse – on the recommendation of the High Council comprising one minister from each ASEAN state[168] – might then be had[169] to "good offices, mediation, inquiry or conciliation". In this instances, the High Council might constitute itself as the competent body to oversee the relevant process, subject to the parties' agreement[170]. In fact, none of these processes was available unless all the parties to the dispute agreed to their application to that dispute[171].

An early indication of how disputes were to be settled between an ASEAN state and a private party appeared in the 1987 Manila Agreement for the Promotion and Protection of Investments ("APPI"[172]) which provides

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162 D.M. Jones & L.R.A. Smith, "Making Process, Not Progress: ASEAN and the Evolving East Asia Regional Order" (2007) 32/1 International Security 148, at 149.

163 N. Akrasanee & D. Stifel, "The Political Economy of the ASEAN FTA," in P. Imada & S. Naya (eds.), *AFTA, The Way Ahead*, Institute of Southeast Asian Studies, Singapore (1992), 27, at 31.

164 Ewing-Chow (2008), at 232-234.

165 For further proposals on DSMs in ASEAN, various then existing models were suggested including GATT and arbitration bodies: see Folsom (1983), at 216-220.

166 TAC, Art. 13.

167 TAC, Art. 15.

168 TAC, Art. 14. On 23 July 2001 in Hanoi, the ASEAN states adopted Rules of Procedure of the High Council.

169 TAC, Art. 15.

170 TAC, Art. 15.

171 TAC, Art. 16. Under Art. 17, the TAC also provided that nothing in it should prevent recourse to the methods of resolving disputes peacefully in Art. 33(1) of the UN Charter although parties were still encouraged to solve the dispute by friendly negotiation before resorting to other UN procedures.

172 R. Baruti Dames, "Provisions for Resolution of Investment Disputes Within ASEAN: The First Arbitral Award and the Implications for ASEAN's Legal Framework" (2005) 22/6 J. Intl. Arbit. 511, at 532-541; and L.Y. Nghee, "Restoring Foreign Investor Confidence in ASEAN: Legal Framework for Dispute Settlement Processes" (1998) 19 Sing. L. Rev. 145, at 152-153.

for a detailed mechanism of arbitration as the means of resolving such disputes[173]. While the parties were to try to settle the matter amicably between them[174], if they could not do so within six months then either party could choose to submit the dispute to conciliation or arbitration and that choice was binding on the other party[175]. Certain bodies were expressly designated before which the dispute could be brought –ICSID[176], UNCITRAL[177], the Regional Centre for Arbitration in Kuala Lumpur or any other ASEAN regional arbitration centre– provided always that such choice was by mutual consent of the parties[178].

Failure of the parties to agree mutually on a suitable to conduct the arbitration within three months would lead to the setting up of a three-member arbitral tribunal to settle dispute. Each party was to select its own arbitrator and those two were to select the third (a national of a third ASEAN state) as chairman[179]. Failure to do so within the prescribed periods of two months for the initial two members of the tribunal and three for the chairman gave either party, in the absence of any other arrangement, to request the President of the ICJ (International Court of Justice) to make the necessary appointments[180]. Decisions of the arbitral tribunal were to be binding and made by a majority of votes[181].

Further deepening of economic co-operation between the ASEAN states necessitated reappraisal of the dispute settlement mechanisms in the early 1990s the model for which proved to be the provisions of GATT 1947 with the continuing emphasis on the amicable settlement of issues between parties. Moreover, this impact of international trade models continued through to the use of the WTO DSM which was the pattern ASEAN followed when drawing up its 1996 Protocol on Dispute Settlement Mechanism[182]. While this Protocol marked a further step along the way of development, underlining the continuing evolution towards a more rules-based regional community and settlement system, it clearly and intentionally falls short of any notion of a permanent judicial tribunal in the strict sense of the concept. Although this mechanism enhanced the transparency and speed in resolving disputes in ASEAN, initial bilateral consultations between the affected parties –aimed at an amicable settlement– were still privileged together with the offer of other ASEAN states' good offices or mediation.

The Protocol was to apply to all disputes under ASEAN agreements but specifically provided that where special rules applied in any such agreement, these were to take priority over the Protocol. Since the Protocol was a dispute settlement system for the ASEAN states alone, the provisions under, e.g., the 1987 Investments Agreement above that deal with investor-ASEAN state disputes were left unaffected.

The WTO DSM model is however adapted to ASEAN standards and in several ways reflects the initial Mercosur approaches, where the national administrations and executives had a direct input into the ultimate resolution of issues. Consequently, where the dispute could not be resolved amicably, it could be sent to the Senior Economic Officials Meeting ("SEOM") which comprises the heads of ASEAN states' ministries of trade, industry, finance and commerce below the level of minister. The SEOM could convene a panel of three experts

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173 This Agreement was amended by the 1996 Protocol on Dispute Settlement Mechanism to allow for the ASEAN DSM as an alternative means of resolving investment disputes: see below.

174 APPI, Art. X(1).

175 APPI, Art. X(2).

176 International Centre for the Settlement of International Disputes.

177 UN Commission on International Trade Law.

178 APPI, Art. X(2).

179 APPI, Art. X(3).

180 APPI, Art. X(3) and (4).

181 APPI, Art. X(5).

182 A. Greenwald, "The ASEAN-China Free Trade Area (ACFTA): A Legal Response to China's Economic Rise?" (2006) 16 Duke J. Comp. L. 193, at 206-207; and Nghee (1998), at 148-152.

to assist them in their decision-making, which panel would conduct fact-finding and determine the applicability of the requisite ASEAN agreements: its purpose was to assist the SEOM in making its decision. The panel, in the nomination to which ASEAN nationals were to be given preference, was to be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served in the ASEAN Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State. Selection from an indicative list kept by the ASEAN Secretariat was to be made with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience. Independence was underlined by ensuring that nationals of ASEAN states, the governments of which were parties to the dispute, were barred from sitting unless the parties otherwise agreed.

An innovation introduced for the first time into the ASEAN system was the fact that the SEOM could act by simple majority in its rulings thus leading to the abandonment –at least in this respect– of the "traditional ASEAN" consensus model. Appeal against the panel report lay to the ASEAN Economic Ministers ("AEM") as the final appellate body, whose decisions as with the SEOM were made by simple majority and, being the last instance, were final and binding on all parties to the dispute. Overall, the ASEAN DSM process had a maximum length of 290 days and an enforcement period (for either the SEOM ruling or AEM decision) of 30 days.

7.3.2. Current model

According to the 2007 ASEAN Charter, for disputes concerning the application or interpretation of ASEAN economic agreements, the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism[183] now provides the compliance monitoring, advisory, and consultative as well as enforcement mechanisms in respect of the covered agreements under the that Protocol. For disputes related to other ASEAN agreements, ASEAN is required to provide effective dispute settlement mechanisms similar to those available under the 2004 Protocol.

The 2004 Protocol as with its 1996 predecessor, which it replaces, is more closely modelled on the WTO system and, in certain instances, improves on it. For example, where a panel or the Appellate Body concludes that a measure is inconsistent with the relevant ASEAN agreement, it may not only recommend that the state concerned bring the measure into conformity with that agreement but also (unlike the WTO panels and Appellate Body) suggest ways in which that state concerned could implement the recommendations.

The major innovation to be considered here however is the removal of ultimate political control in the form of the AEM and its replacement with the already mentioned Appellate Body, similar to the one in the WTO, which now hears appeals from panel reports brought by a party to the dispute (and not third parties). It is composed of seven persons, three of whom sit on any one case, who are appointed by the AEM to serve for a four-year term, renewable once. Those appointed are to be persons of recognised authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. Most importantly, from the point of view of independence and impartiality, such appointees must not be affiliated with any government and are to avoid any direct or indirect conflict of interest in consideration of any dispute.

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183 Greenwald (2006), at 207-208; and C.L. Lim, "East Asia's Engagement with Cosmopolitan Ideals under Its Trade Treaty Dispute Provisions" (2011) 56 McGill L.J. 821, at 849-851.

Issues related to investment have also received a boost by the signing in 2009 of the ASEAN Comprehensive Investment Agreement (the "ACIA"). The ACIA consolidates and amends the 1987 APPI and the 1998 Framework Agreement on the ASEAN Investment Area ("AIA") in one agreement covering both protection of foreign investments (as formerly provided in the APPI) and the liberalisation, promotion and facilitation of ASEAN's investment regime (as previously provided by the AIA[184]).

Part B of the ACIA arguably appears to impose more limitations on the range of disputes that may be submitted to arbitration, *inter alia*, the list of arbitrable claims[185] does not include claims relating to admission, establishment, acquisition, and expansion of a covered investment (compared to the APPI). Moreover, much of this Part is consolidated from the APPI and modelled on Section B of NAFTA, Chapter 11[186], although with some amendments[187]. Compared to Article X of the APPI[188], the arbitration rules pursuant to which a claimant may commence arbitration under the 2009 ACIA have been expanded.

8. NAFTA

8.1. Treaty framework

The North American Free Trade Agreement ("NAFTA"[189]) entered into force on 1 January 1994 between the USA, Canada and Mexico, being based upon and superseding the earlier 1988 free trade agreement between Canada and the USA[190]. The Agreement entered into force a year before the WTO and was strongly influenced by it, e.g., in the area of its DSM.

As its name indicates, NAFTA was designed to promote trade and investment between the three states by establishing a free trade area that aims to eliminate most tariffs and reduce non-tariff barriers between them without creating a common external tariff and customs union, as had happened with the EEC (now the EU). In addition, it seeks to provide rules for the conduct of business in the free trade area, including regulations of investment, services, intellectual property, competition, and the temporary entry of business persons. In order to address concerns raised about different levels of environmental protection and labour and working conditions which, it was submitted, could work to the economic advantage of Mexico as such conditions were lower there, the three states entered into two side agreements: (1) the North American Agreement on Environmental Co-operation ("NAAEC"[191]); and (2) the North American Agreement on Labor Co-operation ("NAALC"[192]) which we will later see have their own DSMs.

184 K.M. Rooney, "Overview of the 2009 ASEAN Comprehensive Investment Agreement" (2010) 4/2 Disp. Resol. Intl. 169-189.

185 ACIA, Art. 32(a).

186 See later in this research.

187 Rooney (2010), at 186.

188 Rooney (2010), at 187.

189 NAFTA, 17 December 1992: (1992) 32 I.L.M. 289 (Chaps. 1–9); and (1992) 32 I.L.M. 605 (Chaps. 10–22). Despite the hopes of the signatories, NAFTA has not been judged as an unqualified success story: A. de Mestral, "NAFTA: The Unfulfilled Promise of the FTA" (2011) 17 E.L.J. 649-666.

190 The Canada United States Free Trade Agreement or "CFTA" came into force on 1 January 1989: (1988) 27 I.L.M. 281.

191 14 September 1993: (1993) 32 I.L.M. 1480.

192 14 September 1993: (1993) 32 I.L.M. 1499.

NAFTA commits the three states to respect the obligations encompassed in the Agreement: the parties are required[193] to complete the "necessary legal procedures" in order to honour the Agreement; further[194], the states must "ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance … by state and provincial governments." No permanent mechanism of governance is provided, but the Free Trade Commission ("FTC") is established[195] to supervise implementation and to resolve disputes arising out of the agreement as well as the NAFTA Secretariat[196] to assist the FTC and "otherwise facilitate the operation" of the Agreement: the Secretariat comprises three sections, one in the capital of each state, and administers binational dispute panels and extraordinary challenge committees under Chapter 19 NAFTA which are discussed below. In addition, a number of committees and working groups are established to assess the operation of the agreement in a number of specific sectors[197], under the supervision of the FTC[198].

8.2. Sovereignty issues

NAFTA[199] (unlike the EU[200]) is in the nature of a confederation among independent sovereign states[201], with each maintaining autonomous political decision-making authority within the constraints defined by the Agreement.

A number of points clearly indicate the states' desire not to impinge on their sovereignty in signing NAFTA[202]. For example, it is arguable that national sovereignty was not impaired as the states retain the power to withdraw from NAFTA on six months' notice[203]. In addition, NAFTA (unlike the EU) does not establish a supranational network of institutions that are empowered to adopt secondary legislation binding on the contracting parties[204]: as a result, the level of detail in NAFTA is exceptional. Consequently, apart from treaty amendments, NAFTA DSMs represent the only way to develop NAFTA's normative framework after it entered into force. Yet the NAFTA amendment procedure itself makes it difficult to change the Agreement: amendments[205] must be approved by each party in accordance with their applicable domestic legislative procedures, i.e., by unanimity, and it thus makes them particularly vulnerable to domestic political pressures and not easily adopted[206].

Consequently, the exceptional detail in NAFTA and the restrictive amendment procedure militate against the operation of the type of incremental institutional dynamic and consequent "spillover" that both Mercosur

193 NAFTA, Art. 2203.

194 NAFTA, Art. 105.

195 NAFTA, Art. 2001.

196 NAFTA, Art. 2002.

197 I. Cohen, "Beyond NAFTA: The Institutional Dimension," in R. Dobell & M. Neufeld (eds.), *Beyond NAFTA: The Western Hemisphere Interface*, Oolichan Books, Lantzville (1993), 86, at 98-100.

198 J.E. Grijalva & P.T. Brewer, "Monitoring and Managing North American Free Trade: The Administrative Bodies of the North American Free Trade Agreement" (1994) 2 San Diego Just. J. 1-18.

199 F.M. Abbott, "Foundation-Building for Western Hemispheric Integration" (1996-1997) 17 Nw. J. Intl. L. & Bus. 900-946.

200 For a comparison with the EEC/EU, see M.W. Gordon, "Economic Integration in North America: An Agreement of Limited Dimensions but Unlimited Expectations" (1993) 56 M.L.R. 157, at 161-164; and R.J. Kelleher, "NAFTA and the European Union: Comparison and Contrast" (1994) 2 San Diego Just. J. 19, at 19-23.

201 All of which are federal States but whose federalism is calibrated different. On the impact of NAFTA on the federal-regional relations of these three States, see G.E. Hale, "Canadian federalism and the challenge of North American integration" (2004) 47/4 Can. Pub. Admin. 497-524; C. Huerta & A. Lujambio, "NAFTA: Recent Constitutional Amendments, Sovereignty Today, and the Future of Federalism in Mexico" (1994) 5 Const. F. 63, at 65-67; Luz & Miller (2002), at 975-997; and M. Tushnet, "NAFTA and Federalism in the United States" (1994) 5 Const. F. 60-62.

202 S. McBride, "Reconfiguring Sovereignty: NAFTA Chapter 11 Dispute Settlement Procedures and the Issue of Public-Private Authority" (2006) 39/4 Can. J. Pol. Sc. 755, at 761-765.

203 NAFTA, Art. 2205.

204 Gordon (1993), at 162-163.

205 NAFTA, Art. 2202.

206 G.M. Starner, "Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional protection of Property" (2001-2002) 33 L. & Poly. Intl. Bus. 405, at 418.

and ASEAN have experienced, however slight over recent years, to mould their dispute resolution processes to the ever-growing demands of deepening integration and co-operation. It is therefore clear that the parties to NAFTA regarded it as imperative to "set in stone" its dispute settlement mechanisms thereby singularly removing any possible hint of further judicial-institutional development of the NAFTA regime without the state parties' prior express consent.

Such remarks must also be coupled with the observations that the FTC –which comprises the trade ministers of the three states– can issue (under Chapter 11 NAFTA[207]) an interpretation of the Agreement that is binding on an arbitral tribunal. For this to occur there would need to be unanimity amongst the parties, but there is no need for legislative approval. Again, the states retain control over NAFTA through the presence of representatives from the national executives sitting in the FTC.

Finally, there is the possibility of judicial review of panel and tribunal decisions made in relation to matters under Chapter 11 NAFTA. Since NAFTA itself does not provide for judicial review of arbitrations, it is left to the relevant arbitration rules being followed to determine this. Although the ICSID Additional Facilities and UNCITRAL rules[208] –that are allowed for under Chapter 11 NAFTA– provide that the results of arbitrations are final and binding, neither set of rules prevents arbitral awards from being subject to judicial review under national federal or sub-federal law. Once more, the states –this time in the form of the judiciary– maintain a control over this aspect of NAFTA.

The marked reluctance of the three NAFTA members to envisage any developments to their original agreement by judicial interpretation under the relevant DSMs is also a product of their individual understanding of national sovereignty and its relationship with international law. Unlike some of the Mercosur states, none of those in NAFTA has a constitutional opening clause towards regional integration so that the domestic legal relationship with NAFTA is dealt with through the constitutional provisions on international law, much as occurred in the formative years of the EEC[209].

Historically the US Congress and Executive have displayed a consistently hostile attitude to both international law and international or supranational institutions[210]. Such hostility to international adjudication of disputes was traced back to the late 19th century by Lauterpacht, J. in the *Interhandel Case*[211] before the ICJ. One of the main points of the Bricker movement of the late 1940s and early 1950s was to have the conclusive establishment of the Constitution over international treaties[212]. The focus of the consistent hostile attitude of the Senate to US adherence to human rights conventions has been its fear of the potential subordination of domestic constitutional principles to the requirements of international treaty provisions[213]. A further manifestation of US opposition to supranational judicial decision-making was the withdrawal of the USA from the compulsory jurisdiction of the ICJ[214]. Even from this short explanation, it is quite apparent that the

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207 NAFTA Art. 1131.2.

208 Only these two sets of rules apply since neither Canada (signed 15 December 2006) nor Mexico has ratified the ICSID: <www.icsid.worldbank.org>. Visited 12 December 2011.

209 See, e.g., T.C. Hartley, *The Foundations of European Union Law*, 7th ed., OUP, Oxford (2010), at 259-284.

210 F. M. Abbott, "Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime" (1992) 40 AJCL 917, at 931.

211 *The Interhandel Case (Switzerland v. United States)* [1959] ICJ Rep. 6.

212 The Bricker Amendment is the collective name of a series of proposed amendments to the US Constitution considered by the Senate in the 1950s which would have put restrictions on the scope and ratification of treaties and congressional-executive agreements entered into by the USA. They are named after Senator John W. Bicker of Ohio, a conservative Republican: see N. Richards, "The Bricker Amendment and Congress's Failure to Check the Inflation of the Executive's Foreign Affairs Powers, 1951-1954" (2006) 94 Cal. L. Rev. 175-213.

213 S.A. Riesenfeld & F.M. Abbott, "The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties" (1991) 67 Chi.-Kent L. Rev. 571, at 622-626, FNs 198-208.

214 See generally, J.P. Kelly, "The Changing Process of International Law and the Role of the World Court" (1989) 11 Mich. J. Intl. L. 129-166.

EU system, as constitutionalised by the ECJ, is fundamentally alien to the historical attitude of US political institutions as regards the relationship between the US constitutional framework, international treaties and institutions[215].

At first glance, Arts. II and VI of the US Constitution would clearly appear to govern issues concerning international treaties in the American legal system. The "Treaty Clause" in Art. II provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." The "Supremacy Clause," Art. VI, cl. 2, states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Nevertheless, both clauses have been qualified by the experiences since the Constitution entered into force. On the one hand, the Treaty Clause is not the final word on the adoption of international treaties: over the years, the US Congress and Executive have evolved a different practice that, in effect, amounts to a constitutional amendment[216]. These are "congressional-executive agreements," a term[217] which covers both agreements negotiated by the President and then submitted to Congress for its *ex post* review and approval as well as presidential agreements authorised by statute but not subject to *ex post* review by Congress[218].

Where the subject-matter of an international treaty falls within the powers of the Congress and the President under the Constitution[219], then the President may initiate a congressional-executive agreement by negotiating terms with the relevant foreign government(s). Since Art. I of the Constitution gives Congress the power to "regulate Commerce with foreign Nations," it was considered that NAFTA and the WTO fell within such definition.

The President thereafter invites Congress to approve the terms of the agreement, either by passing an ordinary statute or a joint resolution, or by enacting implementing legislation necessary for the agreement's legal effectiveness[220]. Congress is also free to impose conditions or "reservations," just as the Senate does for treaties. The President then signs the legislation and ratifies the international agreement in accordance with its provisions. As a result, there is no significant difference between the legal effect of a congressional-executive agreement and the classical treaty approved by two thirds of the Senate[221].

Many international treaties, including both NAFTA and the WTO, have been approved as congressional-executive agreements by simple majorities in both Houses of Congress[222]. For example, regular legislation approved NAFTA and authorised the President to bring it into effect[223].

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215 Abbott (1992), at 932.

216 US Constitution, Art. II, sect. 2, cl. 2.

217 *Restatement (Third) of Foreign Relations Law* (1987), at § 303 cmt. e.

218 Such definition has not been universally accepted: see B. Ackerman & D. Golove, "Is NAFTA Constitutional?" (1995) 108 Harv. L.R. 801, at 802, FN 6.

219 *Restatement* (1987), § 303(2); see also § 303 cmt. e (elaborating on the interchangeability of treaties and congressional-executive agreements). The *Restatement* expresses the widely prevailing view: see, e.g., L. Henkin, *Foreign Affairs and the Constitution*, Foundation Press, Mineola (NY) (1972), at 173-176; and P.R. Trimble & J.S. Weiss, "The Role of the President, the Senate and Congress With Respect to Arms Control Treaties Concluded by the United States (1991) 67 Ch.-Kent L. Rev. 645, at 650-653.

220 Ackerman & Golove (1995), at 804-805.

221 *Restatement* (1987), at § 303 cmt. e.

222 The evolution of the practice in using such agreements to bypass the express wording of Constitution, Art. II(2) is beyond the limits of the present work. For a full analysis, see Ackerman & Golove (1995), at 804-929.

223 NAFTA Implementation Act 1993, 19 U.S.C. § 3311 (Supp. V 1993).

On the other hand, the position of international treaties in the domestic legal system has been developed by the decisions of the Supreme Court. Put briefly, international treaties are co-equal with federal statutes and thus, under the supremacy doctrine, NAFTA is supreme over all inconsistent enactments of US states and will also take precedence over all previously-enacted federal statutes. However, like all federal statutes and treaties, NAFTA is subject to the Constitution as well as to federal statutes enacted after its entry into force (the latter through the principle of *lex posterior derogat priori*). As the Supreme Court has stated[224]:

> But even [though a treaty is the law of the land as an act of Congress is] ... there is nothing in [a treaty] which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date ....
>
> [....]
>
> In short, we are of the opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

Thus, if Congress were to enact a statute in breach of the NAFTA then, while liability would accrue to Canada and Mexico on the international plane, US courts would be bound to apply the later-enacted statute over the provisions of the NAFTA.

Lastly, another measure for the protection of US sovereignty (and that of the other signatories) was in the inclusion in the US NAFTA Implementation Act 1993 of provisions according to which nothing contained in the NAFTA was to confer a private right of action on individuals or companies (a) to challenge US state laws as being contrary to NAFTA and instead reserving this right of action exclusively to the USA[225]; and (b) again that only the USA had any cause of action under NAFTA (or the side agreements) or challenge any action or inaction on the part of any body of the USA, or of any state or division of a state which breached NAFTA (or the side agreements)[226]. Through ratifying the NAFTA, Congress inserted these clauses into the 1993 Implementing Act in order to deny any self-executing nature/direct effect to NAFTA provisions within the US legal system[227] and accordingly to protect US sovereignty from incremental encroachment through judicial decision-making[228].

Canada[229] has, in general, continued to apply the dualist approach to international law that it inherited from the United Kingdom: as such, the Crown (in the form of the federal government) retains the royal prerogative to conduct foreign affairs and to enter into treaties, but the Canadian Parliament (or provincial parliaments[230])

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224 *Head Money Cases* (1884) 112 U.S. 580, 598-599. See also *Whitney v. Robinson* (1888) 124 U.S. 190; *Diggs v. Schultz* (1970) 470 F.2d 461 (D.C. Circ.), certiorari denied (1973) 411 U.S. 931.

225 NAFTA Implementing Act 1993, § 102(b)(2).

226 NAFTA Implementing Act 1993, § 102(c).

227 R.A. Brand, "Direct Effect of International Economic Law in the United States and the European Union" (1996-1997) 17 Nw. J. Intl. L. & Bus. 556, at 570.

228 Nevertheless, despite these attempts, the practice of NAFTA – especially in the field of Chapter 11 dispute resolution in the field of investments – has drawn sharp criticism as having a direct impact on US sovereignty. It is not possible to deal with such issues effectively in the present context and for an analysis of the situation, see, e.g., C.H. Brower, "Investor-State Disputes Under NAFTA: The Empire Strikes Back" (2001-2002) 40 Colum. J. Transnatl. L. 43-88.

229 This discussion on Canada and international law follows Luz & Miller (2002), at 977-980. See also D.S. Macdonald, "Chapter 11 of NAFTA: What are the Implications for Sovereignty?" (1998) 24 Can.-U.S. L.J. 281-288. For further discussion on the impact of NAFTA membership on Canadian sovereignty, see S. Clarkson, "Canada's Secret Constitution: NAFTA, the WTO and the End of Sovereignty?," Canadian Centre for Policy Alternatives, Ottawa, October 2002: <http://www.policyalternatives.ca>; and B. Campbell, "From Deep Integration to Reclaiming Sovereignty: Managing Canada-U.S. Economic Relations Under NAFTA," Canadian Centre for Policy Alternatives, Ottawa, May 2003: <http://www.policyalternatives.ca>.

230 The uneasy relationship between Canada's international treaties and their domestic implementation in spheres of provincial jurisdiction was outlined by Lord Atkin in the Privy Council in *Canada (A.G.)* v. *Ontario (A.G.)* (*Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act*), [1937] A.C. 326; [1937] 1 D.L.R. 673. In his Opinion, Lord Atkin held that Constitution Act, 1867, s. 132 did not give the federal

must enact any necessary legislation to implement a treaty into domestic law[231]. Despite certain dicta of the Supreme Court[232], the fundamental understanding of international treaty law in Canada remains that treaties do not have a self-executing effect in domestic law without implementing legislation[233].

Again, following the practice of the UK, Canadian courts usually interpret domestic federal or provincial legislation so as to conform to the provisions of international treaty law, e.g., NAFTA. At common law, a presumption of legislative interpretation exists according to which Parliament[234] will not "legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law." Nevertheless, where an international treaty provision directly conflicts with a domestic statute or a rule of common law, the domestic instruments must prevail[235].

Nevertheless, despite these evident limits to the impact of international economic treaty law in the form of NAFTA within the Canadian constitutional system, domestic sovereignty has evidently been affected by membership[236]. Although beyond the limits of this work, it has been contended[237] that NAFTA as an economic constitution poses a serious challenge to Canadian sovereignty and domestic constitutionalism. While Canadian sovereignty has always been qualified *de facto* by the economic power of its major trading partners, especially in respect of the economic giant lying across its southern borders, the wording of NAFTA the effect of prohibiting the Canadian government and parliament from enacting laws in a wide range of fields where previously –as in UK parliamentary tradition[238]– it was potentially limitless, with jurisdiction divided only between federal and provincial levels.

Lastly, given the asymmetric nature of the historic and economic relationship with its northern neighbour, it is little wonder that Mexico has remained steadfast in its determination to maintain its sovereignty in the face of any deepening of integration in NAFTA[239]. Yet, of the three states under consideration, the Mexican

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government the power to implement treaties outside its legislative competence. Section 132 states: "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries." The Privy Council held that the authority to implement treaties remained with the level of government having the appropriate jurisdiction under the Constitution for the subject-matter covered in the treaty. Given that the case dealt with the implementation of three International Labour Organisation conventions dealing with areas that clearly fell within provincial jurisdiction (employee working hours, weekly rest, and minimum wages), the Privy Council was concerned that a treaty implementation power equal to s. 132 would effectively undermine the division of powers under the Canadian Constitution.

231 P.W. Hogg, *Constitutional Law of Canada*, looseleaf, Carswell, Scarborough (Ont.) (1997), at 11-15; R.St.J. Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dal. L.J. 307. See *Re Arrow River & Tributaries Slide & Boom Co*. [1932] S.C.R. 495; [1932] 2 D.L.R. 250.

232 See *MacDonald* v. *Vapor Canada Ltd.* (1976), [1977] 2 S.C.R. 134 at 168, 66 D.L.R. (3d) 1; Schneider v. R., [1982] 2 S.C.R. 112 at 134, 139 D.L.R. (3d) 417; *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161.

233 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69, 174 D.L.R. (4th) 193.

234 *Daniels* v. *White and The Queen* [1968] S.C.R. 517, at 541; [1968] 2 D.L.R. (3d) 1; R. Sullivan (ed.), *Driedger on the Construction of Statutes*, 3rd ed., Butterworths, Markham (Ont.) (1994), at 330. Similarly, Canadian courts will interpret provincial statutes so as to conform with international law as far as possible.

235 As L'Heureux-Dubé, J. affirmed in *Thomson* v. *Thomson*, "A statute is not void or inoperative simply because it violates international custom or convention": [1994] 3 S.C.R. 551, at 618, 119 D.L.R. (4th) 253, citing P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed., Yvon Blais, Cowansville (Qc) (1991), at 308. See also *Daniels* v. *White and The Queen* [1968] S.C.R. 517, at 541; "[I]f a statute is unambiguous, its provisions must be followed even if they are contrary to international law ... [W]here the intent of Parliament was clear and unmistakable ..., the plain words of a statute [cannot] be disregarded in order to observe the comity of nations and the established rules of international law." R. v. *Gordon* (1980) 19 B.C.L.R. 289 at 291-92, [1980] 5 W.W.R. 668 (S.C.), affirmed (1980), 22 B.C.L.R. 17, [1980] 6 W.W.R. 519 (C.A.): "[W]here Canada asserts jurisdiction over an area of the sea and purports to limit access thereto, from the standpoint of domestic law the access is in fact limited for a special purpose, and even if the law of Canada contravenes 'customary international law', if Parliament ... has acted unambiguously, the courts of this country are bound to apply the domestic law." R. v. *Meikleham* (1905) 11 O.L.R. 366, at 373 (Div. Ct.), Meredith, C.J.: "[W]here it is plain that the Legislature has intended to disregard or interfere with [international law], the Courts are bound to give effect to its enactments."

236 S.A. Scott, "NAFTA, the Canadian Constitution, and the Implementation of International Trade Agreements," in A.R. Riggs & T. Velk (eds.), *Beyond NAFTA: An Economic, Political and Sociological Perspective*, The Fraser Institute, Vancouver (1993), 238.

237 D. Schneiderman, "Canadian Constitutionalism and Sovereignty After NAFTA" (1994) 5 Const. F. 93-100.

238 Dicey defined UK parliamentary sovereignty in terms of two criteria: the positive criterion, that Parliament has "the right to make or unmake any law whatever"; and the negative one, that "no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament": A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., (E.C.S. Wade, ed.), Macmillan, London (1964), at 40. In Canada, the second criterion has clearly been impacted upon by the Constitution Act, 1982 and the Canadian Charter of Rights and Freedoms.

239 Such position was clearly put in the late 1980s when President Carlos Salinas Gortari in a newspaper interview (with C. Lira, "Integración económica, no política," *La Jornada* (Mexico City independent daily), 13 November 1992, at 1, 18) stated: "We do not have any problem pointing out that, given the unequal relationship that exists between our two countries [Mexico and the United States], any *intention* that the economic interrelationship might lead to a political

Constitution is in fact the most permissive when it comes to international law. In this case, the focus is on Constitution Art. 133 which is a near literal translation of the Supremacy Clause, Art. VI, of the US Constitution[240] and provides:

> This Constitution, the laws of the Congress of the Union set forth it and all the treaties in accordance with it, celebrated by the President of the Republic, with approval of the Senate, will be the Supreme Law of the Union. Judges of each State will adjust laws and treaties to such Constitution, notwithstanding opposing regulations found in the Constitution of laws of such states.

By means of this Article, international treaties become part of the legal order as the supreme law of the nation. But this does not mean that an international treaty, like NAFTA, is on the same level as the Constitution and has the same rank and non-derogatable force[241]. Instead, the treaty takes precedence, within the regulatory hierarchy of Mexican laws, over all subordinate legislation within the federal sphere. Because it is hierarchically subordinate, such legislation has to conform to the text of an international treaty. It is inconceivable that the supreme law of Mexico must conform to an international treaty since the Constitution itself, in establishing the process for becoming a signatory to a treaty, acts as the basis of validity for the treaty. This position conforms to much academic doctrine[242] as well as to the Supreme Court of Justice of Mexico which has ruled[243]:

> [T]his Supreme Court of Justice considers that international treaties have a place immediately under the fundamental law and above federal and local Law. This interpretation of Constitution Article 133 is because these international compromises are assumed by the Mexican State as a whole and they compel all its authorities with the international community. This explains why the Constituent branch authorized the President of the Republic to subscribe international treaties in his character of Head of State, and the same way, the Senate intervenes as representative of the federal entities, and through its ratification, the authorities are bound.

It has also been argued[244] that NAFTA, as a free trade agreement, does not affect the internal sovereignty of Mexico: unlike the Treaty of Rome, NAFTA was not designed to achieve economic and political union and is not regarded as having political effects in the sense of altering the sovereign status of the signatory states through the process of political integration. In addition, Mexican international relations are governed by the principles contained in Constitution Art. 89(X) being essentially principles of international law, including those of "self-determination of nations" and "non-intervention." Such principles are to be interpreted in two ways: both as a prohibition against Mexico's intervention in the internal affairs of other states, and, more fundamentally, as an obstacle to other states interfering within the domain of Mexican jurisdiction. For these reasons, as the three states are bound by the conditions of NAFTA, these principles of international law cannot be infringed, and no rule can be interpreted which might in any way permit interference with Mexican national sovereignty.

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one would be to the detriment and disadvantage of Mexicans: YES to economic interrelationship, but among sovereign nations. NO to any possibility of political integration." See S. Zamora, "The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement" (1993) 24 L. & Poly. Intl. Bus. 391, at 394, FN 4.

240 J.F. Smith, "Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA" (1993) 1 U.S.-Mex. L.J. 85, at 96.

241 Huerta & Lujambio (1994), at 64.

242 J. Carpizo, Estudios constitucionales, UNAM, Mexico City (1980), at 27-30; E. García Máynez, *Introducción al estudio del derecho*, Porrúa, Mexico City (1961), at 87-88; M. de la Cueva, *Apuntes de derecho constitucional*, edición mimeográfica, Facultad de Derecho, Universidad Nacional Autónoma de Mexico, Mexico City (1965), at 46-48; J.M. Serna de la Garza, "El poder de celebrar tratados internacionales y la división de competencias del sistema federal mexicano," in J.M. Serna de la Graza (co-ord.), *Federalismo y regionalismo. Memoria del VII Congreso Iberoamericano de Derecho Constitucional,* UNAM, Instituto de Investigaciones Jurídicas, México (2002), 511, at 511-517: <http://www.bibliojuridica.org/libros/libro.htm?l=1671>. Visited 9 December 2011; and F.A. Vázquez Pando, "Jerarquía del Tratado de Libre Comercio Entre México, Estados Unidos de América y Canadá en el Sistema Jurídica Mexicano," in *Panorama Jurídico del Tratado de Libre Comercio, Memorias*, Universidad Iberoamericana, México (1992), 35, at 41.

243 "International treaties. They are hierarchically located above the federal laws and in a second position with respect to the Federal Constitution": *Amparo* under revision 1475/98. *Sindicato Nacional de Controladores de Tránsito Aéreo*, 11 May 1999. Unanimity of ten votes. *Semanario Judicial de la Federación*, vol. X, November 1999, Thesis: P. LXXVII/99, at 46.

244 Huerta & Lujambio (1994), at 64-65.

8.3. Dispute Settlement Mechanism

8.3.1. Initial model

As indicated above, the initial model for NAFTA was the DSM under the previously established Canada-US Free Trade Agreement or CFTA[245]. This bilateral agreement codified and enhanced a number of the procedures followed under the GATT[246]. In particular, Chapter 18 of the Agreement set up a Binational Trade Commission ("the Commission"), charged with overseeing CFTA's implementation and with resolving some interpretative disputes[247]. Either state could request[248] consultations "regarding any actual or proposed measure or any other matter that it considers affects the operation of this Agreement". Were they to fail to resolve the matter through consultations, then either state might request a meeting of the Commission which could, in its turn, use various means of dispute resolution, including mediation, binational reviews, and binding arbitration[249]. However, the provisions of Chapter 18 applied neither to matters covered by the dispute resolution provisions on financial services[250] nor to binational panel dispute settlement in antidumping and countervailing duty cases[251].

While the Parties could also use the CFTA DSMs for disputes covered by the various GATT agreements to which both states were signatories, either the CFTA or the GATT had to be selected by the state as the exclusive forum[252].

CFTA was a significant improvement on the then GATT procedures since it required the Commission to form a panel upon the request of *either* Party and further provided deadlines for the various stages of the resolution of the dispute[253]. Such rule, unlike in the GATT, rendered the panel process in a sense more automatic: nevertheless, since panel rulings merely acted as recommendations to the Commission, each state retained its ultimate right to object[254]. However, the requirement under CFTA, Art. 1807(8) that the Commission –"shall agree on the resolution of the dispute, which normally shall conform with the recommendation of the panel"– provided a strong enough demand on the two states to reach an acceptable solution.

On the issue of retaliation, the CFTA was an improvement on GATT since it authorised the complainant state to retaliate where a panel ruled in its favour, even if the Commission had not agreed on the resolution[255]. Such important provision eliminated the offending state's ability, under the GATT, to block authorisation to retaliate and also reflects a closer relationship between Canada and the USA[256].

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245 P. Raworth, "Economic Integration, the GATT and Canada-United States Free Trade" (1986) 18 Ottawa L. Rev. 259, at 279-305.

246 J.B. Bialos & D.E. Siegel, "Dispute Resolution under the NAFTA: The Newer and Improved Model" (1993) 27 International Lawyer 603, at 609-610.

247 CFTA, Art. 1802.

248 CFTA, Art. 1805.

249 CFTA, Arts. 1805-1808.

250 CFTA, Chap. 17.

251 CFTA, Chap. 19.

252 CFTA, Art. 1801(2).

253 CFTA, Art. 1807.

254 CFTA, Art. 1807(2). But see Art. 1806 according to which a dispute could be sent to binding arbitration only by action of the Commission; i.e., *both* Parties had agree to submit the dispute to binding arbitration as the results were mandatory.

255 CFTA, Art. 1807(9) thus provided: "If the Commission has not reached agreement on a mutually satisfactory resolution ... within 30 days of receiving the final report of the panel (or such other date as the Commission may decide), and a Party considers that its fundamental rights (under this Agreement) or benefits (anticipated under this Agreement) are or would be impaired by the implementation or maintenance of the measure at issue, the Party shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute."

256 As the CFTA was a bilateral agreement, questions of third party participation in DSMs, or the impact of a ruling on other parties to the agreement, did not arise.

8.3.2. Current models

NAFTA and its associated side agreements cover a broader range of disputes to those under CFTA and, building on the latter's binational panels, contain additional mechanisms due to the latter's trilateral nature[257]. Together they have established five different DSMs[258] that deal with various aspects of regional co-operation and involve different forms of alternative dispute resolution[259]: (i) a general dispute settlement mechanism[260]; (ii) investment[261]; (iii) anti-dumping and countervailing duties[262]; (iv) environment[263]; and (v) labour[264].

A Joint Working Group of the American, Mexican and Canadian bar associations had concluded in 1992 that a permanent tribunal should be established but with limited powers to deal with "disputes between the Parties which involve the interpretation and application" of the NAFTA[265]. However, NAFTA negotiators rejected such an institution and presumably chose weak dispute settlement institutions[266] "because they feared that an absence of consensus in dispute decision-making would undermine the political stability of the new regional arrangement and/or because they feared that the NAFTA would not be approved if it provided for a strong central dispute-resolving institution which might undermine the authority and control of national institutions." Instead of a binding adjudicatory mechanism, then, a system was established whereby the states parties can withdraw concessions as a sanction against other states parties that are unwilling to reform their laws in response to dispute settlement arbitral decisions[267]. Because of its nature and content, NAFTA did not provide for an evolutionary approach to the DSMs created by it and they have been regarded as "frozen in time" and increasingly redundant in the face of the success of the WTO DSM[268].

8.3.2.1. General DSM

Chapter 20 of NAFTA (which is similar to CFTA, Chapter 18[269]) provides the legal basis for the general dispute settlement system relating to the treaty's interpretation or application and is similar to the WTO DSM. It is therefore characterised as a traditional state-to-state *ad hoc* arbitration system with an intention to resolve disputes by agreement where possible[270]. Interestingly, disputes between states arising under both NAFTA and GATT may be resolved, at the discretion of the complainant state, through either the NAFTA or the WTO/GATT DSM; however compulsory jurisdiction is accorded to the NAFTA mechanism in certain circumstances.

257 Bialos & Siegel, at 612-622.

258 J.P. Fitzpatrick, "The Future of the North American Free Trade Agreement: A Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe" (1996-1997) 19 Hous. Jo. Intl Law 1, at 83-91.

259 O.T. Johnson, "Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement" (1993) 46 SMU L. Rev. 2175, 2178.

260 NAFTA, Chap. 20.

261 NAFTA, Chap. 11.

262 NAFTA, Chap. 19.

263 North American Agreement on Environmental Co-operation ("NAAEC"), 14 September 1993: (1993) 32 I.L.M. 1480.

264 North American Agreement on Labor Co-operation ("NAALC"), 14 September 1993: (1993) 32 I.L.M. 1499.

265 H.T. King et al., "Dispute Settlement Under the North American Free Trade Agreement" (1992) 26 Intl. Law 855, at 861.

266 Abbott (1992), at 944-945.

267 Fitzpatrick (1996-1997), at 72; Abbott (1992), at 934-935.

268 De Mestral (2011), at 661-662.

269 J.L. Siqueiros, "NAFTA Institutional Arrangements and Dispute Settlement Procedures" (1993) 23 Cal. W. Intl. L.J. 383-394, noting dispute settlement differences between CFTA Chap. 18 and NAFTA Chap. 20.

270 M. Sher, "Chapter 20 Dispute Resolution under NAFTA: Fact or Fiction?" (2003) 35 Geo. Wash. Intl. L. Rev. 1001, at 1007.

An arbitral panel is set up at the request of a state party where consultation and conciliation has failed. Five panellists are selected from a roster of experts, previously agreed by consensus among the NAFTA states. The panel renders a majority decision to the parties recommending actions to be taken by the party whose measures have been found to infringe NAFTA; such decision is not appealable. A party is expected to comply with the decision, usually by amending or removing the offending measure. Failure by the offending party to act allows the complaining party to suspend application of benefits of equivalent effect to the offending party until resolution of the dispute has been achieved.

Before the issue of the panel report, Chapter 20 NAFTA is similar to the WTO DSM[271]: however, unlike the WTO, the NAFTA general dispute settlement mechanism produces only nonbinding recommendations and thus a panel cannot compel compliance with them.

8.3.2.2. Investment

Chapter 11[272] permits NAFTA private investors (including third country-owned enterprises established in NAFTA territory) to bypass the local courts of a host government and instead opt to take the NAFTA Party hosting its investment before an arbitral tribunal under ICSID (this has not been used as Canada and Mexico both still need to ratify it), ICSID Additional Facilities or UNCITRAL rules for issuance of a binding award if the host has failed to provide fair and equitable treatment or has taken regulatory measures "tantamount" to expropriation of its reasonable investor expectations[273]. The final award of the international arbitral tribunal is to be recognised and enforced in the domestic courts of the relevant NAFTA state.

8.3.2.3. Anti-dumping and countervailing duties

A separate mechanism was established under Chapter 19 NAFTA for anti-dumping and countervailing duty ("AD/CVD") disputes (and follows in all material respects Chapter 19 of the CFTA). The independent bi-national panel mechanism[274], however, represents an innovation since it is directed against a final determination in such type of disputes by a national administrative authority as an alternative to judicial review by a domestic court. Chapter 19 thus transfers judicial review of US, Canadian and Mexican government investigations under AD/CVD laws from national courts to bi-national panels of private international law experts. It has been noted[275]: "The system stands as a unique surrender of judicial sovereignty to an international body, a hybrid of national courts and international dispute settlement with as yet no parallel in the world of international trade or other international law regimes."

Such panels are established on an *ad hoc* basis and do not amount to third-party arbitration since, in applying the importing state party's AD/CVD law, they can only uphold or remand the national administrative authority's determination because the panel decision contains no remedy by itself although it is binding on the state parties. This dispute settlement mechanism includes an appellate panel procedure, the Extraordinary

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271 On the similarities and differences between NAFTA Chapter 20 and WTO DSMs, see M. Sher, "Chapter 20 Dispute Resolution Under NAFTA: Fact or Fiction?" (2003) 35 Geo. Wash. Intl. L. Rev. 1006, at 1019-1025.

272 L.E. Trakman, "Arbitrating Investment Disputes Under the NAFTA" (2001) 18/4 J. Intl. Arbit. 385-415.

273 The financial services chapter interposes additional procedures for investor disputes that involve financial services, including mandatory referral to a committee of the Parties' finance ministers for a ruling on the validity of financial policy defences: NAFTA, Arts. 1414 and 1415.

274 M.R. Joelson, "Resolving Trade Disputes Under the NAFTA: Chapter 19 Binational Panels Come of Age" (2003) 20/2 Journal of International Arbitration 121-130.

275 S.J. Powell, "Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas?" (2010) 16 NAFTA: L. & Bus. Rev. Am. 217, at 217.

Challenge Committee that is limited to the consideration of such issues as excess of power or gross misconduct by the panel.

Formally it is an inter-state mechanism but as private parties to adverse AD/CVD claims can require their governments to commence claims under Chapter 19, in practice such parties have proven to be the engine of this mechanism[276].

8.3.2.4. Environment

The North American Agreement on Environmental Co-operation ("NAAEC"), a supplemental accord to NAFTA, provides for a procedure[277] by which an interested party may request preparation of a "factual record" by the NAAEC-established Secretariat of the North American Commission on Environmental Co-operation ("CEC"). The factual record itself reports on whether or not a NAFTA party is effectively enforcing its own environmental law. In addition to this procedure, the NAAEC provides for another procedure under which a NAFTA party can seek determination by an arbitral panel that another such party has failed persistently to enforce its environmental law.

8.3.2.5. Labour

Similar to the position above in respect of environmental law, NAFTA has provided for another supplemental accord concerning employment laws, the North American Agreement on Labor Co-operation ("NAALC"[278]), again with its own North American Commission for Labor Co-operation ("CLC"). However, unlike the CEC, the CLC Secretariat does not have the power to prepare factual records: rather the NAALC requires each NAFTA party to set up a National Administrative Office ("NAO") in order to hear complaints concerning the domestic enforcement of employment law in the NAFTA parties. The NAALC, as with the NAAEC, also provides an inter-party complaints procedure between NAFTA states involving allegations of a state's persistent failure to enforce its own employment laws.

9. Conclusion

For those economic communities which have rejected the supranational implications of having a permanent court at the centre of their system, the CJEU anti-model has prevailed with an array of DSMs based on negotiation, consensus and conciliation, leading finally to arbitration. Such anti-model – inspired by the GATT/WTO system – functions in regional integrations where issues of continued respect for state sovereignty and/or disparities in social, legal and economic matters remain stark.

Yet the paradox in this paper lies in the fact that the CJEU (with its avowed supranational credentials) has actually acted as one of the main catalysts in encouraging the increase in and development of the judicial

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276 G. Cavazos Villanueva & L.E. Martinez Serna, "Private Parties in the NAFTA Dispute Settlement Mechanisms: The Mexican Experience" (2001) 77 Tul. L. Rev. 1017, at 1020.

277 K.W. Patton, "Dispute Resolution under the North American Commission on Environmental Cooperation" (1994-1995) 5 Duke J. Comp. & Intl. L. 87-116.

278 L. Bierman & R. Gely, "The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations" (1995) 10 Conn. J. Intl. L. 533-569.

dimension of the WTO. Changes to the GATT DSM as a result of the Uruguay Round have had, in their turn, an impact on the DSMs of Mercosur, ASEAN and NAFTA which have emulated (to varying extents) the WTO DSU as a model and rejecting the CJEU as an anti-model. The metamorphosis of their DSMs from essentially political processes into quasi-adjudicative ones must be understood against the backdrop of this ongoing development, acknowledging that, at this stage in the cycle, they derive more inspiration from the WTO DSU and, until recently at least, displayed more aversion to the CJEU in this regard.

Spurred on ostensibly by developments in the WTO DSM, Mercosur's system has been changed, almost imperceptibly bringing it to the point at which a permanently established regional court of justice – as opposed to a regional arbitral tribunal – would become not only feasible but also imperative in order to pursue a deepening integration. The argument may be perceived as becoming ever more persuasive were Mercosur's proposed union in UNASUR ("*Unión de Naciones Suramericanas*," the Union of South American Nations[279]) with the Andean Community of Nations[280] to occur since the latter already has a CJEU-modelled regional court as part of its institutional system and may not wish to negotiate away its existence. Although (through the 2008 UNASUR Constitutive Treaty) no new institutions would be created during the first phase of the union and therefore the regional bodies of both groups would continue to function, nevertheless it is clear that the institutionalisation of UNASUR is gathering pace, at the intergovernmental level and even a UNASUR parliament is envisaged.

Consideration of the need for the creation of a Mercosur regional court, inspired by the CJEU itself[281], has been evidenced by a recent project of the Mercosur Parliament ("PARLASUR"[282]). The project envisages a permanent court with jurisdiction to review the acts and omissions of the Mercosur organs and the Member States, provisions on preliminary references together with clauses on arbitration and staff cases. As with the CJEU, natural and legal persons will have standing –under certain conditions– to bring direct actions before the Mercosur court as well as having the indirect possibility of seeking to utilise the reference procedure[283]. Should this development come about, it would certainly amount to the best example of the neofunctional spillover effect in judicial institutionalisation among the three regional groups studied.

ASEAN is unlikely to move towards a permanent regional-judicial institution while profound disparities remain between the states and differences of approach are permitted to continue within the treaty framework. It will probably continue on the road of measured incremental institutional change for the foreseeable future, guided by the main tenets of the ASEAN Way that recognise the primordial respect for a nation's internal and external sovereignty. Despite the steady evolution of the ASEAN DSMs into a more rules-based procedure with certain independent aspects, any notion of judicial institutional spillover for ASEAN is premature at this moment (due to the profoundly contrasting economic, social and political conditions prevailing between its

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279 Moya Domínguez (2006), at 447-454. UNASUR is an intergovernmental union integrating the customs unions of Mercosur and the Andean Community of Nations ("CAN"). Originally the South American Community of Nations (2004), the UNASUR Constitutive Treaty was signed in 2008 and entered into force in March 2011.

280 Moya Domínguez (2006), at 115-129 and at 198-207.

281 A.D. Perotti, "El proyecto de la creación de la Corte de Justicia del MERCOSUR: estado de las negociaciones" 2010/1 Procuración del Tesoro de la Nación, "Edición Bicentenario," 39-43, which describes the process of formulating the proposal for the court; G.L. Gardini, "MERCOSUR: What You See Is Not (Always) What You Get" (2011) 17 E.L.J. 682, at 700.

282 Parlamento de Mercosur, "Proyecto de Norma: Protocolo Constitutivo de la Corte de Justicia del MERCOSUR," MERCOSUR/PM/PN 02/2010, Secretaría Parlamentario, Parlamento de Mercosur, Montevideo, Uruguay (2010): <www.mercosur.int>. Visited 9 December 2011.

283 This discussion of a Mercosur regional court must also be seen against the backdrop of the PRT's *Laudo* 1/2005 and Consultative Opinions, Nos. 01/2007, 01/2008 and 01/2009, in which the Tribunal distinguished the nature of Mercosur law from that of national and international law and affirmed the primacy of Mercosur community law approved, ratified and implemented by Member States, using CJEU case-law: D.P. Piscitello & J.P. Schmidt, "In the Footsteps of the ECJ: First Decision of the Permanent MERCOSUR-Tribunal. Permanent Tribunal of Review of Mercosur, *Laudo* 1/2005, 8 December 2005, and *Laudo Complementario*, 13 January 2006" (2007) 17 L.I.E.I. 283-293. In this the PRT is following its counterparts in Central America and the Andean Community, see A.F. Tatham, "In the Judicial Steps of Bolívar and Morazán? Supranational Court Conversations Between Europe and Latin America" (2011) E.J.L.R. 157-171.

different members) with the result that the actual creation of a regional court along the lines of the CJEU lays some time off.

In this respect, then, the anti-model in the form of the WTO DSM (perhaps reinforced with further influence from NAFTA) is likely to continue to exercise a pull on the ASEAN states as it allows for quasi-adjudicative resolution of problems and respect for state sovereignty, without the need to address the enforcement of rights of private parties and issues of priority of ASEAN regional law in domestic systems, except in the limited area of investment protection.

For NAFTA, too, progress to a more integrated judicial system in highly unlikely, given, e.g., the profound US attachment to national constitutional supremacy and the domestic legal and political inability to countenance any (presumed) priority of regional community law or decisions of regional judicial fora over American law. Nevertheless, Abbott[284] was already warning in the early 1990s, before the NAFTA came into force, that its structure "which permits parties to accept the withdrawal of concessions rather than conform their laws to decisions of dispute settlement panels, appears really to countenance the slow disintegration of the union because it encourages the parties to gradually withdraw the trade concessions".

Despite the slim possibilities of judicial institutional change in NAFTA, this has not stopped the development of ideas for a more permanent solution to dealing with trade disputes at the regional level. In answer to Abbott's concerns, Fitzpatrick already proposed[285] "[a] possible solution to the problems posed by the current dispute resolution provisions of NAFTA and its side agreements is the creation of a standing appellate tribunal", modelled in part of the WTO DSU. Such a creation would mark a modest step towards a more permanent DSM for NAFTA and amount to a marginal spillover (as did the environmental and labour side agreements to the NAFTA) with limited impact on national sovereignty.

Why then, despite being an anti-model, should the CJEU still exert such an influence? Simply put, the matter is tied up in the perceived success of the European project and in the role law and the CJEU has played in that success. O'Hop notes that[286]: "In a situation laden with potential legal conflict, a central judiciary typically can help to preserve the uniformity of application of the central institutions' laws and ensure that the laws promulgated by the Member States are consistent with their obligations to the association. A central judiciary can also play a role in the resolution of private disputes, especially those involving the interpretation of the laws of the integration association". Fitzpatrick further provides the argument[287] "[A] regional tribunal is critical to maintaining legal certainty with regard to the substantive law of the region. A regional judicial institution with the authority to provide independent and uniform interpretations of international obligations and to definitively resolve disputes in a legalistic manner would minimize political conflict over the interpretation and enforcement of regional law."

Creation of a fully adjudicative DSM for a regional grouping will not, on its own, ensure the success of the relevant integration project: decision-making and supervisory institutions as well as permanent administrations are needed as well. In all this, however, sight must not be lost of the fact that institutional innovation is not an end in itself. It is only through the effective operation of these institutions and the enforcement of their decisions, e.g., judicial decisions against regional community and national bodies (and

284 Abbott (1992), at 944-945.

285 Fitzpatrick (1996-1997), at 92-94.

286 P.A. O'Hop, "Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System" (1995) 36 Harvard Intl. L.J. 127, at 161.

287 Fitzpatrick (1996-1997), at 94.

even before national courts), that will guarantee a measure of success in moving towards further economic, social and ultimately political integration rather than disintegration.

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Resumen: La cesión de la soberanía –incluso siendo los ideales de integración económica ampliamente reconocidos– se ha evitado de manera firme por los Estados miembros de algunas organizaciones regionales existentes fuera de Europa, en una búsqueda de un paradigma aceptable y factible que preserve el carácter independiente de los Estados, al mismo tiempo que les permita una cooperación funcional. Dichos Estados no han encontrado impedimento en restringir el activismo judicial o, incluso, eliminarlo completamente, con la finalidad de mantener su posición de "señores del tratado". En consecuencia, se ha considerado a la UE como el "anti-modelo" por excelencia, con un Tribunal Europeo de Justicia que es una "*bête noire*" para el mantenimiento de la soberanía constitucional nacional frente a la amenaza que supone la profundización de la integración.

Este documento de trabajo analiza el papel que desempeña la soberanía nacional como freno a los procesos de integración regional (económica) en los Tratados fundacionales de las organizaciones regionales NAFTA, Mercosur y ASEAN. Se tiene en especial consideración la actuación de los actuales (o potenciales) cuerpos judiciales en estos respectivos procesos de integración. Se examina en qué medida los "spillover" judiciales han sido restringidos o podrán serlo en el futuro, en tanto que las respectivas organizaciones regionales se desarrollen.

Palabras clave: Tribunales y Cortes internacionales - integración económica regional - mecanismos de resolución de controversias - Tribunal de Justicia de la Unión Europea - NAFTA - ASEAN - Mercosur- momento constitucional - soberanía.

Abstract: Abnegation of sovereignty –even for the stated ideals of economic integration– has been strongly eschewed by state participants in a number of regional organisations outside of Europe, in their search for an acceptable and workable paradigm that preserves their independent status while allowing them a functional co-operation. Such states have not baulked at restricting judicial creativity or eliminating the possibility altogether in order to retain their own position as the "masters of the treaty." The EU has accordingly been considered as the "anti-model" par excellence with the European Court of Justice as the judicial *"bête noire"* to the preservation of the vestiges of national constitutional sovereignty in the face of the threat posed by deepening integration.

This paper examines the impact of the role of national sovereignty as a necessary brake on issues of regional (economic) integration in the treaty-based communities of NAFTA, Mercosur and ASEAN. Consideration is had, in particular, to the actual (or potential) judicial bodies of these integrations. It examines to what extent any judicial institutional "spillover" has been or may be contained, as a regional organisation matures and develops over time.

Keywords: International courts and tribunals - regional economic integration - dispute settlement mechanisms - European Court of Justice - NAFTA - ASEAN - Mercosur - constitutional moment - sovereignty.

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